WE well knowing the great learning, ability and judgment, of the author, do allow and approve of the printing and publiſhing of this book, entituled, *Reports of caſes argued and adjudged in the courts of King's Bench and Common Pleas, taken and collected by the Right Honourable* Robert *Lord* Raymond, *deceaſed, late Lord Chief Juſtice of the court of King's Bench.*

Hardwicke C.
W. Lee,
W. Forteſcue,
J. Willes,
T. Parker,
Law. Carter,
J. Forteſcue A.
Wm. Chapple,
M. Wright,
Ja. Reynolds,
Tho. Abney,
T. Burnett,
T. Deniſon,
Ch. Clarke,

15 2 K

REPORTS
OF
CASES

ARGUED and ADJUDGED in the COURTS of

KING'S BENCH
AND
COMMON PLEAS,

In the REIGNS of

The late King *William*, Queen *Ann*, King
George the Firſt, and King *George* the
Second.

Taken and Collected

By the Right Honourable *ROBERT* Lord *RAYMOND*,
late Lord Chief Juſtice of the Court of King's Bench.

The SECOND EDITION, Corrected; with Additional References to
the former and later REPORTS,

By GEORGE WILSON, Serjeant at Law.

VOL. II.

LONDON:

Printed by his Majeſty's Law Printers; for J. WORRALL, at the *Dove* in
Bell-Yard, near *Lincoln's Inn*; and P. URIEL, at the *Inner-Temple Gate*, *Fleet-Street*; and W. FLEXNEY, near *Grays-Inn-Gate*, *Holbourn*. MDCCLXV.

FH
MVSEVM
BRITANNICVM

A
LIST
OF
The Chief Officers in the Law,
AT THE
Time of the death of King *William* III.
8 *March* 1701-2.

SIR Nathan Wright *knight, keeper of the great ſeal of* England, *the ſame day on which King* William III. *died, viz. the eighth of* March, *delivered the great ſeal into the hands of* Queen Anne, *being then ſitting in council, and the Queen redelivered it to him, with the title of Keeper of the great ſeal of* England.

Sir John Trevor *knight, maſter of the rolls, held his office for life, and therefore it was not determined by the demiſe of the King; but yet he accepted a new commiſſion from the Queen of the ſaid office for his life.*

The office of maſter of the Rolls does not determine by the demiſe of the King.

Sir John Holt *knight, chief juſtice of the King's Bench, holding his office by writ, though it was* quamdiu ſe bene geſſerit, *held it to be determined by the demiſe of the King, notwithſtanding the act of* 12 & 13 Will. 3. *And therefore the Queen in council gave orders, that he ſhould have a new writ, which he received accordingly, and was ſworn before the lord keeper of the great ſeal the* Saturday *following,* viz. *the fourteenth of* March, *chief juſtice of the King's Bench.*

Sir John Turton *knight*
Sir Littleton Powys *knight* } *juſtices of the King's Bench.*
Sir Henry Gould *knight*

Sir Thomas Trevor *knight, chief juſtice of the Common Pleas.*

Sir Edward Nevill *knight*	*juſtices of the Common Pleas.*
Sir John Powell *knight*	
Sir John Blencowe *knight*	

Henry Boyle *eſquire, chancellor of the Exchequer, received a new commiſſion, and was ſworn in the court of Exchequer,* May 12 *or* 13.

Sir Edward Ward *knight, chief baron.*

Sir Henry Hatſell *knight*	*barons of the Exchequer.*
Robert Tracy *eſquire*	
Sir Thomas Bury *knight*	

Sir Richard Simpſon *knight, curſitor baron.*

The right honourable Gray *earl of* Stamford, *chancellor of the duchy of* Lancaſter, *was removed from the ſaid office, and Sir* John Leviſon Gower *baronet was made chancellor of the duchy, and took the oaths of the ſaid office in council the twenty-firſt of* April 1702.

Sir William Wogan *knight*	*the King's ancient ſerjeants.*
Sir Nathaniel Bond *knight*	

Edward Northey *eſquire, attorney general.*

Sir John Hawles *knight, ſolicitor general.*

Sir Ambroſe Philips *knight*	*King's ſerjeants.*
Sir George Hutchins *knight*	
Sir Salathiel Lovel *knight*	
Sir John Darnall *knight*	
Sir Joſeph Jekyll *knight*	
Charles Whitaker *eſquire*	

John Conyers *eſquire*	*King's counſel.*
Sir Nathaniel Powell *baronet*	
William Cowper *eſquire*	
Aglionby *eſquire*	
Edward Clerk *eſquire*	
William Farrer *eſquire*	

Entwiſtle *eſquire, vice-chancellor of the duchy, was removed, and* John Weddall *eſquire promoted to the ſaid office, who died* 1703. *and was ſucceeded by Mr.* Brennard *of* Grays Inn.

Edward Northey *eſquire, attorney of the dutchy of* Lancaſter.

Aſhurſt *eſquire, attorney of the county palatine, was removed, and* Robert Starkey *eſquire promoted to the ſaid office.*

Juſtices of Wales.

Sir Joſeph Jekyll *knight, chief juſtice* (a) *Sir* Salathiel Lovell *knight*	*juſtices of* Cheſter, Flint, &c.
Mr. ſerjeant Neeve Francis Floyd *eſquire*	*juſtices of* Weſt Wales.
Mr. ſerjeant Hook William Peaſly *eſquire*	*juſtices of* North Wales.
Mr. ſerjeant Pawlett Robert Price *eſquire*	*juſtices of* South Wales.

(a) Note *it was held, that his office did not determine by the demiſe of the King; otherwiſe he would have been removed, great intereſt being made for the ſaid office by Mr.* Conyers.

Anno regni Annae reginae Angliae, &c. primo 1701-2.

Heron *verſ.* Treyne.

In covenant to make aſſurance at the coſts of *B.* notice of the aſſurance ought to be given to *B.* before he ſhall tender the coſts.
2 Salk. 457. pl. 2.
12 Mod. 401.
Jenk. 305. pl. 7.

IN covenant brought by *Heron* againſt *Treyne* it was ruled by *Holt* chief juſtice of the King's Bench upon evidence at the trial at *Lent* aſſiſes at *Southwark March* 27. 1 *Annae* 1702. that if *A.* covenants with *B.* to make farther aſſurance to *B.* at the coſts of *B. A.* ought to give notice to *B.* what ſort of aſſurance he will make, and then *B.* ought to tender the coſts, and then *A.* ought to make the aſſurance. But if the covenant is, that *A.* ſhall make a new demiſe to *B.* at the coſts of *B.* (as the covenant, upon which this action was brought, was) or any particular aſſurance ſpecified in the covenant; then *B.* ought firſt to tender the coſts, and then *A.* ought to make the aſſurance. For in the former caſe *B.* cannot know what coſts will be ſufficient to tender, before he knows, what ſort of aſſurance *A.* will make; but in the latter caſe by the inſpection of the covenant itſelf he will know what ſort of aſſurance will be made.

Little *verſ.* Heaton.

S. C. 1 Salk. 259.
The general confeſſion of entry by the defendant in ejectment will ſerve the plaintiff, without proof of actual entry by his leſſor, where he makes title by condition broken. see
[illegible]

AN ejectment was brought by the leſſor againſt the leſſee for years of land, *&c.* rendering rent, for breach of the condition contained in the leaſe for non-payment of the rent (there being a clauſe of re-entry in the leaſe for non-payment thereof.) And upon not guilty pleaded, it being tried before *Holt* chief juſtice at the aſſiſes at *Southwark March* 26, 1702. 1 *Ann. R.* after confeſſion of leaſe, entry, and ouſter, Mr. *Broderick* for the defendant inſiſted upon it, that this confeſſion by the defendant of entry, *&c.* did not extend to the confeſſing of an entry, that was neceſſary to make title to the leſſor of the plaintiff, but only an entry to make his leaſe to the plaintiff good; and therefore that the plaintiff ought to prove an actual entry by the leſſor of the plaintiff for the condition broken, before which he had not in point of law any title. And *Holt* chief juſtice ſaid, that it was always held ſo until the time of *Hale* chief juſtice, and then it was ruled by *Hale* at the aſſiſes in *Bucks*, that the general confeſſion of leaſe, entry, and ouſter, was ſufficient in ſuch caſe, and that the plaintiff ſhould not be driven to prove any actual entry by his leſſor; but he reſerved it for his more deliberate opinion, a caſe being made of it. And afterwards it being moved in the King's Bench, the judges there were of the ſame opinion: and afterwards in the time of *Scroggs* chief juſtice, in ejectment between the leſſee of Sir *Robert Pye* and *Billing* it was held accordingly in the King's Bench: But notwithſtanding theſe caſes, very ſoon after the revolution the ſame point aroſe before himſelf in evidence upon a trial at *niſi prius* at *Guildhall*, and he doubted of it, and reſerved it as a point for his opinion, and cauſed it to be moved in the King's Bench, where the three *puiſne* judges, *viz.* Sir *William Dolben*, Sir *William Gregory*, and Sir *Giles Eyre* held, that the general confeſſion of entry by the defendant was enough, and that the plaintiff ſhould not be driven to prove an actual entry by his leſſor, according to the practice ever ſince the aforeſaid opinion of *Hale* chief juſtice, but he doubted of it himſelf then. But in this preſent caſe, he ſaid, that it ſeemed to be ſettled, and therefore he would not unſettle it; and therefore he ruled the preſent caſe according to the opinion of *Hale* aforeſaid.

Sir R. Pye v. Billing. 1 Vent. 332. 1 Vent. 248.

This was the opinion of all the judges in *Hilary* term 1703. But the demand of the rent muſt be proved notwithſtanding the confeſſion of the entry. *Ex relatione* Mr. juſtice Blencowe.

Jones *verſ.* Hammond.

IN an action upon the caſe brought by the plaintiff againſt the defendant for ſtopping a way, the plaintiff declared, that he was poſſeſſed of the cloſe of *A.* and that the defendant was poſſeſſed of the cloſe of *B.* and that the plaintiff *habuit, et habere debuit*, a way over the cloſe of *B*, *&c.* Upon not guilty pleaded, upon the evidence at the trial, *March* 19, 1701. at *Lent* aſſiſes at *Maidſtone* 1 *Annae Reginae*, it was objected by Mr. *Broderick*, that the plaintiff ought to be nonſuit; becauſe it appeared by the plaintiff's declaration, that the defendant was poſſeſſed of the cloſe of *B.* and for that reaſon ſuch a general declaration of a *habuit et habere debuit* is not good, but the plaintiff ought to ſhew his title to the way; for ſuch a general declaration is only good againſt a wrong doer; but in this caſe if the plaintiff recovered, it might be, that the court at *Weſtminſter* would hold, that this defect was aided by the verdict, becauſe they would intend, that the plaintiff ſhewed his title to the way in evidence. But *Holt* chief juſtice ſaid, that the defendant had good reaſon to have demurred; but he had authority

S. C. Lutw. 124. General declaration of *habuit et habere debuit* a way over the defendant's cloſe.

See after 1093.

thority only to try the iſſue, and the plaintiff had no need to prove more than was contained in the declaration; and for that reaſon he over-ruled Mr. *Broderick*'s objection, and the plaintiff recovered a verdict.

Broughton *verſ.* Harpur.

A man has two wives. The firſt wife cannot be admitted to prove her marriage in a civil action. Ray. 1. Chanc. Caſes 39. 2 Vern. 70.

IN ejectment, the plaintiff made title to his leſſor to the lands in queſtion as ſon and heir of *Jerome Jacques* and *Hannah* his wife in right of *Hannah*. The defendant gave in evidence, that *Jerome Jacques* was married before he was married to *Hannah*; and the woman, to whom it was ſuppoſed he was married before, was produced at the trial, *ſummer* aſſiſes 13 *Will.* 3. at *Maidſtone*, to prove this marriage. The counſel for the plaintiff oppoſed her teſtimony, becauſe ſhe ſwore for her advantage, *viz.* to have a huſband, the huſband then being living. But nevertheleſs *Gould* juſtice of the King's Bench then judge of aſſiſe admitted her teſtimony. But afterwards the ſame cauſe upon the ſame title between the ſame parties was tried before *Holt* chief juſtice, at the aſſiſes in *March* at *Maidſtone* 1 *Ann. reg.* and he refuſed after debate, to admit the former wife, to be witneſs for this purpoſe; but upon other evidence the former marriage was proved to the ſatisfaction of the jury, being gentlemen, whereupon they found a verdict for the defendant. But in the former trial before *Gould* juſtice the jury found a verdict for the plaintiff.

Skinner *verſ.* Upſhaw.

A carrier may juſtify the retaining of goods for his hire. *Poſt.* 867.

THE plaintiff brought an action of trover againſt the defendant, being a common carrier, for goods delivered to him to carry, *&c.* Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refuſed, *&c.* and therefore he retained them. And it was ruled by *Holt* chief juſtice at *Guildhall* (the caſe being tried before him there) *May* 12. 1 *Ann. reg.* 1702. that a carrier may retain the goods for his hire; and upon direction the defendant had a verdict given for him.

The governor and company of the bank of England *verſ.* Glover.

IN *indebitatus aſſumpſit* brought by the plaintiffs againſt the defendant for 454 *l.* 18 *s.* and 3 *d.* lent to the defendant by the plaintiffs, and another count for 454 *l.* 18 *s.* and 3 *d.* laid out at the requeſt of the defendant for the uſe of the defendant; and *non aſſumpſit* pleaded; upon the evidence at the trial before *Holt* chief juſtice, at the ſittings at *Guildhall*, *Paſch.* 1 *Ann.* the caſe was thus. The defendant *Jan.* 31. 1700. brought a note of Mr. *Shepherd* the goldſmith payable to *Robert Stamper* for 454 *l.* 18 *s.* and 3 *d.* to the bank of *England*, and prayed Mr. *Maddocks* the caſhier of the bank to give him a *ſpecie* bank note payable to the ſaid *Stamper* for the ſaid note of *Shepherd*; which Mr. *Maddocks* refuſed, but told the defendant, that if he would promiſe to pay the bank the 454 *l.* 18 *s.* and 3 *d.* in caſe *Shepherd* did not pay the ſaid note, he would give him a *ſpecie* bank note payable to himſelf for the ſaid Sum; to which the defendant agreed. Whereupon Mr. *Maddocks* accepted *Shepherd*'s note, and gave the defendant *Glover* a *ſpecie* bank bill of 454 *l.* 18 *s.* and 3 *d.* This was done upon the *Friday*. The *Monday* after, this note of *Shepherd* was ſent to him to be paid, and *Shepherd* refuſed to pay it. In the mean time *Glover* gave this bank note to *J. S.* for a debt owing by him to *J. S.* and *J. S.* received the 454 *l.* 18 *s.* and 3 *d.* of the bank. And after debate by the counſel of both ſides, *Holt* chief juſtice was of opinion, that this evidence did not maintain the action. For (by him) this was not money lent, nor laid out for the uſe of the defendant; but it was a buying of the note of *Shepherd* with a warranty of it from the defendant; and therefore the plaintiffs might well maintain a ſpecial action, but not a general *indebitatus aſſumpſit*. It was urged by the plaintiffs counſel, that this note was only a *depoſitum* or pledge. But to that the chief juſtice anſwered, that that could not be, becauſe it was not redeemable by the defendant, and redemption is incident to the nature of a pledge. The plaintiffs were nonſuit.

Indebitatus aſſumpſit for money lent lies not without ſpecial promiſe. See the caſe of *Marriot* and *Leſter*, *Eaſter* 2 *Geo.* 3. *in C. B.* wherein it was reſolved that the word *lent* is a technical term, and no man can be indebted to another for money lent unleſs the money be actually lent to that perſon himſelf. *Per* ſerjeant *Wilſon.* 1 Salk. Bather *v.* Andrews.

Jennings *verſ.* Rogers.

IN ejectment upon evidence at *niſi prius* at *Lent* aſſiſes at *Southwark* the caſe appeared to be thus. *A.* was tenant of the lands for life, remainder to *B.* in tail, remainder to *C.* for life, *&c.* *B.* leaſed and releaſed all his eſtate to *A.* then a *praecipe* was brought againſt *A.* *A.* vouched *B.* and *C.* and they vouched the common

Recovery in which tenant in tail and tenant for life are jointly vouched.

vouchee, and the recovery was perfected. The queſtion was, if this recovery was good, to bar the intail? And *Holt* held, that it was, though *C.* had but an eſtate for life. But he reſerved it for a point for his farther conſideration. See *Plowd. Com. Manxel*'s caſe 504. *Eare v. Snow*; and 3 *Co. Cuppledike*'s caſe. And afterwards he gave his opinion accordingly, after conſideration had.

Poſt. Piggot, c. 2, 35, 36. 2 Salk. 570.

Term adjourned.

Memorandum, *That the twenty-third of* April *being appointed for the queen's coronation, which was to happen on* Thurſday *the ſecond day of the term* (quindena Paſchae *being the* Monday *before*) *one judge of each court went to* Weſtminſter, *to keep the eſſoins of* quindena Paſchae, *and there received a writ of adjournment, to adjourn the term from* quindena Paſchae *until* tres Paſchae; *which being read in the ſeveral courts, they returned. And afterwards at the appearance day of* tres Paſchae *all the judges ſat at* Weſtminſter, *and diſpatched buſineſs.*

Eaſter

Eaſter Term

1 Annae reginae, B. R. 1702.

Sir John Holt *Chief Juſtice.*
Sir John Turton
Sir Littleton Powys } *Juſtices.*
Sir Henry Gould

Jacob *verſ.* Dallow.

S. C. 5 Mod. 436.
2 Salk. 551.
Farreſ. 8.
12 Mod. 233.
Libel upon a preſcription to have a ſeat in the church.
See 6 Mod. 230, 231.
2 Mod. 283.
Mo. 878.
Hob. 95.
12 Rep. 105.
2 Lev. 71.
Ray. 52.
Sid. 88. p. 6.
201. p. 25.
3 Lev. 37.

IN a declaration upon attachment upon a prohibition, the plaintiff ſhewed a right in him and all thoſe whoſe eſtate he had to a ſeat in the church, and that the defendant ſurmiſing a uſage to ſit in the ſaid ſeat, time whereof, *&c.* had libelled againſt him for having diſturbed him in ſitting there; that the plaintiff had denied the ſaid uſage in the ſpiritual court, and that the judge of the ſpiritual court had nevertheleſs refuſed to allow it, *&c.* The defendant in bar pleaded the ſaid uſage, *&c.* and traverſed the preſcription alleged by the plaintiff, to have a ſeat in the ſaid church, *&c.* The plaintiff demurred. And the defendant joined in demurrer. And now Mr. *Eyre* for the plaintiff urged, that though the plaintiff by his demurrer had confeſſed, that he had not any title to this ſeat by preſcription, yet the defendant founding his libel in the ſpiritual court upon a cuſtom, which is not triable there, but at common law, the defendant could not have a conſultation; and therefore his traverſe is ill, for it is not material, whether the plaintiff has any title or not. But ſince he has denied the cuſtom alleged by the defendant in his libel, and the ſpiritual court has not power to try it, the prohibition muſt ſtand. And he cited *Hetl.* 94. in the caſe of *Eaton v. Ayliffe*, it is ſaid by *Richardſon* chief juſtice, that if title be made in the ſpiritual court to a ſeat in the church by preſcription, it is merely *coram non judice*; and

Noy 78. *Carlton v. Hutton*, where it is ſaid, that a ſeat may be claimed by preſcription, and an action upon the caſe lies for diſturbance of the enjoyment of it at common law. He cited alſo Sir *Thomas Jones* 3. *Bradbury v. Burch*, as a caſe ſtrong to the purpoſe; where in an action upon the caſe for diſturbing him in the enjoyment of a ſeat in a pariſh church, which ſeat the plaintiff claimed as appendant to his houſe by preſcription, without alleging repairs, the defendant pleaded preſcription in himſelf and his anceſtors, and traverſed the preſcription alleged by the plaintiff; and adjudged, that the traverſe taken by the defendant was impertinent, and that the caſe reſted ſolely upon the diſturbance; and judgment was there after verdict given for the plaintiff. *Sed non allocatur.* For *per Holt* chief juſtice, the defendant, if he pleaſes, may ſue upon his preſcription in the eccleſiaſtical court, to have his poſſeſſion quieted, which the ordinary ought to do upon the foundation of his uſage to have ſat there; for one may ſue upon a preſcription in the ſpiritual court, if it is not denied, as upon a *modus decimandi*; or for a penſion due by preſcription, and the ſpiritual court will give judgment upon it. Then in this preſent caſe the preſcription, upon which the defendant libelled, is not denied by the plaintiff; and therefore the ſpiritual court may well proceed upon it. Then as to the preſcription alleged by the plaintiff in his declaration, it is confeſſed to be falſe by the demurrer, and conſequently it appears that the plaintiff had no right to the ſeat; and therefore he ought not to have a prohibition, though the plaintiff in the ſpiritual court had only a bare poſſeſſion; for the foundation upon which the prohibition ought to be granted, is the invaſion that is made by the ſuit in the eccleſiaſtical court upon the temporal preſcriptive right of the defendant; but in this caſe there is none ſuch; and then if the defendant had no extraordinary title, yet he had the poſſeſſion, and being diſturbed in it, the ordinary has conuſance of the diſturbance, and may ſettle and quiet the poſſeſſion according to the uſage, no temporal right being infringed. And therefore (by him) a conſultation ought to be granted. And a conſultation was granted by the whole court.

Regina *verſ.* Ewer.

S. C. 2 Salk. 564, 600, 659.
Farreſ. 9.
Variance.
Vide 1 Salk. 147, 8, 9.
Farreſ. 120.
6 Mod. 42.
2 Leon 24.

A *Scire facias* was ſued againſt the defendant upon a recogniſance acknowledged by him before one of the judges of this court, upon the granting of a *certiorari* to remove an indictment found at the general quarter ſeſſions of the peace before the juſtices of the peace there, *&c.* The defendant prayed *oyer* of the recogniſance, and of the condition thereof; and they being entred *in haec verba*, the defendant demurred; and judgment was given for the defendant,

dant, for a manifeſt variance between the recogniſance mentioned in the *ſcire facias* and the recogniſance entred *in haec verba*, inaſmuch as it was mentioned to be part of the condition of the recogniſance recited in the *ſcire facias*, that the defendant ſhould give notice of trial *proſecutori et ejus clerico*; but the condition of the recogniſance entred upon the *oyer* prayed was, that the defendant ſhould give notice of trial *proſecutori aut ejus clerico*. Mr. *King* council for the defendant took another exception; *viz.* that this recogniſance varied from the form preſcribed by the act of parliament lately made, in this, that the ſaid ſtatute appoints that the ſum ſhall be 20 *l.* but this recogniſance is of 40 *l.* But to that exception the chief juſtice anſwered, that notwithſtanding that, the recogniſance will be good by the common law; for before the 5 & 6 *Will. & Mar. cap.* 11. any judge of this court might have taken a recogniſance with condition to proſecute, *&c.* And the conſtant practice in *London* and *Middleſex* for removal of indictments by *certiorari*, before the ſaid ſtatute, was ſo; but the difference was, that after the ſaid act, and before the act of 8 & 9 *Will.* 3. *cap.* 33. although ſuch recogniſance had been taken by a judge, yet that would not have made the *certiorari* a *ſuperſedeas*: but ſince the laſt act, if a recogniſance be taken by a judge to proſecute, and a *certiorari* granted, the *certiorari* will be as much a *ſuperſedeas*, as if the recogniſance had been taken by the juſtices of peace, according to 5 & 6 *Will. & Mar. cap.* 11.

Recogniſance upon granting a *certiorari* where good.

Clerke *verſ.* Martin.

S. C. 1 Salk. 129. *Poſt.* 774. 6 Mod. 29. *Poſt.* 825. A note payable to *J. S.* or order by a goldſmith is not a bill of exchange. See now the Stat. 3, 4 Ann. c. 9. ſ. 1.

THE plaintiff brought an action upon his caſe againſt the defendant upon ſeveral promiſes; one count was upon a general *indebitatus aſſumpſit* for money lent to the defendant; another count was upon the cuſtom of merchants, as upon a bill of exchange; and ſhewed, that the defendant gave a note ſubſcribed by himſelf, by which he promiſed to pay   to the plaintiff or his order, *&c.* Upon *non aſſumpſit* a verdict was given for the plaintiff, and intire damages. And it was moved in arreſt of judgment, that this note was not a bill of exchange within the cuſtom of merchants, and therefore the plaintiff, having declared upon it as ſuch, was wrong; but that the proper way in ſuch caſes is to declare upon a general *indebitatus aſſumpſit* for money lent, and the note would be good evidence of it. But it was argued by Sir *Bartholomew Shower* the laſt *Michaelmas* term for the plaintiff, that this note, being payable to the plaintiff or his order, was a bill of exchange, inaſmuch as by its nature it was negotiable; and that diſtinguiſhes it from a note payable to *J. S.* or bearer, which he admitted was not a bill of exchange, becauſe it is not aſſignable nor indorſable by the intent of the ſubſcriber, and conſequently not negotiable, and therefore it cannot be a bill of exchange, becauſe it is incident to the nature of a bill of exchange to be negotiable: but here this bill is negotiable, for if it had been indorſed payable to *J. N. J. N.* might have brought his action upon it as upon a bill of exchange, and might have declared upon the cuſtom of merchants. Why then ſhould it not be before ſuch indorſement a bill of exchange to the plaintiff himſelf; ſince the defendant by his ſubſcription has ſhewn his intent, to be liable to the payment of this money to the plaintiff or his order; and ſince he hath thereby agreed, that it ſhall be aſſignable over, which is by conſequence that it ſhall be a bill of exchange? That there is no difference in reaſon, between a note, which ſaith, "I promiſe to pay to *J. S.* "or order, *&c.*" and a note, which ſaith, "I pray you to pay "to *J. S.* or order, *&c.*" they are both equally negotiable; and to make ſuch a note a bill of exchange, can be no wrong to the defendant, becauſe he, by the ſigning of the note, has made himſelf to that purpoſe a merchant, 2 *Ventr.* 292. *Sarsfield v. Witherly*, and has given his conſent, that his note ſhall be negotiated, and thereby has ſubjected himſelf to the law of merchants. But *Holt* chief juſtice was *totis viribus* againſt the action; and ſaid, that this note could not be a bill of exchange. That the maintaining of theſe actions upon ſuch notes, were innovations upon the rules of the common law; and that it amounted to the ſetting up a new ſort of ſpecialty, unknown to the common law, and invented in *Lombard-ſtreet*, which attempted in theſe matters of bills of exchange to give laws to *Weſtminſter-hall*. That the continuing to declare upon theſe notes upon the cuſtom of merchants proceeded from obſtinacy and opinionativeneſs, ſince he had always expreſſed his opinion againſt them, and ſince there was ſo eaſy a method, as to declare upon a general *indebitatus aſſumpſit* for money lent, *&c.* As to the caſe of *Sarsfield v. Witherly*, he ſaid, he was not ſatiſfied with the judgment of the King's Bench, and that he adviſed the bringing of a writ of error.

A note, by which *J. N.* promiſes to pay to *J. S.* or bearer, is not a bill of exchange.

Gould juſtice ſaid, that he did not remember, it had ever been adjudged, that a note, in which the ſubſcriber promiſed to pay, *&c.* to *J. S.* or bearer, was not a bill of exchange. That the bearer could not ſue an action upon ſuch a note in his own name, is without doubt; and ſo it was reſolved between *Horton and Coggs*, now printed in 3 *Lev.* 299. but that it was never reſolved, that the party himſelf (to whom ſuch note was payable) could not have an action upon the cuſtom of merchants upon ſuch a bill. But *Holt* chief juſtice anſwered, that it was held in the ſaid caſe of *Horton verſ. Coggs*, that ſuch a note was not a bill of exchange within the cuſtom of merchants. And afterwards in this *Eaſter* term it was moved again, and the court continued to be of opinion againſt the action. And then Mr. *Branthwaite* for the plaintiff urged, that if this note was not a bill of exchange within the cuſtom of merchants, then the promiſe founded upon it was void; and then it could not be intended, that any damage was given by the jury for the breach of it, but all the damages muſt be intended to have been given upon the general *indebitatus aſſumpſit*. *Holt* chief juſtice ſaid, that would be true, if it had been void by reaſon of its being inſenſible; but this matter is ſenſible enough, though not ſufficient in law to raiſe a promiſe; and therefore one cannot intend, but that damages were given for it; and conſequently that judgment muſt be arreſted. And judgment was given, *quod querens nil capiat per billam, &c.* by the opinion of the whole court.

Damages for what given.

Potter *verſ.* Pearſon.

S. C. 1 Salk. 125, 129, 364.
A note promiſing to pay to *J. S.* or his order, the cuſtom laid within *London*.
Ante 757.

ERROR upon a judgment given by *nihil dicit in C. B.* in an action upon the caſe upon a bill of exchange upon the cuſtom of merchants, in which the plaintiff declared, that there was a cuſtom in *London*, *&c.* that if a merchant ſigned a note, promiſing to pay to *J. S.* or his order, *&c.* that he became obliged by the cuſtom to pay it, *&c.* And now Mr. *Acherley* attempted to make a diſtinction between this caſe and the caſe of *Clerke v. Martin*; becauſe that in the ſaid caſe of *Clerke v. Martin* the cuſtom was laid generally to be between all merchants, *&c.* of which the court will take notice, and conſequently will take notice that there is not any ſuch cuſtom; but in this caſe the cuſtom being confined to the merchants in *London*, the court cannot take any other notice of it than as it is pleaded, the which being confeſſed, by permitting judgment to paſs by *nihil dicit*, muſt be looked upon by the court as true; and it not being void nor unreaſonable, the judgment ought to be affirmed. *Sed non allocatur.* For (*per curiam*) it is a void cuſtom, ſince it binds a man to pay money without any conſideration. For the rule is, *ex nudo pacto non oritur actio*. And therefore the judgment was reverſed.

Meredith *verſ.* Chute.

S. C. 1 Salk. 25.
7 Mod. 12, 13.
Conſideration of *aſſumpſit*.

IN caſe upon *aſſumpſit* the plaintiff declared, that the defendant, in conſideration that the plaintiff at the ſpecial requeſt of the defendant *deliberaſſet* to the defendant *quandam notam*, by which one *Hurſt* aſſumed to pay to the plaintiff a hundred *Guineas*, aſſumed to pay to the plaintiff, *&c.* Upon *non aſſumpſit* pleaded, verdict for the plaintiff. And now Mr. *Gilbert* moved in arreſt of judgment, that the conſideration of this promiſe was not good, ſince it did not appear, that *Hurſt* gave this note to the plaintiff upon any good conſideration, and conſequently the ſaid note would be void, and then the delivery of the ſaid note by the plaintiff to the defendant would be no prejudice to the plaintiff nor advantage to the defendant. But it was reſolved (*per totam curiam*) that this was a good conſideration; for though no conſideration was expreſſed in *Hurſt*'s note, yet the note being ſubſcribed by *Hurſt*, was Evidence. good evidence of a debt due from *Hurſt* to the plaintiff; and therefore the delivery of the evidence of his debt to the defendant at his requeſt was a good conſideration of the *aſſumpſit* of the defendant, upon which this action was brought. And judgment was given for the plaintiff. Note, *Holt* chief juſtice ſaid, that he was of opinion upon the trial, that it was not neceſſary for the plaintiff to prove, upon what conſideration the note of *Hurſt* was given, the defendant having admitted it to have been given upon good conſideration by his promiſe.

Feltham *verſ.* Cudworth.

Intr. *Paſch.* 12 *Will.* 3. B. R. Rot. 97.

S. C. Far. 10. S. C. Comyns 112. 3 Salk. 59. 7 Mod. 11. Plea of the compoſition act 8 Will. 3.

THE plaintiff ſued a *ſcire facias* upon a judgment of 817 *l.* 13 *s.* recovered by him as executor to *Thomas Feltham* in an action of debt brought by him againſt the defendant. The defendant at the day of the return of the ſecond *ſcire facias* (which as well as the firſt *ſcire facias* was returned *nihil, &c.*) *ſolemniter exactus venit et dicit quod ipſe non poteſt dedicere quin praedictus* the plaintiff *executionem de debito, &c. praedictis verſus eum ſuper terras et tenementa bona et catalla ipſius* the defendant *levandis habere debeat, Sed idem* the defendant *ulterius dicit quod* the plaintiff *executionem de debito, &c. praedictis ſuper perſonam* of the defendant *habere non debet quia dicit quod per* a certain act of parliament made 8 *Will.* 3. *inter alia* it was enacted *quod liceret et licitum foret ad et pro duabus tertiis partibus vel pluribus in numero et valore omnium realium creditorum eorum executoribus adminiſtratoribus guardianis et fiduciariis et aliis perſonis authorizatis per eos aut aliquem eorum facere tale agreeamentum ſeu compoſitiones qualia putarent apta vel rationabilia cum aliquibus debitorum ſuorum qui exiſtentes inhabiles ad ſolvendum tota debita ſua ſeipſos ſubſtraxerant vel abſcondiderant ab eorum uſualibus locis commorantiae ſive fuerant vel devenerant priſonarii pro debiti ante decimum ſeptimum Novembris* 1696, *et quod quodlibet tale agreeamentum vel compoſitio facta pro aequali beneficio omnium creditorum in proportione ad reſpectiva debita ſua et ſubſcripta et ſigillata per prae-*

dictas duas tertias partes vel plures in valore abſque aliquo ſecreto fraudulento ſive collaterali agreeamento pro aliquo majori advantagio quam in eodem expreſſum foret obligaret et concluderet omnes alios creditores executores adminiſtratores guardianos et fiduciarios ſuos et omnes perſonas authorizatas vel clamantes ſub ipſis vel aliquo eorum tam plenarie et effective ad omnia intentiones et propoſita quaſi omnes et quilibet eorum actualiter facerent ſubſcriberent et ſigillarent faceret ſubſcriberet et ſigillaret talia agreeamenta ſive compoſitiones; then he ſhews alſo the reſt of the act, which indemnifies executors, truſtees, &c. for what they ſhould do in purſuance of the ſaid act; and the proviſo, that ſuch agreements ſhould not defeat judgments, &c. ſo as they ſhould not affect the perſons of ſuch creditors, &c. *prout per eundem actum inter alia plenius liquet et apparet:* Then the defendant farther ſaith, that he at and before the ſeventeenth of *November* 1696 was indebted to the ſeveral perſons hereafter mentioned in the ſeveral real debts hereafter ſpecified, *viz.* (and then he particulariſes his creditors and his debts) *in toto ſe attingentibus ad* 35686 *l.* 4 *s. et* 10 *d. et non ultra*, and that he *ſeparalibus temporibus praedictis vel aliquo tempore inde non fuit indebitatus alicui alii perſonae ſive perſonis quibuſcunque in aliqua denariorum ſumma quacunque, quodque ipſe adtunc non fuit indebitatus praedictis perſonis ſuperius nominatis ſeu eorum alicui in aliqua majori vel alia denariorum ſumma quam ut ſuperius mentionatum exiſtit, quodque ipſe idem* the defendant *praedictis ſeparalibus temporibus ibidem inhabilis fuit ad ſolvendum debita ſua praedicta et ſic inhabilis exiſtens ipſe idem* the defendant *ante praedictum decimum ſeptimum diem Novembris* 1696 *apud Weſtmonaſterium praedictum in comitatu praedicto ſeipſum ſubſtraxit et abſcondidit ab uſuali loco ejus commorationis, eodemque* the defendant *ſic abſcondente ſubſtracto indebitato et inhabili ad ſolvendum debita praedicta exiſtente, duae tertiae partes in numero et valore omnium realium creditorum ipſius* the defendant *praedictorum, viz.* (and then he particulariſes their names) *octavo die Januarii* 9 *Will.* 3. *apud Weſtmonaſterium praedictum in comitatu praedicto per quoddam ſcriptum per eos reſpective ſubſcriptum et ſigillatum gerens datum eiſdem die et anno quoddam agreeamentum et compoſitionem cum eodem* the defendant *de praedictis debitis per eundem* the defendant *ut praefertur debitis fecerunt in forma ſequenti, viz.* they ſeverally covenanted and agreed with the defendant, *quod ipſi acceptarent reciperent et caperent* of the defendant *duos denarios pro qualibet libra quam ipſe* the defendant *debuit ſeparalibus creditoribus qui ſcriptum illud ſubſcripſerint in plena exoneratione et ſatisfactione ſeparalium debitorum et ſummarum monetae quas ipſe* the defendant *debuit ipſis ſeparalibus creditoribus, ita quod duae tertiae partes in numero et valore omnium realium creditorum praefati* the defendant, &c. *ſigillarent et ſubſcriberent ſcriptum praedictum, et ita quod duo denarii ſolvendi pro qualibet libra quam ipſe*

the defendant *debuit ipſis praedictis creditoribus qui ſcriptum illud ſubſcripſerint in manus ſuas ſoluti eſſent praedictis ſeparalibus creditoribus vel eorum ſeparalibus executoribus adminiſtratoribus vel aſſignatis infra terminum ſive ſpatium quinque annorum proxime poſt tale tempus quale duae tertia partes in numero et valore omnium realium creditorum praedicti* the defendant, *&c. ſubſcriberent ſcriptum praedictum et proxime poſt tale tempus quale ipſe* the defendant *aſſet actualiter exoneratus de ſuo impriſonamento per unum judicium modo et forma prout in actu praedicto et in ſcripto praedicto mentionatum eſt, prout per ſcriptum illud plenius liquet et apparet:* then he avers, that this compoſition was made for the equal benefit of all his creditors in proportion to their debts without any fraud, *&c.* and that the plaintiff had notice thereof the day and place aforeſaid, and was requeſted to ſign it, but that he refuſed, *&c. et hoc paratus eſt verificare, unde petit judicium ſi* the plaintiff *executionem ſuam praedictam verſus perſonam* of the defendant *habere debeat, &c.* The plaintiff demurred generally, and the defendant joined in demurrer.

And this caſe was argued ſeveral times at the bar by Mr. *Dee*, Mr. *Broderick*, and Mr. *Robert Eyre*, for the plaintiff; and by Sir *Bartholomew Shower*, Mr. *Cowper*, Mr. *Raymond*, and Mr. *Mountague*, for the defendant. And the firſt exception that was taken by the plaintiff's council to this plea was, that the defendant has pleaded this compoſition to have been made *per quoddam ſcriptum* of the creditors ſubſcribed and ſealed by them, which is in judgment of law a deed, as when one declares upon a bond, one ſays that the defendant *per ſcriptum obligatorium ſigillo ſuo ſigillatum, &c.* and then the defendant ſhould have pleaded it with a *profert in curia*; for all deeds make to the defendant himſelf, and pleaded by him, ought to be pleaded with a *profert in curia*; and therefore in this caſe for want of pleading this deed of compoſition with a *profert in curia* the plea is ill.

Poſt. 976.

Whether the omiſſion of a *profert in curia* be form or ſubſtance

Againſt which it was argued by the council for the defendant, that admitting, that this compoſition ought to have been pleaded with a *profert in curia*; yet that ſuch omiſſion was only matter of form, of which the plaintiff could not take advantage upon a general demurrer. *Cro. Eliz.* 217. *Vauny v. Aplen.* But the court did not give any opinion upon that. But ſee 10 *Co.* 94. *b.* Dr. *Lyfield*'s caſe. *Cro. Ja.* 32. *Dawbeney v. Banniſter* 292. *Purfrey v. Grime* 360. *Rolls v. Boulting and Roberts*, that the want of pleading a deed with a *profert in curia*, where it ought to be, is matter of ſubſtance. Then it was farther argued by the defendant's council, that this compoſition was not a deed, nor is it requiſite that it ſhould be by deed; for the act of parliament ſays, that they by

1 Sid. 308.

writing ſigned and ſealed, &c. which does not deſcribe a deed, for delivery is eſſentially requiſite to the making of a deed: and then it not being a deed, there is no need to plead it with a *profert in curia*, no more than an award. And as to the caſe cited of the declaration upon a bond, that there it is only ſaid, *per ſcriptum obligatorium ſigillo ſigillatum*, and yet that is looked upon as a deed, and always pleaded with a *profert in curia*; it was anſwered, that it is partly by the courſe of the court, that ſuch declaration is held good to deſcribe a bond, without ſhewing the delivery, and partly by reaſon of the word *obligatorium*; but that an appointment in an act of parliament, will, power, &c. to do a thing by writing ſealed, ſhall never be conſtrued by law, to be an appointment to do it by deed, for want of an appointment that it ſhall be delivered, the delivery being of the eſſence of a deed. And therefore they concluded the plea good notwithſtanding this exception. And of this opinion was the whole court for the reaſon laſt mentioned, and over-ruled the exception. 3 Lev. 205.

Inſtrument of compoſition with creditors made in purſuance of 8 *Will.* 3. has no need to be pleaded with a *profert in curia*.

2. A ſecond exception taken by the plaintiff's council was, that the act, as it is pleaded, is that every compoſition made for the equal benefit of all the creditors in proportion to their reſpective debts, and ſubſcribed and ſigned by two third parts in number and value, ſhall bind, &c. then this compoſition pleaded in the defendant's plea does not appear to be made for the equal benefit of all the creditors; for it is pleaded to have been made by two thirds in number and value, and that they agreed to accept two pence for every pound due to themſelves; ſo that it was made for their benefit only, and not for the benefit of the other creditors; and conſequently the compoſition is not ſuch as will oblige the other creditors by the act of parliament.

To which it was anſwered by the defendant's council, that this compoſition was for the equal benefit of the two third parts, &c. and made by them, and then their act will oblige the reſt, and they alſo might have taken advantage of the compoſition, and might have demanded the two pence for every pound of their debts, as well as the ſubſcribers, and ſo in effect and by the law it is a compoſition for the equal benefit of all the creditors. Beſides, that the defendant has averred expreſsly, that this was a compoſition for the equal benefit of all the creditors, which the plaintiff has not denied, but has admitted by his demurrer. And *Holt* chief juſtice ſeemed to be ſtrongly of opinion, that this compoſition was for the equal benefit of all the creditors; but to that he did not give a poſitive opinion.

Compoſition, by whom good?

3. A third exception taken by the plaintiff's council was, that this act extended only to perſons who were impriſoned, or abſconded for debt before the ſeventeenth of *November*, &c. but the defendant has not ſhewn that he abſconded for debt; for he has ſaid only, after ſhewing of his debts, that he was unable to pay his debts, *et ſic inhabiles exiſtens* he abſconded, &c. *et ſic abſcondente indebitato et inhabili ad ſolvendam debita ſua praedicta exiſtente*, two thirds, &c. Now it may be, that though he was unable to pay his debts, yet he did not abſcond for the ſaid reaſon, but for the commiſſion of ſome crime, as treaſon, &c. and then he will not be within the intent or benefit of the ſaid act. And Mr. *Robert Eyre* cited a caſe ſome years ago, where ſuch a plea was adjudged ill for this exception. And of that opinion the court ſeemed ſtrongly to be; but afterwards upon reading of the act, and urging, that this plea was pleaded in the very words of the act, and that the defendant had no need but to purſue the words of the act of parliament, the court ſeemed to change their opinion; but they did not determine this point.

Averment purſuant to the words of the ſtatute, good.

4. The fourth exception taken by the plaintiff's council, and upon which they principally relied, was that this compoſition pleaded by the defendant was not any compoſition at all within the meaning of the act, becauſe it does not appear, that the defendant would be at any time obliged to perform it, *viz.* by payment of the two pence in the pound, &c. foraſmuch as the compoſition is, that the two pence ſhould be paid within five years after two thirds part of the creditors had ſubſcribed, and the defendant was diſcharged out of priſon according to the form preſcribed by the act; and it does not appear in all the plea, that the defendant was in priſon: and perhaps the defendant was not in priſon, and then he cannot be diſcharged out of it, and conſequently the two pence will never be payable. Beſides which, they urged, that the payment of the two pence was a condition preceedent to the compoſition, ſo that before the performance of it the compoſition was not to ariſe; then it not appearing, that this condition preceedent was poſſible to be performed, the compoſition can never take effect.

To which it was anſwered by the defendant's council. 1. That the words of the act were general, of any compoſition, and therefore that two thirds of the creditors in number and value had authority, to make any agreement or compoſition whatſoever; be it conditional, or with limitation, or be it to take effect immediately or forty years hence. And Sir *Bartholomew Shower* urged, that if they releaſed their whole debts, &c. that would bind the other third of the creditors. That in this caſe this was a compoſition, and ſubſcribed and ſigned by two thirds of the creditors, *&c.* and therefore that it would bind the plaintiff; and he will have his remedy for the money due to him, when it becomes due: or if it never becomes due, it will be ſame thing; becauſe he will be in as good a condition as the other ſubſcribing creditors, to whom the act has given power to bind all the creditors. 2. They urged, that this *ita quod* could not be a condition preceedent, but if it were a condition, it would be ſubſequent; and then if it were impoſſible to be performed, the compoſition would be abſolute. But if it was poſſible to be performed, and was not performed, that ought to be ſhewn on the part of the plaintiff. And for this purpoſe 7 *Co.* 9. *Ughtred's* caſe. *Cro. Eliz.* 219. 1 *Leon.* 229. *Jennings v. Gower. Winch* 103. *Cooper v. Edgar. W. Jones* 389. 1 *Roll. Abr.* 415. *pl.* 12. *Spring v. Caeſar.* 3 *Lev.* 132. *Edwards v. Hammond.* 3. They urged, that if this *ita quod* were adjudged to make a condition preceedent, yet the performance of it is not neceſſary to be ſhewn in this caſe, becauſe the defendant has five years to perform it after his diſcharge out of priſon; *a multo fortiori* he has five years from the making of the compoſition: but here it appears, that five years are not yet elapſed ſince the compoſition made; for the compoſition was made the eighth of *January* 1697, and therefore at this time there is no need to ſhew it performed, ſince by the agreement, which appears to the court, he has a longer time to perform it. 4. They urged, that this bar was good to a common intent; and therefore if the defendant was not in priſon, that ought to be ſhewn on the part of the plaintiff. And for that *Cro. Car.* 6, 195. 2 *Bulſtr.* 205. *Savill.* 111. 1 *Saund.* 298. were cited: that the true notion of a common intendment is as much as to ſay, that ſomething in ſtrictneſs is omitted, which the court will ſupply by their intendment; which if the court will do here (admitting that the defendant ought to have ſhewn that he was in priſon) the plea will be good, and the compoſition performable. *Sed non allocatur.* For (*per totam curiam*) this is no compoſition within the act; becauſe it may happen, that the defendant ſhall never be obliged to perform it. For the agreement is to pay 2*d.* in the pound, *ita quod* it be paid within five years next after, *&c.* which makes this circumſtance of time, when the money ſhall be paid, a condition preceedent to the compoſition; ſo that if that be never performed, there will be no compoſition. An agreement and compoſition within the act muſt be intended, a final agreement, ſuch as the defendant ſhall be bound to, and from which he cannot vary. Therefore until the money be paid in this caſe, this here will not be a compoſition; for if the money be not paid within the five years, the defendant will be at large from his agreement, and not obliged to pay the 2*d.* at

A compoſition, which it may be the defendant ſhall never be bound to perform, is ill.

all.

3. A third exception taken by the plaintiff's council was, that this act extended only to perſons who were impriſoned, or abſconded for debt before the ſeventeenth of *November*, *&c.* but the defendant has not ſhewn that he abſconded for debt; for he has ſaid only, after ſhewing of his debts, that he was unable to pay his debts, *et ſic inhabiles exiſtens* he abſconded, *&c. et ſic abſcondente indebitato et inhabili ad ſolvendam debita ſua praedicta exiſtente*, two thirds, *&c.* Now it may be, that though he was unable to pay his debts, yet he did not abſcond for the ſaid reaſon, but for the commiſſion of ſome crime, as treaſon, *&c.* and then he will not be within the intent or benefit of the ſaid act. And Mr. *Robert Eyre* cited a caſe ſome years ago, where ſuch a plea was adjudged ill for this exception. And of that opinion the court ſeemed ſtrongly to be; but afterwards upon reading of the act, and urging, that this plea was pleaded in the very words of the act, and that the defendant had no need but to purſue the words of the act of parliament, the court ſeemed to change their opinion; but they did not determine this point.

Averment purſuant to the words of ~~the ſtatute,~~ good.

4. The fourth exception taken by the plaintiff's council, and upon which they principally relied, was that this compoſition pleaded by the defendant was not any compoſition at all within the meaning of the act, becauſe it does not appear, that the defendant would be at any time obliged to perform it, *viz.* by payment of the two pence in the pound, *&c.* foraſmuch as the compoſition is, that the two pence ſhould be paid within five years after two thirds part of the creditors had ſubſcribed, and the defendant was diſcharged out of priſon according to the form preſcribed by the act; and it does not appear in all the plea, that the defendant was in priſon: and perhaps the defendant was not in priſon, and then he cannot be diſcharged out of it, and conſequently the two pence will never be payable. Beſides which, they urged, that the payment of the two pence was a condition preceedent to the compoſition, ſo that before the performance of it the compoſition was not to ariſe; then it not appearing, that this condition preceedent was poſſible to be performed, the compoſition can never take effect.

To which it was anſwered by the defendant's council. 1. That the words of the act were general, of any compoſition, and therefore that two thirds of the creditors in number and value had authority, to make any agreement or compoſition whatſoever; be it conditional, or with limitation, or be it to take effect immediately or forty years hence. And Sir *Bartholomew Shower* urged, that if they releaſed their whole debts, *&c.* that would bind the other third of the creditors. That in this caſe this was a compoſition, and ſubſcribed and ſigned by two thirds of the creditors, *&c.* and therefore that it would bind the plaintiff; and he will have his remedy for the money due to him, when it becomes due: or if it never becomes due, it will be ſame thing; becauſe he will be in as good a condition as the other ſubſcribing creditors, to whom the act has given power to bind all the creditors. 2. They urged, that this *ita quod* could not be a condition preceedent, but if it were a condition, it would be ſubſequent; and then if it were impoſſible to be performed, the compoſition would be abſolute. But if it was poſſible to be performed, and was not performed, that ought to be ſhewn on the part of the plaintiff. And for this purpoſe 7 *Co.* 9. *Ughtred*'s caſe. *Cro. Eliz.* 219. 1 *Leon.* 229. *Jennings v. Gower. Winch* 103. *Cooper v. Edgar. W. Jones* 389. 1 *Roll. Abr.* 415. *pl.* 12. *Spring v. Caeſar.* 3 *Lev.* 132. *Edwards v. Hammond.* 3. They urged, that if this *ita quod* were adjudged to make a condition preceedent, yet the performance of it is not neceſſary to be ſhewn in this caſe, becauſe the defendant has five years to perform it after his diſcharge out of priſon; *a multo fortiori* he has five years from the making of the compoſition: but here it appears, that five years are not yet elapſed ſince the compoſition made; for the compoſition was made the eighth of *January* 1697, and therefore at this time there is no need to ſhew it performed, ſince by the agreement, which appears to the court, he has a longer time to perform it. 4. They urged, that this bar was good to a common intent; and therefore if the defendant was not in priſon, that ought to be ſhewn on the part of the plaintiff. And for that *Cro. Car.* 6, 195. 2 *Bulſtr.* 205. *Savill.* 111. 1 *Saund.* 298. were cited: that the true notion of a common intendment is as much as to ſay, that ſomething in ſtrictneſs is omitted, which the court will ſupply by their intendment; which if the court will do here (admitting that the defendant ought to have ſhewn that he was in priſon) the plea will be good, and the compoſition performable. *Sed non allocatur.* For (*per totam curiam*) this is no compoſition within the act; becauſe it may happen, that the defendant ſhall never be obliged to perform it. For the agreement is to pay 2*d.* in the pound, *ita quod* it be paid within five years next after, *&c.* which makes this circumſtance of time, when the money ſhall be paid, a condition preceedent to the compoſition; ſo that if that be never performed, there will be no compoſition. An agreement and compoſition within the act muſt be intended a final agreement, ſuch as the defendant ſhall be bound to, and from which he cannot vary. Therefore until the money be paid in this caſe, this here will not be a compoſition; for if the money be not paid within the five years, the defendant will be at large from his agreement, and not obliged to pay the 2*d.* at all.

A compoſition, which it may be the defendant ſhall never be bound to perform, is ill.

Ita quod, when it makes a condition ſubſequent.

all. And *Holt* chief juſtice (who pronounced the opinion of the court) ſaid, that although *ita quod* is held in *Littleton*, to make a condition ſubſequent; yet that is in caſe of eſtates executed, but it is otherwiſe in caſe of things executory. As if *A.* ſhall covenant, to convey his lands to *B. ita quod* 10 *l.* be paid to *A.* before *Michaelmas*; the payment of the money is a condition precedent to the conveyance of the lands; and he is not obliged to perform his agreement, unleſs the 10 *l.* be paid at the time appointed. In this caſe the act intended, that it ſhould be a complete agreement, and that it ſhould not depend upon any contingency; but in this caſe the compoſition is ſtill worſe, for this here is a condition precedent impoſſible; for it does not appear, that the defendant was in priſon, *&c.* and the court cannot intend it, for there is nothing in the plea, that can lead us to ſuch intendment. Now if a condition precedent be impoſſible; the eſtate, intereſt, or agreement, cannot riſe: but a condition ſubſequent is of another conſideration; for if the agreement had been, that the 2 *d.* ſhould be paid within the five years; that had been only in nature of a defeaſance of the agreement, and well enough. But it is otherwiſe now, this being a condition precedent impoſſible. And for this reaſon judgment was given for the plaintiff.

Wright *verſ.* Crump.

Attachment againſt a man for ſitting as judge in his own cauſe. 12 Mod. 688. 2 Salk. 607. 1 Salk. 396. Farreſ. 1.

A Motion was made for an attachment againſt *Rolfe* an attorney, ſteward of a court in *Norfolk*, for having miſdemeaned himſelf in a trial before him between theſe parties. And *Holt* chief juſtice upon this motion cited a caſe, to have been adjudged *in B. R.* when *Hyde* was chief juſtice, which was thus. The mayor of *Hereford* claimed a title to a houſe in *Hereford*, and in order to recover it he made a leaſe of it to *J. S.* to the end that he ſhould ſue an ejectment, which *J. S.* did accordingly in the mayor's court in *Hereford*, and ſo the mayor in effect was judge in his own cauſe, and he gave judgment for his leſſee, and execution was ſued there by him; and upon complaint of this matter *in B. R.* the court here granted an attachment, and committed the mayor for theſe proceedings.

Odes *verſ.* Dr. Woodward.

S. C. 1 Salk. 87. Far. 93. 1 Vent. 310. 2 Vent. 218. 1 Mod. 188. 2 Barnes 212, 213. Judgment entred againſt a man after his death as of the term preceeding, good.

MR. ſerjeant *Hooper* moved that the examination of the regularity of a judgment entred up againſt the defendant, late prolocutor of the convocation, might be referred to Mr. *Clarke*; becauſe he ſaid, that the defendant gave the plaintiff a warrant of attorney, to enter a judgment againſt him for last *Hilary* term; that the plaintiff did not proceed upon it in the term; that after the end of the term Dr. *Woodward* died; and that after his death the plaintiff entred this judgment againſt him, which was erroneous. But *Holt* chief juſtice ſaid, that the entry will be as of the laſt term, and ſo before the defendant's death, and conſequently not erroneous; and that ſuch entry was not irregular, but agreeable to the conſtant practice of the court. But upon the ſerjeant's importunity they granted a reference, &c. but refuſed to ſtay the proceedings. And they told the ſerjeant, that if that was all the irregularity, he would get nothing by his reference. *Poſt*. 849.

Lumley *verſ.* Quarce.

THE plaintiff brought an action of trover againſt the defendant in the *Poultry* counter in *London* for goods of a great value. The defendant removed the cauſe by *habeas corpus* into the King's Bench, and he moved there, to be diſcharged upon common bail; becauſe he ſeiſed theſe goods as judge of the admiralty in *Penſilvania*, they being condemned there by ſentence; and the ſaid ſentence affirmed here upon appeal by Sir *Charles Hedges*. The plaintiff made *affidavit* of the value of the goods to be 1000 *l*. And *per Holt* chief juſtice the practice is, that if the plaintiff does not ſhew his cauſe of action upon ſummons, the defendant ſhall be diſcharged upon common bail, notwithſtanding that the cauſe is removed from an inferior court. Now here the defendant, having acted as judge, is not liable to an action. But bail was ordered to be put in for 500 *l*. becauſe if the defendant acted as a judge, he will be out of danger of any action; but if he did not act as a judge, then it is very reaſonable that ſpecial bail ſhould be put in.

S. C. 1 Salk. 101. Farreſ 9: *i. e.* 7 Mod. 9.

Where ſpecial bail is requiſite upon a removal by *habeas corpus*. Now ſee the ſtatute of 12 Geo 1 c. 29. and 5 Geo. 2. c. 27.

Regina *verſ.* Taylor.

AN indictment was found at the ſeſſions of the peace of the corporation of *Wells* in *Somerſetſhire* againſt the defendant, for having uſed a trade, not having ſerved as an apprentice for ſeven years. And being moved into the King's Bench by *certiorari*, it was quaſhed, becauſe the juſtices at ſuch ſeſſions have not juriſdiction to take ſuch indictments, for the ſtatute doth not give them juriſdiction, and juſtices of peace have no juriſdiction but by ſome ſtatute.

Indictment upon 5 Eliz. cap. 4 taken at the ſeſſions in a corporation.

Regina *verſ.* Ford & al'.

S. C. Caſes *B. R.* 453. 12 Mod.

Levari facias for penalties upon convictions of deer-ſtealing. See the ſtat. 5 Geo. 1. cap. 15. & cap. 28. 10 Geo. 2. c. 32. 9 Geo. 1. c. 22.

FORD and the other defendants were convict of deer-ſtealing by juſtices of peace according to the late act of parliament. And the convictions, being removed into the King's Bench by *certiorari*, were there confirmed. And after the confirmation, and before execution awarded, the perſon, who was as well the informer as the owner of the deer, died; and his wife, being his adminiſtratrix, ſuggeſted his death upon the roll, and that ſhe was adminiſtratrix, and upon that ſued a *levari facias* upon the ſaid convictions confirmed as aforeſaid, to levy the penalties; which were levied accordingly by the ſheriff, and diſtributed as the ſtatute directs. And now Mr. *King* moved, that this execution ſhould be ſet aſide as irregularly obtained. 1. Becauſe a *levari facias* does not lie. 2. Becauſe the execution ought not to have been ſued by the adminiſtratrix without a *ſcire facias, &c.* But as to the firſt objection, the whole court held, that a *levari facias* well lay. But they held, that this execution was irregular; becauſe in no caſe where the parties to the judgment are changed ought execution to be ſued by any other without a *ſcire facias.* Whereupon reſtitution was granted of the money levied.

Scire facias neceſſary, where a party to the judgment dies, before another can ſue execution.

Attorney general and ſolicitor general.

Memorandum, *That the firſt day of* June 1702. Edward Northey *eſquire, attorney general to the late King, and* Simon Harcourt *of the* Inner Temple *eſquire, received commiſſions to be attorney general and ſolicitor general to the Queen, and were ſworn the ſame day before the lord keeper of the great ſeal, and afterwards were knighted by the Queen. Sir* John Hawles, *late ſolicitor general to the deceaſed King, received notice of his removal ſome days before.*

Judges for life determined by the demiſe of the King. See 1 Ric. 3. 4. Anderſ. pl. 113. Dier 165. a. 7 Co. 30 a. Moor pl. 311. 12 Co. 49. 2 Inſt. 175. Cro Car 12. Bro. Pat 89. Fitzh grant 31. 4 Edw. 4. 44.

Memorandum, *That* Thurſday *the fourth of* June 1702. *Sir* John Turton *knight, juſtice of the King's Bench, and Sir* Henry Hatſell *knight, baron of the Exchequer, received letters from the lord keeper of the great ſeal, that it was the Queen's pleaſure, to ſuperſede their commiſſions, and to acquaint them, that they would receive their* ſuperſedeas *within two or three days after; and therefore he referred it to their diſcretion, whether they would come to* Weſtminſter-hall *for ſo ſhort a time. And upon receipt of the ſaid letters they did not come to the hall. And afterwards on* Tueſday *the ninth of* June *they received their* ſuperſedeas's. *And ſo they determined a queſtion againſt their intereſt,* viz. *that a patent* *a patent to be judge* quamdiù ſe bene geſſerint, &c. *determined by the demiſe of the King, of which many doubted.*

Memorandum, *That in this* Trinity *term the Queen gave directions for renewal of the judges patents, and for ſupply of the vacancies, and accordingly they all received new patents, excepting* Holt chief juſtice de B. R. *who had received his writ as aforeſaid. And Mr.* Price *and Mr. ſerjeant* Smith *were made judges inſtead of Sir* John Turton *and Sir* Henry Hatſell *lately removed. And Mr.* Robert Price *not being a ſerjeant, Sir* Thomas Powys *and he received writs to be ſerjeants. And accordingly* Tueſday *the twenty-third of* June *they appeared in chancery, and took the oaths of ſerjeants; and afterwards they were coifed in the treaſury of the Common Pleas; and being robbed in their party-coloured robes, were brought to the bar of the Common Pleas, and counted; and gave rings, of which the inſcription was,* Regina et lege gaudet Britannia; *and afterwards they made a treat in* Lincolns-inn-hall, *where there the greateſt part of the judges,* &c. *were preſent, and ſome of the nobility.* Note, *That at firſt was ingraved* Deo et regina *in the motto of the rings; which not being approved of by the lord keeper of the great ſeal, he gave direction, that it ſhould be altered, which was done accordingly. The next day, being the feaſt of St.* John Baptiſt, *the judges were ſworn in the morning (except Mr. Baron* Price, *who was not ſworn till night, to the end to have preſerved the ſeniority for Mr. ſerjeant* Smith *then about his return from* Ireland) *at the houſe of the lord keeper of the great ſeal,* viz. *Sir* John Powell (*formerly a juſtice of the Common Pleas*) *Sir* Littleton Powys *and Sir* Henry Gould *juſtices of the Queen's Bench; Sir* Thomas Trevor *chief juſtice, Sir* Edward Nevill, *Sir* John Blencowe, *and* Robert Tracy *eſquire (formerly a baron of the Exchequer) juſtices of the Common Pleas; and Sir* Edward Ward, *Sir* Thomas Bury, Robert Price *eſquire, barons of the Exchequer. Serjeant* Smith *was not ſworn then, not being returned from* Ireland, *but he was ſworn before the circuit.*

Judges made.

Sir *Thomas Powys* and Baron *Price* made ſerjeants.

Memorandum, *That the ſame twenty-fourth of* June *Sir* Thomas Powys *knight, ſerjeant at Law, and Mr. ſerjeant* Birch, *were ſworn ſenior Queen's ſerjeants, by which they have precedence of the attorney and ſolicitor general. And at the ſame time Mr. Recorder* Lovell, *Sir* John Darnall *knight, Sir* Joſeph Jekyll *knight, and ſerjeant* Hooper, *were ſworn Queen's ſerjeants, having received their patents before.*

Memorandum, *That the ſame twenty-fourth of* June *Sir* William Whichcote *knight*, John Conyers *eſquire, and* William Cowper *eſquire, were ſworn Queen's counſel, having received their patents before.*

Note, *That by theſe alterations ſerjeant* Bond, *ſerjeant* Wogan, *ſerjeant* Philips, *ſerjeant* Hutchins, *and ſerjeant* Whitacre, *ſerjeants to the deceaſed King, were left out from being Queen's ſerjeants; and Sir* Nathaniel Powell, Aglionby *eſquire, and* William Clerk *eſquire, were left out from being Queen's counſel, they having all been counſel to the deceaſed King.*

Serjeant Hook *was removed from being a* Welch *judge, and Mr.* Peaſly *ſucceeded him as chief; and* Marmaduke Gwynne *eſquire ſucceeded Mr.* Peaſly. *And* Charles Cox *eſquire ſucceeded Mr. Baron* Price *in his place of* Welch *judge. The other* Welch *judges had their commiſſions renewed, except* Francis Floyd *eſquire, who was afterwards removed, and ſucceeded by* Thomas Webb *eſquire.*

Note, *That Sir* Joſeph Jekyll, *chief juſtice of* Cheſter, *inſiſted, that his office was not determined, being uſually granted for life, and therefore he continued the exerciſe of it without a new patent.*

Trin.

Trin. Term

1 Annae reginae, B. R. 1702.

Poitvin *verſ.* Tregeagle.

THE plaintiff ſued a *latitat* againſt the defendant returnable in *Hilary* term 13 *Will.* 3. and in the ſame term he declared upon it againſt the defendant, and alſo in the ſame term he delivered a declaration by the by in *aſſumpſit* upon ſeveral promiſes; to which laſt declaration the defendant pleaded *non aſſumpſit*. And iſſue being joined, notice was given for trial. After which the plaintiff ſeeing, that his *Chriſtian* name was miſtaken, viz. *John*, where it ſhould be *Peter*; *Wedneſday* the tenth of *June*, all being in paper, Mr. *Raymond* moved for leave to amend the declaration, which was granted upon payment of coſts. But afterwards when the attorney came before Mr. *Clerk*, to have the coſts taxed, he refuſed to do it, becauſe in this caſe the plaintiff could not have leave to amend, this being only a declaration by the by. Upon which Mr. *Raymond* moved the court for their direction to the maſter to tax the coſts *Monday* the fifteenth of *June*. And he urged, that ſuch amendment might well be granted, tho' it was a declaration by the by; for ſince the delivery of the declaration was regular in this manner, it would be a declaration to all purpoſes, and therefore would partake of all advantages that other declarations enjoyed; that it was in effect founded upon the *latitat* in the other action, and therefore in this matter of the name of the plaintiff might well be amended by it; that it would be no prejudice to the defendant, becauſe if he nonſuited *John Poitvin*, yet he could not levy the coſts upon *Peter Poitvin*. But nevertheleſs *Powys* and *Gould* juſtices, being only in court, held that ſuch amendment could not be granted, becauſe there is no writ by which the declaration can be amended; and therefore they refuſed to give any direction in it.

Amendment of a declaration delivered by the by cannot be granted in the name of the plaintiff. The reaſon is plain, for if the plaintiff's name is miſtaken, it is no declaration at his ſuit, and if *Peter* will declare by the *by* in the name of *John* it is not *Peter*'s ſuit, ſo he has no right to move to amend.

Green *verſ.* Rivet.

Intr. *Mich.* 13 *Will.* 3. B. R. Rot. 316.

S. C. 2 Salk. 421.
Farr. 5, 12.
7 Mod.

A bill of Middleſex cannot be returnable the ſame day that it is ſued.

Vide 1 Mod. 31, 89, 268.
2 Mod. 71, 72, 311.
1 Vent. 90.
2 Saund. 125, 127.
1 Saund. 36, 37, 120, 127.
Comb. 70.
1 Show. 354.
2 Show. 79, 126.
3 Salk. 227.

See after.

INdebitatus aſſumpſit for goods ſold. The defendant pleaded the ſtatute of limitations. The plaintiff replied, that he at *Weſtminſter in comitatu Middleſex die lunae proxime poſt tres ſeptimanas Paſchae proſecutus fuit* a bill of *Middleſex* for the ſame cauſe of action returnable *in B. R. apud Weſtmonaſterium praedicto die lunae proxime poſt tres ſeptimanas Paſchae, &c.* which was within the ſix years. The defendant rejoined matter impertinent and idle, upon which the plaintiff demurred. And exception was taken the laſt term by Mr. *Cheſhyre* for the defendant, that the replication was ill, inaſmuch as the bill of *Middleſex* did not appear to be good. For, 1. it is pleaded to be ſued *Monday proxime poſt tres Paſchae*, returnable *apud Weſtmonaſterium praedict. die lunae, &c.* Now in point of grammar *praedict.* muſt be referred to *Weſtmonaſterium*, and then the *Monday proxime poſt, &c.* the day of the return muſt be regarded as the *Monday proxime poſt tres Paſchae* next after the writ ſued, which will be twelve months after; and ſo the bill of *Middleſex*, being a proceſs to arreſt the body of the defendant, and having ſo long a return, is perfectly void. And for that he cited *Tr.* 15 *Edw.* 3. 5. 18 *Edw.* 4. 4, 12, 13. *Daliſon* 104. *Dier* 175. *Cro. Eliz.* 467. *Dier* 118. 2. If *praedict.* ſhall be taken to refer to *die lunae*, and ſo the ſuing out and the return the ſame day, it will be a bad bill of *Middleſex*; becauſe ſuch bills of *Middleſex* are not warranted by the courſe of the court, but they ought to be returnable *immediate*, or *de die in diem.* So that both ways the bill is void, and will not prevent the operation of the ſtatute of limitations. Againſt which it was urged by Mr. ſerjeant *Hall* for the plaintiff, that the *praedict.* may well be referred to *die lunae*, and then it will be well enough, becauſe the proſecution and the return may be the ſame day. As in *Wales*, they are not confined to fifteen days between the *teſte* and return, but proceſs may be returnable the next day. *Cro. Car.* 179. *Griffith verſ. Jenkins*, 1 *Saund.* 74. That bills of *Middleſex* are founded upon the courſe and cuſtom of this court, and therefore not confined ſo ſtrictly to the rules that govern other writs; as bills of *Middleſex* have not any *teſte.* 2 *Sid.* 129. And therefore he concluded, that this bill of *Middleſex* ſhould be taken to be returnable the ſame day, and well enough. But the whole court held it ill, and therefore gave judgment for the defendant, *niſi, &c.* before the end of *Eaſter* term. And afterwards Mr. *Raymond* attempted to ſhew cauſe, *&c. abſente Holt* chief juſtice, and obtained an enlargement of the rule until the firſt day of this term. At which day he urged, that the *praedict.* ſhould be referred to the *die lunae*, and not *Weſtmonaſterium*, becauſe one never makes uſe of the word *praedict.* when one mentions *Weſtminſter* upon the record; and therefore in the entry of the continuances one does not ſay *apud Weſtmonaſterium praedictum*, but *Weſtmonaſterium* generally; alſo that it is no objection, to ſay that it cannot be referred to the *die*, *&c.* becauſe it goes before it; for it is more elegant *Latin*, to inſert the adjective before the ſubſtantive, than after it. Beſides, that it would be hard, when it was in the power of the court, to make a conſtruction that would preſerve a debt, to make ſuch conſtruction as would deſtroy it. And for theſe reaſons the court ſeemed to incline to refer *praedict.* to *die*. Then he urged, that a bill of *Middleſex* might be returnable the ſame day that it was ſued out, as proceſs in many courts are. *Habeas corpus* in this court returnable *immediate*, *&c.* But *Holt* chief juſtice ſaid, the proceſs was returnable *de die in diem* in this court; that a bill of *Middleſex* could not be returnable the ſame day that it was ſued; that in this caſe the fault was, in not having pleaded this bill to have been proſecuted as before, *&c.* And therefore he was clear, that the defendant ought to have judgment. To which the other judges agreed, and they diſallowed the cauſe, *&c.*

Lapiere *verſ.* ducem St. Albans.

In the Exchequer, Friday June 19.

In judgment by default upon a ſingle bill the intereſt ſhall be given in damages.
2 Salk. 623.

THE plaintiff brought an action of debt againſt the defendant upon a ſingle *Engliſh* bill, *viz.* I do promiſe to pay to *Francis Lapiere* or order the ſum of 40 *l.* the firſt of *October* next, witneſs my hand and ſeal; which bill was ſigned, ſealed and delivered by the defendant, dated the fifteenth of *March* 1693. The defendant permitted judgment to paſs againſt him by default. And the maſter of the office at the plaintiff's requeſt declared, that he would give intereſt for this money in the damages. Upon which the defendant by Mr. *How* made application to the court to have their rule, to hinder the maſter of the office from doing ſo. And he urged, that intereſt ought not to be given at all; becauſe the bill being ſingle, the debt was certain, and where the debt is certain, the party ought not to have intereſt; for that would be in ſome manner againſt his own agreement, which was to content himſelf with the ſum contained in the bill. Beſides, that in debt for rent they never give intereſt, no more here, *&c.* But againſt this it was urged by Mr. *Raymond*, that it was the conſtant practiſe in all the courts of *Weſtminſter hall*, upon judgments in debt upon default or confeſſion,

ſion, to tax the damages *occaſione detentionis debiti*. Then the nonpayment of intereſt, when the debt carries intereſt (as all *Engliſh* bills do) is a damage to the plaintiff. But as to the caſe of rent, it does not carry intereſt, and therefore in ſuch caſe no intereſt ſhall be given. And he cited 2 *Saund.* 106. *Holdip v. Otway*, as a much ſtronger caſe, where in debt upon a bill obligatory brought againſt an executor upon a bill of the teſtator judgment was given by default in the Common Pleas, and the intereſt of that bill was taxed in the damages; and yet in ſuch caſe the judgment is, that the damages ſhall be levied *de bonis teſtatoris, ſi, &c. ſi non, tunc de bonis propriis* of the executor; and upon error brought *in B. R.* as to that matter, the ſaid judgment was held good, but reverſed for other error. And in this preſent caſe the whole court of Exchequer were clear of opinion, that the intereſt ought to be taxed by the maſter of the office in the damages.

Rolleſton v. May, Skin. 561. not againſt executor.

Note, that *Mich.* 6 *Will. & Mar. B. R.* 1694, between *Rolleſton* and *May*, debt was brought upon a ſingle bill dated ſeven and twenty years before, againſt the defendant as executor to his father, and judgment was given againſt him by default; and Mr. *Aſhton* then ſecondary taxed damages and coſts. And Sir *Bartholomew Shower* moved the court, that the intereſt ſhould be included in the damages, upon the authority of the ſaid caſe of *Holdip v. Otway*, 2 *Saund.* 106. But it was denied *per curiam*; becauſe by ſuch means, if the defendant had not *aſſets*, he would be compelled to pay this intereſt, being included in the damages (the entry being, as to the damages, *ſi non, tunc de bonis propriis*) out of his own eſtate, which would be very unreaſonable.

Burton *verſ.* Souter.

Aſſumpſit upon a note payable to a man or order.

ASſumpſit upon ſeveral promiſes. One count was upon the cuſtom of merchants, and declared upon a note ſubſcribed by the defendant, payable to the plaintiff or order, *&c.* The defendant pleaded a tender, and brought the money into court. The plaintiff took the money out of court; and then to have damages, traverſed the tender. And iſſue being joined upon it, a verdict was found for the plaintiff, and a penny damage given. Upon which Mr. *Broderick* moved in arreſt of judgment, 1. That ſuch note is not within the cuſtom of merchants, but they ought to declare upon a *mutuatus*, and give the note in evidence; as it was ſettled laſt term between *Clerk* and *Martin*. [See the ſaid caſe before, 757.] And of that opinion was the whole court. 2. That the plaintiff could not proceed for damages, after he had accepted the money brought into court. And of the ſaid opinion was *Holt* chief juſtice ſtrongly

Cro. Jac. 126. pl. 15. *Ante* 643. 1 Salk. 129.

Accepting of money out of court bars the proceeding for damages.

ſtrongly, as he had been, before in the caſe of *Horne v. Lewin.* [See the ſaid caſe before, 639.] But becauſe the *poſtea* was not in court, it was only ſtaid until, *&c.* And afterwards it was ſtaid abſolutely; Mr. *King* council for the plaintiff declaring, that he could not maintain it.

Shirley *verſ.* Wright.

THE plaintiff brought an action of debt againſt the defendant for the eſcape of *J. S.* being in his cuſtody as ſheriff of the county of *Cheſter*, by virtue of a *capias ad ſatisfaciendum* iſſuing out of the court of   upon a judgment recovered there by the plaintiff againſt the ſaid *J. S.* And upon not guilty pleaded, a verdict was given for the plaintiff at *Guildhall* in *London* the laſt term. Upon which the laſt day of the laſt term Mr. *Ward* moved in arreſt of judgment, that it appeared upon the declaration, that the *capias ad ſatisfaciendum* bore *teſte* in *Michaelmas* term, and was returnable *termino Paſchae* next following: ſo that all *Hilary* term intervened, and was left out; and that for this reaſon the ſaid *capias ad ſatisfaciendum* was altogether void; and then of conſequence it was no eſcape in the defendant, though he permitted *J. S.* to go at large. And to prove, that if there is an intervening term between the *teſte* and return of a *capias*, the writ is void, he cited *Fitz. continuance* 3. becauſe the defendant ought not to ſtay ſo long in priſon. *Hil.* 21 *Hen.* 7. 16. *pl.* 27. *Dier* 175. *Cro. Eliz.* 466. *Nector and Sharpe v. Gennet* in point; where it is held, that a man taken upon a *capias utlagatam* returnable five years after the *teſte* was not lawfully a priſoner; and that it was no eſcape in the keeper of *Newgate*, though he permitted him to go at large. Upon which the court made a rule, that the judgment ſhould be ſtayed, until, *&c.* And now this term Mr. Common ſerjeant *Dee*, Mr. *Broderick* and Mr. *Cheſhyre*, moved for judgment for the plaintiff. And they ſaid, that all the books cited of the other ſide, which affirm, that a *capias*, that has a term intervening between the *teſte* and return, is void, except *Cro. Eliz.* 466. muſt be underſtood of a *capias* in *meſne* proceſs, and not of a *capias ad ſatisfaciendum*, which is apparent by the reaſon given by the ſaid books, *viz.* that the defendant ought not to be detained ſo long in priſon, without having an opportunity to make his defenſe. But the ſaid reaſon does not hold in caſes of writs of execution; for there the defendant ought to be kept in cuſtody, until he pay the whole money recovered againſt him, and then upon payment thereof he ſhall be diſcharged, and not before. Then if the ſaid reaſon fails in caſes of *capias ad ſatisfaciendum*, the law will fail alſo. Wherefore they concluded, that a *capias ad ſatisfaciendum* with ſuch a return was

S. C. 1 Salk. 273. 2 Salk. 700. Far. 29. 3 Danv. Abr. 121. p. 6. 7 Mod.

A *capias ad ſatisfaciendum* returnable with an intervening term is not void. Cro. Jac. 289. 11 Mod. 50.

See before, 772. 2 Roll. Rep. 442. Johnſon v. Norton.

not void, but was only voidable at moſt. And then if it were only erroneous and voidable, the ſheriff ſhall not take advantage of it; but it will be an eſcape in him, if he permits a man taken in execution upon ſuch a writ to go at large. And to prove that, *Cro. Eliz.* 188. *Buſhe*'s caſe, 2 *Bulſtr.* 256. *Keiſar v. Tyrrell*, were cited, where it was held, that if the defendant is arreſted upon a *capias ad ſatisfaciendum*, iſſuing upon a judgment without a *ſcire facias*, after the year, and the ſheriff permits him to eſcape, an action lies againſt the ſheriff, notwithſtanding that the *capias ad ſatisfaciendum* iſſued erroneouſly. So in *Moor* 274. *Cro. Eliz.* 164. *Ognel v. Paſton*, it was held, that if it ſhould be admitted, that a *capias ad ſatisfaciendum* would not lie upon a judgment upon a *ſcire facias* upon a recogniſance acknowledged in Chancery; yet if the court awarded a *capias ad ſatisfaciendum*, and the ſheriff arreſted the defendant upon it, and permitted him to go at large, an action would lie againſt him for the eſcape. And ſeveral other caſes were cited, to prove, that the ſheriff ſhall not take advantage of error in proceſs. 2 *Saund.* 100. *Cro. Eliz.* 271. *Richbell v. Goddard*, *Poph.* 205. a ſtrong caſe, where a *capias* was returnable at the day of All Souls, which is not a *dies juridicus*, and the ſheriff was forced to have the body in court. 21 *Edw.* 4. 23. *Dier* 67. and 21 *Edw.* 3. 31. *Fitzh. jour*, 9. were cited, that the juſtices at their diſcretion may give day. From whence it was concluded, that this writ was not void, and conſequently that the defendant was guilty of an eſcape; and therefore that the plaintiff ought to have his judgment.

Mr. *Mountague* and Mr. *Ward* for the defendant argued to the ſame purpoſe as was done laſt term. And they relied principally upon the caſe in *Cro. Eliz.* 466. as a caſe in point, there being no difference as to this purpoſe between a *capias ad ſatisfaciendum* and a *capias utlagatum*. And *Holt* chief juſtice held, that the caſe of *Nector and Sharpe v. Gennet* was a caſe in point; but he ſaid, he was not ſatisfied with the reaſon of the ſaid caſe; for there is an apparent difference between writs of *meſne* proceſs, and writs of execution; for in caſe of writs of a *meſne* proceſs if a term be omitted between the *teſte* and return, the cauſe is altogether out of court. But that is to be underſtood in perſonal actions; for in real actions the law is otherwiſe, for in them there muſt be nine returns between the *teſte* and return. But in caſe of a writ of execution the cauſe is come to its end. In caſes of *meſne* proceſs it would be hard to ſuffer ſo long a return, becauſe the body muſt lie in priſon, without having an opportunity to make a defenſe, when perhaps he is able to make a good defenſe. But the defendant ought to lie in execution, and the ſheriff ought to have his body always ready, to bring to the court, when he ſhall be commanded by *habeas* *corpus*, &c. And therefore all the judges, *viz.* *Holt* chief juſtice, *Powys* and *Gould* juſtices held, that this writ could never be void. And therefore they gave judgment for the plaintiff, *niſi*, &c.

Regina *verſ.* Rogers.

UPON a *certiorari* directed to the mayor and aldermen of *London*, to remove, &c. they return, that there is a cuſtom in *London*, that if any citizen of *London* makes an aſſault upon, or ſpeaks words defamatory of, an alderman of *London* being in the execution of his office, that the common ſerjeant of the city of *London* ſhould exhibit an information againſt ſuch perſon in his name in the court of the mayor and aldermen, and that proceedings might be againſt him there, in order to impoſe a fine upon him; that at a wardmote held before Sir *Robert Jefferyes* one of the aldermen of the city, the defendant *Rogers* made an aſſault upon Sir *Robert Jefferyes*, and ſpoke of him theſe defamatory words (the wardmote being held in a church) "If I am churchwarden next year, you ſhall aſk my leave to keep your wardmote here:" upon which Sir *Robert Jefferyes* called him rogue and raſcal; to which *Rogers* replied, "I have as much to do here as you; you think "ſure you are among your *Bridewell* birds, you are not among "your *Bridewell* birds, you are miſtaken:" and upon this the common ſerjeant exhibited an information againſt him, &c. [Note, Sir *Robert Jefferyes* was governor of *Bridewell*.]

S. C. 2 Salk. 425, 426. Far. 28. 7 Mod. Cuſtom of London for the Common ſerjeant to exhibit an information againſt a man aſſaulting an alderman, &c. in the court of the mayor and aldermen. See 1 Mod. 35. 5 Mod. 75, 94, 440. 6 Mod. 124.

Several motions were made in this caſe by Mr. Recorder *Lovell*, and by Mr. *Dee* Common ſerjeant, for a *procedendo*. And they were oppoſed by Mr. *Broderick* and Mr. *Yates*, on behalf of the defendant. And it was agreed by the court, and council of both ſides, that a cuſtom to diſfranchiſe for ſuch words would be void. 2 *Lev.* 200. But Mr. *Dee* ſaid, that notwithſtanding the report of the caſe in *Levinz*, he had ſeen a rule for a *procedendo* in the ſaid caſe. 2. It was reſolved, that a cuſtom to proceed in ſuch manner for an aſſault of an alderman exerciſing his office was good, ſince it tended to preſerve the good government of the city: that the proper proceeding for offenſes by the common law was by indictment, and yet they proceeded in this court by information againſt offenders; and for the ſame reaſon a cuſtom to proceed in ſuch manner in *London* will be good. Then the cuſtom being returned, ſince it is not unreaſonable, it ought to be allowed. And therefore upon this point of the aſſault only, without having any regard to the words, the court declared, that they would grant a *procedendo*. For as to the words, *Holt* chief juſtice ſaid, that ſince no information or indictment will lie for theſe words at common law,

Cuſtom to diſfranchiſe a freeman for defamatory words ſpoken by him of an alderman is void.

T. Jones 229. Cro. Eliz. 78, 689. 1 Ventr. 327. 1 Ventr. 16.

Binding to the good behaviour for ſcandalous words.

law, 2 *Roll. Abr.* 78. 2 *Inſt.* 181. it was a great queſtion, whether this cuſtom, to proceed in another manner than the common law would allow for words, would be good. For the common law has provided a proper method for puniſhment of ſcandalous words, *viz.* binding to the good behaviour; ſuch words being a breach of the peace. 3. It was reſolved, that ſuch information would well lie in the court of aldermen. Though it was objected, that this would be to make the party injured judge in his own cauſe, the offenſe being aſſault upon one of the aldermen. But *Holt* chief juſtice ſaid, there was a difference between this caſe, where the offenſe is an aſſault upon an aldermen, and if it had been an aſſault upon the mayor; for the mayor is the head of the corporation, and an integral part of it, without whom the court cannot be held; but otherwiſe it is in the caſe of an alderman, for the court may be held without him; and when his cauſe comes on to trial he ought to leave the bench. And this is like the caſe of a dean and chapter, or mayor and commonalty. The dean and chapter cannot make a grant to the dean, nor can the mayor and commonalty make a grant to the mayor; but they may make grants to one of the chapter, or of the commonalty, reſpectively. So if the chief juſtice of the King's Bench bring an action in this court, the *placita* muſt be before the other three judges, omitting the chief juſtice. And he cited a caſe lately adjudged here between the mayor and commonalty of the city of *London* and *Wood*; where it was held, that an action of debt being brought by the mayor, *&c.* for a fine for not ſerving the office of ſheriff of *London*, being duly elected, was ill; but it had been otherwiſe, if it had been brought in the name of the chamberlain. And a *procedendo* was granted for the reaſons aforeſaid.

Dean and chapter cannot grant to the dean.

Debt by the mayor of *London* for a fine.

Mayor of London *v.* Wood.

Machell *verſ.* Clarke.

Intr. *Paſch.* 12 *Will.* 3. B. R. Rot. 342.

S. C. 2 Salk. 619. Farreſ. 18. 3 Danv. Abr. 198. p. 10. S. C. Comyns ~~198~~ 119.

Covenant to ſtand ſeiſed by tenant in tail.

EJectment. Upon ſpecial verdict the caſe was thus. Tenant in tail covenanted in conſideration of natural love and affection, to ſtand ſeiſed of the lands in queſtion, to the uſe of himſelf for life, remainder to *John Machell* his eldeſt ſon in tail, remainder to *Matthew Machell* his ſecond ſon in tail; and after that he ſuffered a common recovery with ſingle voucher, in which he was tenant to the *praecipe*, which recovery was ſuffered to other uſes. And the queſtion upon this ſpecial verdict made in the Common Pleas was; whether the tenant in tail had made any alteration of the eſtate-tail by this covenant to ſtand ſeiſed, *&c.* for if he had made any alteration of the eſtate-tail, then he was become tenant for life with remainder over *ut ſupra*, and of conſequence the recovery ſuffered by him was a forfeiture of the eſtate for life, and the new uſes limited upon the recovery could not ariſe; but *e contra* if the covenant to ſtand ſeiſed made no alteration of the eſtate-tail, then the recovery was well ſuffered, and the eſtate-tail barred, and the new uſes would ariſe. And it was adjudged *in C. B.* that the covenant, *&c.* did not alter the eſtate-tail, and that the common recovery was well ſuffered, and the new uſes aroſe. And it was argued at the bar ſeveral times, by Mr. *Peere Williams* and Mr. *King* for the plaintiff in error, and by Mr. *Cowper* and Mr. *Broderick* for the defendant in error. And now this term *Holt* chief juſtice delivered the opinion of the court, *viz.* of himſelf, *Powys* and *Gould* juſtices, the vacancy made by the removal of *Turton* juſtice not being then ſupplied, that the judgment of the Common Pleas ought to be affirmed. And he ſaid, that though there are many authorities in the point, yet the reaſon given in the reports of them is not clear, and therefore he would give at large the reaſon of his preſent opinion. It has been made a queſtion, if tenant in tail bargains and ſells, or leaſes and releaſes, or covenants to ſtand ſeiſed of the lands intailed, to another in fee, whether the eſtate conveyed by the ſaid conveyances determines by the death of the tenant in tail, or whether it continues until the actual entry of the iſſue in tail. And he held, that ſuch eſtate continues until the actual entry of the iſſue in tail, for theſe reaſons. 1. Becauſe tenant in tail himſelf has an eſtate of inheritance in him; and before the ſtatute *de donis Weſtm.* 2. *cap.* 1. it was held, that ſuch eſtate was a fee-ſimple conditional; then the ſtatute made no alteration as to the tenant in tail himſelf, but only makes proviſion, that the iſſue in tail ſhall not be diſinherited by the alienation of his anceſtor. And by *Co. Lit.* 18. *a.* it appears that a baſe fee may be created out of an eſtate-tail, where it is ſaid, that if a gift in tail be made to a villein, and the lord enters, he hath a baſe fee. Then if a baſe fee may be created out of an eſtate-tail, there is great reaſon, that the bargainee, *&c.* of tenant in tail ſhould have it. 2. The tenant in tail has the whole eſtate in him, and therefore there is no reaſon why he cannot diveſt himſelf of it by grant, bargain and ſale, *&c.* ſince the power of diſpoſition is incident to the property of every one. 3. It is no prejudice to the iſſue in tail, and therefore no breach of the ſtatute *de donis*. Indeed there are ſtrong words in the act for reſtraining alienations to the prejudice of the iſſue in tail, where it ſays, *quod finis ipſo jure ſit nullus*, *&c.* yet the conſtruction of the ſaid words hath always been, that the entry of the iſſue is tolled by ſuch fine, and he is driven to his formedon: therefore, if an act, which drives the iſſue in tail to his formedon, will not be a breach of the ſtatute; much leſs will it be a breach of the ſtatute, to drive the iſſue in tail, to enter, to

If tenant in tail bargains and ſells, leaſes and releaſes, or covenants to ſtand ſeiſed to the uſe of *J. S.* in fee; the eſtate does not determine by the death of tenant in tail until the entry of the iſſue.

Plowd. 557. Cro. Car. 499.

avoid a bargain and ſale by his anceſtor. As to authorities, 10 *Co.* 95. *Seymour*'s caſe is in point, where it is held, that the bargainee of tenant in tail has a deſcendible eſtate, of which his wife ſhall be endowed; and that a fine afterwards levied by tenant in tail barred the iſſue in tail, but did not enlarge the eſtate of the bargainee, the eſtate-tail being before converted into a baſe fee by the bargain and ſale. And if the fine there had enlarged the eſtate, it would have created a diſcontinuance, and then the collateral warranty had been a bar to him in remainder. In 3 *Co.* 84. in the caſe of fines, the caſe of *Littlet. ſect.* 613. is put and conſidered; and there it is held, that the words ought not to be literally underſtood, but in another ſenſe. The words of *Littleton* are, that if tenant in tail grants *totum ſtatum ſuum* to *J. S.* and his heirs, and makes livery of ſeiſin to *J. S.* yet the eſtate of *J. S.* is determined by the death of the tenant in tail. But this ought to be underſtood, that it is no diſcontinuance, but will drive the iſſue in tail to enter to avoid it. Tenant in tail of a rent or common grants it in fee; the grant does not determine by his death, but at the election of the iſſue in tail. And therefore according to the caſe put in the caſe of fines, if a warranty be annexed to the grant, and the iſſue in tail brings a formedon, the warranty will bar him. *Winch* 5. Tenant in tail bargains and ſells his land to *J. S.* in fee, *J. S.* ſells to the iſſue in tail being of full age, then tenant in tail dies; and the queſtion was, whether the iſſue in tail was remitted; and *Hobart* held, that he was, *Hutton* and *Warburton* held the contrary. But that queſtion ſuppoſes, that the eſtate of *J. S.* continued after the death of the tenant in tail. *Bridgm.* 92. *accord.* If tenant in tail makes a leaſe for years not warranted by 32 *Hen.* 8. *cap.* 28. the iſſue in tail muſt enter to avoid it; and if he accepts rent become due afterwards, that will make the leaſe good as to him; which could not be, if the leaſe was actually determined by the death of tenant in tail. In caſes of exchange the eſtates exchanged muſt be equal in quality, and yet tenant in tail may exchange his lands with tenant in fee of other lands; and it will be a good exchange, till it be avoided by the iſſue in tail. *Co. Lit.* 51. *a.* And in the ſaid caſe the tenant in tail paſſes a fee by the word exchange without livery of ſeiſin, and it does not amount to a diſcontinuance. *Co. Lit.* 332. *a.* but it paſſes only a baſe fee: and if the heir in tail will avoid it, he muſt waive the lands given in exchange; for if he occupies them, he will be bound for his life. For if he had not a fee, the exchange had not been good, becauſe the eſtates had not been equal. 2. Though tenant in tail by bargain and ſale, leaſe and releaſe, or covenant to ſtand ſeiſed, may create a baſe fee; yet in this caſe the tenant in tail did not create a baſe fee by his covenant to ſtand ſeiſed; becauſe an eſtate made by tenant in tail, which will not take effect till after his death, is void. If tenant in tail makes a leaſe for years to commence after his death, it is void in its creation. *Dier* 279. *pl.* 7. *Cro. Ja.* 455. Lady *Griffin verſ. Stanhope.*

An eſtate granted by tenant in tail, which cannot take effect till after his death, is void.

Objection. He has here made himſelf tenant for life.

Anſwer. That will not alter his eſtate, unleſs for the ſake of the remainders. As if tenant in fee covenants to ſtand ſeiſed to the uſe of himſelf for life, it is void; but a covenant to ſtand ſeiſed to the uſe of himſelf for life, remainder to *J. S.* or to the uſe of himſelf in tail, will be good for the ſake of the intail, or of the remainder. But here the remainder is *ipſo facto* void, and therefore will not make the eſtate for life good, which otherwiſe would be void alſo. The reaſon why an eſtate made by tenant in tail to commence after his death is void, is becauſe then the iſſue has a right paramount *per formam doni*. There is expreſs authority in this caſe. 2 *Co.* 52. *Cro. Eliz.* 279. *Yelvert.* 51. *Moor* 883. 1 *Leon.* 110. 1 *Anderſ.* 291. 3 *Leon.* 291. *Cro. Eliz.* 895. *Bedingfield*'s caſe. Which laſt book ſeems to give the true reaſon, *viz.* becauſe the eſtate there was to commence after the death of the tenant in tail. But an eſtate granted by tenant in tail, which muſt, or which by poſſibility may, commence in the life of the tenant in tail, is good. He ſaid farther, that the caſe of fines, 3 *Co.* 84. ſupported him in maintenance of this opinion againſt *Littleton.* And *Hob.* 339. ſays, that *Littleton* was confounded in himſelf, when he held, that a grant of *totus ſtatus ſuus* by tenant in tail put the tail in abeyance. All the books agree, that the inheritance is out of the tenant in tail. And in the ſame place *Hobart* ſays, that the law abhors abeyance; therefore the inheritance muſt be rather in the releaſee, than in abeyance.

Objection. 1 *Saund.* 260. *Took v. Glaſcock.* It is held, that if tenant in tail bargains and ſells his land in fee, the bargainee has an eſtate but for the life of tenant in tail; for a deviſe by him is adjudged void, becauſe tenant *pur auter vie* cannot deviſe by the ſtatute of *Henry* 8. of wills.

Anſwer. The caſe of *Took v. Glaſcock* is not law; for there the tenant in tail after the bargain and ſale, and after the death of the bargainee, levied a fine to a ſtranger; and it is held there, that the fine enured to the benefit of the heir of the bargainee: but that is impoſſible; for if tenant in tail bargains and ſells to *J. S.*

in fee, and thereby an eſtate *pur vie* only paſſes, *viz.* for the life of the tenant in tail, and that deſcends to the heir of the bargainee but as ſpecial occupant; the fine levied to a ſtranger cannot change this eſtate *pur auter vie* into an eſtate of inheritance; for there is no inſtance in the law, that a fine levied to a ſtranger can increaſe; but it may extinguiſh a right: therefore the caſe of *Took v. Glaſcock* is contradictory in itſelf, and hath no reaſon to ſupport the reſolution given. Upon the whole matter he held, 1. That if tenant in tail conveys the lands intailed by bargain and ſale, leaſe and releaſe, or covenant to ſtand ſeiſed to the uſe of another, in fee, and dies; a baſe fee paſſes by the conveyance, and the eſtate continues, until it be avoided by the iſſue in tail by entry. 2. That if tenant in tail covenants to ſtand ſeiſed to the uſe of the covenantee for life, remainder to *J. S.* in fee; or to the uſe of *J. S.* for life, remainder to *J. N.* in fee; the remainder is good, till avoided by the entry of the iſſue in tail; although tenant in tail dies, before the remainder takes effect: becauſe the eſtate for life takes effect immediately, and the remainder might by poſſibility have taken effect in the life of the tenant in tail. 3. If tenant in tail leaſes and releaſes to *J. S.* in fee, to the uſe of himſelf for life, remainder to *J. N.* in fee after his death; this remainder is good, though it is to commence after the death of the tenant in tail, becauſe it ariſes out of the eſtate of the releaſee, which eſtate would have been good till avoided by the entry of the iſſue in tail. 4. That in this caſe the eſtate being raiſed by covenant to ſtand ſeiſed, without tranſmutation of the poſſeſſion, or any alteration of the eſtate made, except the remainder which is void, and therefore works no alteration of the eſtate-tail; the recovery was good, and docked the intail, and the new uſes limited upon it well aroſe; and therefore that the judgment of the Common Pleas ought to be affirmed.

A fine levied to a ſtranger may extinguiſh a right, but cannot increaſe an eſtate.

Note, *Holt* chief juſtice ſaid, after delivery of the argument aforeſaid, that he had not communicated theſe reaſons to his brothers; and therefore if they did not agree with them, he prayed them to declare themſelves thereupon. *Gould* juſtice ſaid, that he agreed in all, *Powys* juſtice *tacente.*

Smith *verſ.* Angell.

Intr. *Paſch.* 13 *Will.* 3. B. R. Rot. 325.

S. C. 1 Salk. 354. Farreſ. 40. 7 Mod. 44. 8 Rep. 134. 2 Mod. 50. 3 Salk. 157, 158, &c. Where a general judgment ſhall be given againſt the heir.

THOMAS Smith and *Margaret* his wife executrix of *Matthew Field*, brought debt againſt the defendant *John Angell*, as heir to his father *Juſtinian Angell*, upon divers bonds, in which the ſaid *Juſtinian* bound himſelf and his heirs to the ſaid *Matthew Field*. The defendant comes and defends the wrong and the force, when, *&c.* and ſaith, that he cannot deny, but the bonds are the deeds of his father, nor that he detains the ſeveral ſums of money, *&c.* but for plea he ſaith, that his father *Juſtinian Angell* in his life, *viz.* 1679. was ſeiſed in his demeſne as of fee *de et in tribus quartis partibus toto in quatuor partes dividendo ſex acrarum terrae vocatarum Ravenſey Spurne, &c. in comitatu Ebor.* and being ſo ſeiſed in his life-time by a certain indenture made at *London* 17 *July* 1679. demiſed to *H. Greenwood* the ſaid three fourth parts, *&c.* for five hundred years to be computed from the making of the ſaid indenture, which he produceth in court; by virtue of which demiſe *H. Greenwood* entred into the ſaid three fourth parts, *&c.* and was thereof poſſeſſed; that afterwards the firſt of *October* 1681, his father died; after whoſe death the reverſion of the ſaid three fourth parts, *&c.* deſcended to the defendant as ſon and heir to his father, *per quod idem* the defendant *ſemper poſtea hucuſque fuit ſeiſitus et adhuc ſeiſitus exiſtit de reverſione tenementorum praedictorum in dominico ſuo ut de feodo*; and he farther ſaith, that he hath not any other lands or tenements by hereditary deſcent from his father aforeſaid in fee ſimple, nor had the day of the exhibiting of the plaintiff's bill, nor at any time ſince, beſides the reverſion aforeſaid; and he farther ſaith, that after the death of his ſaid father and the deſcent of the reverſion aforeſaid, *viz.* the twenty-third of *November* 9 *Will.* 3. *in quadam ſecta in* Chancery *pendente inter quoſdam Edvardum Thompſon armigerum et alios quaerentes quandam Elizabetham Angell nuper uxorem praedicti Juſtiniani Angell et ipſum* the defendant it was by the ſaid court of Chancery decreed, that the ſaid *Elizabeth haberet et gauderet unam tertiam partem praedictarum ſex acrarum terrae, &c.* for her life for her dower, *virtute cujus decreti ipſa praedicta Elizabetha fuit et adhuc exiſtit ſeiſita de et in praedicta tertia parte, &c.* as of her freehold for her life; *et hoc paratus eſt verificare, unde petit judicium ſi ipſe* as ſon and heir of the ſaid *Juſtinian de debito praedicto praeterquam de praedicta reverſione de praedicto termino annorum et praedicto ſtatu praedictae Elizabethae pro termino vitae ſuae de et in praedicta tertia parte quando ſeparaliter acciderint virtute ſeparalium ſcriptorum* *obligatoriorum praedictorum onerari debeat*, *&c.* The plaintiff prays *oyer* of the deed of demiſe; which being read, it appears, that there was a proviſo, that if the defendant's father paid 50 *l. per annum* to *Greenwood* for his life, the ſaid demiſe ſhould be void; and then he replies (*proteſtando* that *Greenwood* did not enter, nor take the profits) that after the death of his father, *viz.* the ſecond of *October* 1681. the defendant entred, *&c.* as ſon and heir to his father, and was ſeiſed thereof in his demeſne as of fee, and being ſo ſeiſed, afterwards, *viz.* the tenth of *May* 12 *Will.* 3. received *aſſets* of the profits, to ſatisfy the plaintiffs debt over and above the annuity of *Greenwood.* The defendant rejoins, *proteſtando* that he did not receive *aſſets* of the profits to ſatisfy the plaintiffs debt, for plea he ſaith, that he did not enter, *modo et forma prout*, *&c. et de hoc ponit ſe ſuper patriam.* Upon which the plaintiffs demur, and the defendants join in demurrer. This caſe was argued ſeveral times at the bar by Mr. *Boult*, Mr. *Raymond*, and Mr. *Herring*, for the plaintiffs, and by Mr. ſerjeant *Hall*, Sir *Bartholomew Shower*, and Mr. *Cheſhyre* for the defendant. And it was agreed by all, that the plaintiffs ought to have judgment; but the queſtion was, whether they ſhould have a general judgment againſt the defendant, or only a ſpecial judgment of the *aſſets* confeſſed. And *Holt* pronounced the reſolution of the whole court, *viz.* of himſelf, *Powys* and *Gould* juſtices, that the plaintiffs ought to have a general judgment, upon which his body, his own lands and goods (though not *aſſets*) might be taken in execution. And he ſaid he would conſider, 1. The pleading of the leaſe for years, whether it is good for the heir or not, to hinder the plaintiff from having immediate execution. 2. The pleading of the aſſignment of dower to the wife in Chancery, and that he has only a reverſion expectant upon an eſtate for life. 1. As to the firſt, the queſtion is, whether the heir ought to plead the leaſe for years in delay of execution of the plaintiffs, or ought to confeſs *aſſets* in poſſeſſion. He ſaid, he had known the leaſe pleaded, and therefore he was unwilling to deliver a deciſive opinion in that point, becauſe it is not now material in this caſe; but it ſeemed to him, that the heir ought not to plead the leaſe, but ought to confeſs *aſſets* in poſſeſſion, without taking notice of the leaſe for years; for the having of the freehold and inheritance of the lands of the anceſtor deſcended to the heir makes complete *aſſets* (as in this caſe the defendant hath) in poſſeſſion. But if the anceſtor had made a leaſe for the life of *J. S.* and died, and the reverſion had deſcended to the defendant; there he would have had only *aſſets* in reverſion. Moreover at common law terms for years were not regarded, but were ſubject to the power of the tenant of the freehold, and would be bound by a recovery ſuffered by him. 2 *Inſt.* 321. *Co. Li.* 42. And after the ſtatute of *Glouceſter*, if the tenant for years did not

The heir ought not to plead a leaſe for years made by his anceſtor.

come in before judgment, he could not falſify, which was remedied by 21 *Hen.* 8. *cap.* 15. At this day if the reverſioner expectant upon a leaſe for years brings an aſſiſe, the defendant cannot plead, that there is a prior leaſe; but the leſſee for years ought to come in by virtue of the 21 *Hen.* 8. *cap.* 15. and falſify the recovery. And the ſame reaſon holds place in this caſe, why the leaſe for years ſhould not be pleaded, *viz.* becauſe the bond of the anceſtor attaches the land deſcended as *aſſets* in poſſeſſion. 43 *Edw.* 3. *Bro. aſſets* 9. there is a caſe ſtrong in point. In a *ſcire facias* the defendant pleaded a confirmation with warranty and *aſſets* deſcended; the plaintiff replied, that his father was indebted to the King, and that thereupon the land was committed to the plaintiff, and traverſes any other *aſſets*, and the replication was held ill, becauſe the freehold and inheritance deſcending are immediate *aſſets*, and conſequently the lineal warranty and *aſſets* a good bar; the book admits, that the plaintiff might have made uſe of the leaſe for years to have diminiſhed the value of the *aſſets*, but nevertheleſs it was held there to be immediate *aſſets*. If this were a good plea, the conſequence of it would be, that an immediate judgment ought to be given for the plaintiffs, and an *extendi facias* ought to iſſue upon it, and the ſheriff ought to value the *aſſets*, and deliver the reverſion *quando acciderit*; that is the courſe, where an eſtate for life *in eſſe* is pleaded by the heir. *Dier* 373. *pl.* 14. *Hearne's pleader* 307. in caſe of a leaſe for years, as in this caſe. But in the preſent caſe if the heir had confeſſed *aſſets* in poſſeſſion, it would not be a prejudice to any; for if the plaintiff ſued execution, the termor for years might defend himſelf in an ejectment brought upon the return of the extent. But he declared ſtill, that he gave no poſitive opinion as to this point, becauſe it was not neceſſary to the matter in queſtion. 2. But as to the ſecond point he held, that the pleading of the aſſignment of dower in Chancery to the wife, whereby the defendant had but a reverſion expectant, *&c.* was ill, and let in the plaintiffs to have a general judgment. 1. Becauſe a decree in Chancery cannot carry any eſtate; and dower cannot be aſſigned there, unleſs where the heir of the King's tenant is in ward, and in ſuch caſe it is aſſigned in court, which is more uſual, or a writ iſſues to the eſcheator to do it. *Fitzh. nat. bre.* 263. If it had been ſaid, that the heir had aſſigned in obedience of the decree, it might have been good; but there the tenant in dower had been in by the aſſignment, not by the decree. Then this being pleaded ill, is a confeſſion of preſent *aſſets*. 2. The plea is, that the wife was endowed of the third part of the ſix acres, whereas the anceſtor had but three fourths of the ſix acres, and that in common. Now the wife of tenant in common ought to be indowed in common, the wife of one ſole ſeiſed, by metes and bounds. But the pleading is of the indowment of one ſole ſeiſed, but then the parcels

Dier 81.
W. Jones 88.
Poph. 155.

Dier 344. b.
3 Leon. 64. pl. 96.
Moor 169. pl. 302.
Cro. El. 263.
Stile 287, 327.

cels ought to be ſhewn in certainty. Beſides, that by pleading, that the wife was indowed of a third part of the ſix acres, whereby ſhe was ſeiſed for life, the reverſion to the defendant; he admits himſelf to have the reverſion of a third part of a fourth part of the ſix acres more than he has pleaded; and therefore he will be charged of his own eſtate. *Plowd.* 440. the caſe of *Davie v. Pepys*, that if the heir does not confeſs the action, and ſhew the certainty of *aſſets* that he hath by deſcent, but pleads *riens per deſcent*, or judgment is given by default, *nil dicit*, or confeſſion, or upon any other ground or matter whatſoever, without confeſſing the *aſſets* and the certainty of them; execution ſhall iſſue againſt his body, lands, and goods, as if it had been given upon his own bond; which reſolution has always been held law. *Moor* 522. *Cro. Eliz.* 693. 2 *Leon.* 11. in point. And in ſuch caſe the court cannot give a ſpecial judgment, unleſs the plaintiff aſſents to it, and then they may. 2 *Roll. Abr.* 71. If in this caſe a ſpecial judgment ſhould be given for the *aſſets* confeſſed, that would be, to allow the plea to be good, which is bad, *viz.* that the defendant has a reverſion expectant upon an eſtate for life, where it appears that he hath not. Therefore ſince the heir has attempted to delay the plaintiffs of the recovery of their debt by a falſe and ill plea; he has prejudiced himſelf, in attempting to prejudice others. If in this caſe the defendant had pleaded, that he had but a reverſion expectant upon an eſtate for life, and the plaintiffs had replied, that the tenant for life was dead, and upon iſſue joined it had been found for the plaintiffs; they would have had a general judgment. Now here it is the ſame thing, ſince it appears by his plea, that it is falſe. And therefore a general judgment muſt be entred againſt him, which was done accordingly. See 1 *Keb.* 156. *Cudmore v. Lewis.*

Topham *verſ.* Tollier.

S. C. 2 Salk. 575, 578.
Releaſe of all his right to the perſonal eſtate will not releaſe a debt.
See 11 Mod. 90 pl. 13. Arguendo.
3 Leon. Caſe 105.
Vide 10 Rep. 48, 52.
Cro. El. 897.
Lutw. 249.
1 Lev. 99, 272.
2 Lev. 210.

DEBT upon bond againſt the defendant as adminiſtrator, &c. The defendant pleaded a releaſe by the plaintiff; which upon *oyer* appeared to be thus, *viz.* the plaintiff, reciting that there were ſeveral controverſies between the defendant and him about a legacy, and the right of adminiſtration to the inteſtate, by the ſaid deed releaſed to the defendant all his right, title, intereſt, claim and demand, in and to the perſonal eſtate of the inteſtate. Upon which the plaintiff demurred. And it was urged by Mr. *Grove* and Mr. *Peere Williams* for the defendant, that this bond was diſcharged by this releaſe. And they cited *Yelvert.* 214. *Bridges v. Eynon. Sed non allocatur.* For *per Holt* chief juſtice there is a difference between a releaſe of all demands to the perſon of the obligor or adminiſtrator, which is the caſe in *Yelverton*, and a releaſe of all demands to the perſonal eſtate of the obligor or adminiſtrator, as the caſe at bar is. Such releaſe will not diſcharge the bond, as the other may, becauſe the bond does not give any right or demand upon the perſonal eſtate, &c. until judgment and execution ſued. And upon a *fieri facias* the goods ought to be ſold, though upon extent they may be delivered to the plaintiff. The caſe of a releaſe by the conuſee of a ſtatute, of all his right to the land, is a ſtronger caſe; where it is held, that ſuch a releaſe does not prevent an extent; and yet the ſtatute binds the land againſt any alienation. See 2 *Lev.* 214. *Morris v. Wilford.*

Molloy *verſ.* Lock.
vel
Johns *verſ.* Bromfield.

Intr. *Hil.* 13 *Will.* 3. Rot. 431.

DEBT upon bond. The defendant pleaded, that he delivered it as an eſcrow to *J. S.* to be delivered to the plaintiff upon conditions to be performed by the plaintiff, which were not performed; *et hoc paratus eſt verificare.* The plaintiff demurred ſpecially, and ſhewed for cauſe, that this plea ought to conclude to the country. And no perſon appearing for the defendant, judgment was given for the plaintiff.

Plea of delivery as an *eſcrow* ought to conclude to the country.

Poſt. 803.

Vanhatton *verſ.* Morſe.

Paſch. 1 Ann. Rot. 124.

INdebitatus aſſumpſit for money for goods ſold by the plaintiff to the defendant. The defendant pleaded payment. The plaintiff demurred ſpecially, and ſhewed for cauſe of demurrer, that the plea amounted to the general iſſue. *Sed non allocatur.* For *per curiam*, it admits at one time a good cauſe of action in the plaintiff, and excuſes it by matter *ex poſt facto*, and therefore is an honeſt and good plea. And judgment was entred for the defendant.

Ante 217, 566.

Payment pleaded in *aſſumpſit.* But it is much to be doubted whether this would be a good plea at this time, becauſe any thing may be given in evidence that deſtroys the plaintiff's cauſe of action upon *non aſſumpſit*, and *payment* before the action deſtroys it.

Slipper *verſ.* Maſon. C. B.

S. C. Lutw. 121. 3 Danv. Abr. 121. p. 7. Eſcape lies againſt a ſheriff for letting a man go at large being arreſted upon an *excommunicato capiendo.* 6 Mod. 78.

THE plaintiff obtained ſentence againſt *J. S.* for 210*l.* in the Spiritual Court for non-payment of tithes, beſides his expenſes of ſuit. And for not obeying the ſentence *J. S.* was excommunicate, and arreſted upon an *excommunicato capiendo,* and being in cuſtody of the defendant then ſheriff of the county, he permitted him to eſcape. Upon which the plaintiff brought a ſpecial action upon his caſe againſt the defendant for this eſcape. And upon not guilty pleaded, the plaintiff recovered a verdict for the 210*l.* Afterwards it was ſeveral times moved *in C. B.* in arreſt of judgment, that this action would not lie againſt the defendant. But it was adjudged unanimouſly by all the judges of the Common Pleas, *viz.* Sir *Thomas Trevor* chief juſtice, *Nevill*, *Powell*, and *Blencowe* juſtices, that the action well lay, *Thurſday* the eighteenth of *June*, as ſerjeant *Jenner* told me. And the court relied much upon the caſe, where it is held, that caſe lies againſt the ſheriff, for ſuffering a man to eſcape, being arreſted upon a *capias utlagatum* after outlawry upon *meſne* proceſs.

Smith *verſ.* Walker and Nois.

No coſts in replevin for the defendant, if the plaintiff confeſſes the plea in abatement to be true.

REplevin for taking of cattle at a place called *A.* The defendants pleaded, that they took them at a place called *B. abſque hoc* that they took them at *A.* The plaintiff confeſſed it. And thereupon Mr. *Eyre* for the defendants moved to have coſts; and he cited *Cro. Eliz.* 329. *Haſlop v. Chaplin. Cro. Jac.* 520. *Samuel v. Hoder. Cro. Car.* 497. *James v. Tutney. Intr. Trin.* 11 *Car.* 1. *Rot.* 753. That the defendants in replevin after judgment for them upon demurrer ſhall have coſts. And after ſeveral motions it was reſolved *per curiam*, that the defendants in this caſe could not have coſts, becauſe the plaintiff was not barred from having another replevin, and driven to his writ of ſecond deliverance; but notwithſtanding this confeſſion and the abatement of this writ he may have a new replevin. But otherwiſe it had been, if he had been barred from having another writ of replevin by this *priſal en auter lieu.* And if iſſue had been joined upon the place of the taking, and found for the defendants, they would have had coſts. And coſts were denied by the whole court.

Quaere, for it ſeems like a nonſuit, in which defendant ſhall have coſts,

Camell *verſ.* Clavering. *Exchequer.*

AN ejectment was brought in the Exchequer *de minutis decimis.* And upon not guilty pleaded, verdict for the plaintiff. And Mr. *Cheſhyre* about five or ſix years ago moved in arreſt of judgment, that an ejectment would not lie for ſmall tithes. 1. Becauſe eggs are ſmall tithes; and it is abſurd to ſay, that an ejectment would lie of an egg. 2. Becauſe the ſheriff does not know of what he is to deliver poſſeſſion, upon a *habere facias poſſeſſionem. Sed non allocatur.* Becauſe it has been adjudged, that an ejectment lies of wool, being tithe, and by the ſame reaſon for an egg. And therefore by all the barons judgment was given for the plaintiff. 11 *Co.* 25. *Ex relatione m'ri Cheſhyre.*

Ejectment lies *de minutis decimis.*
Cro. Car. 301.
Mar. 32.

June 17. *Wedneſday.*

HOLT chief juſtice declared, that all the judges of this court had made a rule, that no reference whatſoever of any cauſe depending in this court ſhould ſtay the proceedings of this court; unleſs it was expreſſed in the rule of reference, to be agreed, that all proceedings in this court ſhould ſtay.

No reference will ſtay proceedings of *B. R.*

This is matter of practice, and is generally determined on affidavits.

Pentrye *verſ.* Trippett.

TO a *ſcire facias* upon a recognizance of bail the defendant demurred ſpecially, and ſhewed cauſe; becauſe neither the term nor the year, when the judgment was given againſt the principal, was ſhewn in the declaration. But judgment was given for the plaintiff, becauſe it is the courſe of the King's Bench not to ſhew them. *Contra* of the Common Pleas.

In *ſcire facias* upon a recogniſance they do not ſhew the term nor the year of the judgment againſt the principal.

This ſeems bad practice in *B. R.* and *quaere,* whether *B. R.* does not now agree with the *C. B.*

Dowler *verſ.* Keite.

THE defendant was taken into cuſtody by the officers of the court of admiralty by way of execution, being condemned by ſentence there. And, intending to procure his liberty, he perſwades the plaintiff to ſue a *habeas corpus ad reſpondendum* out of this court, to the intent that he ſhould be turned over to the *Marſhalſea,* he being in fact indebted to the plaintiff. And he being brought into court, Mr. *Salkeld* for the plaintiff moved, that the defendant might be committed to the *Marſhalſea.* And he urged,

S. C. 1 Salk. 351.

A man ſhall not be turned over to the marſhal of the King's Bench upon a *habeas corpus ad reſpondendum,* unleſs a plea be depending againſt him.

1. That if it were denied, there would be a failure of juſtice, becauſe the ſheriff could not arreſt and take the defendant out of the admiralty priſon; that this court would not permit a failure of juſtice. And he cited 2 *Inſt.* 23. 4 *Inſt.* 71. *W. Jones* 380. 2. That a perſon may be charged in cuſtody of the marſhal with the ſentence of another court, which this court cannot execute; as a man committed by Chancery upon a decree there may be turned over to the marſhal of the King's Bench upon a *habeas corpus.* 2 *Roll. Abr.* 69. 4 *Inſt.* 290. *Hardr.* 476. *Sed non allocatur.* For though upon a *habeas corpus ad ſubjiciendum* this court upon a charge of treaſon or felony would have turned the defendant over to the marſhal; or if a bill had been filed againſt him, ſo that he had been in cuſtody of the marſhal before; but yet in this caſe the court cannot do it, becauſe there is no plea in this court at this time depending againſt him; and it cannot be, becauſe he is not *in cuſtodia marreſcalli.* And he was remanded by the whole court.

Dr. Watſon's caſe.

This ſame term Dr. *Thomas Watſon*, formerly biſhop of *St. David*'s, being arreſted upon an *excommunicato capiendo* after an excommunication in the ſpiritual court for non-payment of coſts of the ſuit in which he was condemned, was brought into the King's Bench upon a *habeas corpus ad reſpondendum J. S. de placito debiti, &c.* and upon motion by the council of *J. S.* that he might be committed to the *Marſhalſea*, he was remanded, becauſe no ſuit was depending here againſt him, the bill of *Middleſex* not being returnable till next term.

Regina *verſ.* Langley.

Indictment does not lie for entertaining vagrants. See Burn's Juſtice, title Vagrant.

An indictment found againſt the defendant, for having entertained two idle and vagrant perſons in his houſe, knowing them to be ſuch, was removed into this court by *certiorari.* And upon demurrer to it by the defendant, judgment was given for the defendant, and his recognizance diſcharged. 1. Becauſe it was not ſaid, that they were vagrants at the time of the entertainment by the defendant. 2. Becauſe the entertainment of them, *viz.* the giving them meat, drink and lodging, is not any offenſe within 39 *Eliz. cap.* 4.

Brown verſ. Mugg.

EJectment. Upon a ſpecial verdict the caſe in effect was thus. The defendant *Mugg* had a benefice with cure of ſouls, of 8 *l. per annum*, to which he was preſented by *J. S.* and he was inſtituted and inducted. Then *Mugg* was made chaplain extraordinary to the King, and was preſented by the King to another benefice with cure of ſouls, of 8 *l. per annum*, and he was inſtituted and inducted to it. Upon which the King preſented the leſſor of the plaintiff to the former benefice as by lapſe. And it was adjudged after ſeveral arguments at the bar, that the plaintiff ought to have judgment, becauſe by the acceptance of the ſecond benefice the former benefice became void; a chaplain extraordinary of the King not having privilege to retain two benefices, with cure of ſouls, above 8 *l. per annum* value, without a diſpenſation. And judgment was given for the plaintiff.

S. C. 1 Salk. 161.
Chaplain extraordinary of the King cannot retain two benefices, &c.
2 Brown. 45.
3 Cro. 424.
Godb. 41.
Hob. 302.

Regina verſ. Moore.

A Conviction againſt the defendant for killing deer was removed into this court by *certiorari*, and was quaſhed, becauſe it ſaid only, that he killed deer *in quodam loco* where they had been uſually kept, and did not ſay incloſed.

For killing deer in a place not ſaid incloſed.
5 Geo. 1. c. 15, 25.
10 Geo. 2. c. 32.
9 Geo. 1. c. 22.

Holman verſ. Burrow.

THE plaintiff brought an action of covenant againſt the defendant upon an indenture of charter-party, which he alledged in his declaration was made the twenty-ſixth of *Auguſt* 13 *Will.* 3. The defendant prayed *oyer* of the deed; which being granted, it was entred *in haec verba*: This indenture, &c. made, &c. the ſix and twentieth of *Auguſt* 1701. And then he pleaded in abatement of the bill this variance in the date of the deed pleaded, and of that ſhewn upon the *oyer*. The plaintiff demurred. And ſerjeant *Hall* for the plaintiff urged, that this was not a material variance, becauſe the year 1701 was the thirteenth of *William* 3. And the court agreed, that though it was not ſaid in the deed *anno domini* 1701, yet they would intend 1701 to be the year of our Lord 1701. But *Holt* ſaid, that the plaintiff, by his *profert in curia, cujus datus eſt eiſdem die et anno*, had confined himſelf to the deed dated the thirteenth of *William* 3. but the deed produced not being ſo, it was a material variance. And he inclined for the defendant.

S. C. 2 Salk. 658.
Variance.
Poſt. 794.
8 Mod. 45.
Cro. Jac. 261.
Lat. 11.

defendant. *Sed adjournatur.* See afterwards. Judgment for the plaintiff, *quod defendens reſpondeat ulterius.*

Taylor *verſ.*

Trover, where it lies. *Poſt.* 918.

IT was ruled by *Holt* chief juſtice, upon a trial at *niſi prius* at *Hertford*, 4 *Aug.* 1 *Ann. reg.* that if goods be delivered to a carrier, and he does not deliver them according to the direction given him; upon demand of the goods from him, and refuſal by him to deliver them, trover lies againſt him; or an action upon the caſe lies againſt him upon the cuſtom. But if the goods be delivered to a ſervant of the carrier, or to his warehouſe-keeper, and they are not delivered, *&c.* an action of trover does not lie againſt the carrier, *&c.* without an actual converſion by him.

Regina *verſ.* Sir John Bucknall.

S. C. 1 Salk. 358. Far. 54, 98. 7 Mod. Preſcription to repair a bridge. 6 Mod. 150, 307, 255, 191. 3 Salk. 77, 381.

AN information was exhibited againſt the defendant, for that, that he and all the lords of the manor of *D.* have time whereof, *&c.* been obliged to repair a bridge, *&c.* which was out of repair, *&c.* Upon not guilty pleaded, and trial before *Holt* chief juſtice at *niſi prius* at *Hertford*, *Summer* aſſiſes 1 *Ann. reg.* it was held by him, that a preſcription, that the lords of the manor ought to repair the bridge, without ſaying *ratione tenurae*, or *ratione terrae*, was good; becauſe (by him) the manor may have been granted to be held by the ſervice of repairing of this bridge before the ſtatute of *Quia emptores terrarum*; or the King may make ſuch a grant at this day, he not being bound by the ſaid ſtatute. And in pleading one may ſay, that he is obliged as lord of the manor. But indeed it is by reaſon of the demeſnes of the manor; and therefore if part of the demeſnes be granted to *J. S.* he will be obliged to contribute to the repairs: but the information or indictment may be againſt any of them; and though it appear upon the evidence, that another is obliged alſo, yet the defendant muſt be convicted. And ſo the defendant was convict in this caſe; though he proved upon the evidence, that others were obliged to repair as well as himſelf. See after 804.

Sands and Taſh *verſ.* Ledger.

At *niſi prius.* Variance.

AT the *Summer* aſſiſes 21 *July* 1 *Ann.* 1702, at *niſi prius* at *Kingſton*, before *Holt* chief juſtice the caſe was thus: In debt for rent the plaintiffs declared, that *Robert Hatton*, being ſeiſed in fee of the lands out of which, *&c.* the twenty-eighth of *October* 1684. by indenture between himſelf of the firſt part, *William Lambert* eſquire of the ſecond part, the plaintiffs *Sands* and *Taſh* of the third part, and *Mary*, ſiſter of Mr. *Lambert*, the intended wiſe of *Hatton*, of the fourth part, covenanted for himſelf, *&c.* that he, the ſame *Michaelmas* term, ſhould levy a fine of the lands out of which, *&c.* to the uſe of himſelf for life, and after his death to the uſe of *Sands* and *Taſh* for twenty-one years, remainder to *Thomas Hatton* in tail, *&c.* with power reſerved to *Robert Hatton* at any time during his life to make leaſes of the lands out of which, *&c.* for twenty-one years, *&c.* that the fine was levied accordingly; and that afterwards, *viz.* . 1700. *Robert Hatton* made a leaſe to the defendant by indenture rendering rent 15 *l. per annum*; that *Robert Hatton* was dead, and ſo the rent belonged to the plaintiffs; and for the arrears of one year this action was brought. Upon *nil debet* pleaded, and iſſue joined upon it, the plaintiffs at the trial gave in evidence this deed of ſettlement and fine. And upon reading the deed the power appeared to be, to make leaſes for twenty-one years in poſſeſſion, not in reverſion, rendering the ancient rent, and not diſpuniſhable of waſte. And *Holt* chief juſtice ſeemed to be clear of opinion, that this was a material variance. For it was neceſſary to ſhew the power to intitle the plaintiffs to this rent; otherwiſe rent reſerved by tenant for life could not come to them in remainder; and this power ſhewn in evidence is not that of which they have declared; becauſe this is a ſpecial power, the other general. But *Holt* chief juſtice ſaid, that he would ſee the nature of the defendant's defenſe. Upon which the defendant gave in evidence a leaſe of the ſame lands made by *Robert Hatton* in 1693 to *Taſh* and Mr. *Lambert* for twenty-one years, if he and *J. S.* ſhould ſo long live. And *Holt* chief juſtice held, that by this leaſe the power was ſuſpended for the time of the leaſe; but that being expired, he inclined, that the ſecond leaſe was good. Note, *J. S.* was alſo dead. Then Mr. *Raymond* ſaw a variance between the leaſe ſhewn in the declaration, and that ſhewn in evidence, *viz.* the declaration was of a leaſe rendering 15 *l. per annum* rent, and this produced in evidence was rendering 15 *l. per annum* rent and three fowls. Upon which the plaintiffs were nonſuit.

Power ſuſpended.

Mich. Term

1 Annae Reginae, B. R. 1702.

Memorandum, *That the firſt day of this term* William Jennings *eſquire of the* Middle Temple *took his place in Chancery as one of the Queen's council within the bar, being ſworn before.*

Holman *verſ.* Burrow.

S. C. 2 Salk. 658.
Variance.
Ante 391.
Vide 41 Ed. 3. 23.

Covenant. The plaintiff declared upon an indenture of charter-party *cujus datus fuit viceſimo ſexto die Auguſti decimo tertio anno regni Willielmi tertii nuper regis, &c.* This declaration was delivered of *Hilary* term 13 *Will.* 3. The defendant in *Eaſter* term following pleaded in abatement. And by reaſon of the death of the King, and of the adjournment of *Eaſter* term from *quindena Paſchae* until *tres Paſchae*, the entry upon the record by the advice of all the practiſers, and by the approbation of the chief juſtice, was thus, *viz. Et (quia ante diem Mercurii proxime poſt quindenam Paſchae ultimo praeteritum uſque quem diem praedictus Thomas Burrow ſalvis ſibi omnibus et omnimodus exceptionibus quoad billam praedictam habuit licentiam ad billam praedictam interloquendi et tunc ad reſpondendum, &c. coram dicto nuper domino rege apud Weſtmonaſterium, dictus dominus rex Willielmus tertius diem ſuum clauſit extremum et ante eundem diem loquela praedicta adjournata fuit per breve dominae Annae nunc reginae Angliae de communi adjournamento coram eadem domina regina apud Weſtmonaſterium uſque ad et in hunc diem ſcilicet a die Paſchae in tres ſeptimanas iſto eodem termino) modo ad hunc diem ſcilicet a praedicto die Paſchae in tres ſeptimanas coram domina regina apud Weſtmonaſterium venit tam praedictus Benjaminus Holman per attornatum ſuum praedictum quam praedictus Thomas*

Plea pleaded after adjournment of part of the term and death of the King.

Burrow per Joannem Bernard attornatum ſuum, Et idem Thomas defendit vim et injuriam quando, &c. And he prayed *oyer* of the ſaid indenture, which was entred *in haec verba*, This indenture made the twenty-ſixth of *Auguſt* 1701. and does not ſay *anno domini, &c.* And then he pleaded a variance between the indenture in the declaration, and that ſhewn upon *oyer*, *viz.* he declared upon an indenture made the twenty-ſixth of *Auguſt* 13 *Will.* 3. and this ſhewn upon the *oyer* is dated the twenty-ſixth of *Auguſt* 1701. The plaintiff demurred. And laſt term to maintain this plea Mr. *Raymond* urged, that the indenture not being ſaid to be made *anno domini*, the court cannot underſtand, what it meant by 1701 in figures. *Sed non allocatur.* For the court underſtands well enough, that the indenture meant by it the year of our Lord. Then he urged, that although the twenty-ſixth of *Auguſt* 13 *Will.* 3. and the twenty-ſixth of *Auguſt* 1701. were the ſame day, and that notwithſtanding the court took notice of the year of the reign of every King, in what year of our Lord it happened; yet the plaintiff by his *cujus datus* had confined himſelf to the very date in his declaration, and therefore that this was a variance. And *Holt* chief juſtice ſeemed then to be of the ſame opinion, and it was adjourned. But afterwards in this term he and all the other judges held, that the twenty-ſixth of *Auguſt* 13 *Will.* 3. and the twenty-ſixth of *Auguſt* 1701. were the ſame day; and therefore they awarded, that the defendant ſhould anſwer over. See *Cro. Jac.* 261. *Dobſon v. Keyes. Paſch.* 10 *Will.* 3. *B. R. Cromwell v. Grumſden, ante* 335.

Stanian *verſ.* Davies.

Intr. *Hil.* 13 *Will.* 3. B. R. Rot. 179.

S. C. 1 Salk. 404.
6 Mod. 223.

Caſe againſt an innkeeper for prejudicing a horſe left with him at livery.

11 Mod. 7.

ERROR upon a judgment againſt *Davies* in the court of the *Marſhalſea* in an action brought againſt him there by *Stanian*, in which the plaintiff *Stanian* declared, *quod cum idem* the plaintiff *primo Octobris* 13 *Will.* 3. *apud parochiam ſancti Martini in campis in comitatu Middleſex ac infra juriſdictionem hujus curiae* (*viz.* the *Marſhalſea*), *&c. praedictus Griffith Davies* the defendant *adtunc necnon diu antea et poſtea quoddam commune hoſpitium vocatum* the Red Lion *apud parochiam praedictam et infra comitatum et juriſdictionem praedictos exiſtens tenuit et cuſtodivit, et praedictus* the plaintiff *quoſdam ſpadones ipſius* the plaintiff *pretii viginti librarum in ſtabulis praedicti* the defendant *infra hoſpitium praedictum ſub cuſtodia praedicti* the defendant *ad pabulandos et ſalvo cuſtodiendos et eidem* the plaintiff *cum inde poſtea requiſitus eſſet redeliberandos pro rationabili pretio inde per ipſum* the plaintiff *eidem* the defendant *ſolvendo poſuit*. [Then there was another count upon the general cuſtom of innkeepers. *Praedictus tamen* the defendant intending to defraud, *&c.* the plaintiff *poſtea ſcilicet eiſdem die anno et loco ſpadones praedictos adtunc et ibidem tam negligenter et improvide cuſtodivit quod ſpadones illi ob defectum curae et cuſtodiae* of the defendant *adeo vehementer et graviter equitati fuerunt et tam graves ictus verbera et contuſiones receperant et ſuſtulerant, quod ſpadones illi deteriorati et totaliter ſpoliati fuerunt et nullius uſus ſeu valoris devenerunt et eidem* the plaintiff *ulterius deſervire non potuerunt, et idem* the plaintiff divers ſums of money *in et circa curationem ſpadonum praedictorum expendere et erogare coactus fuit, ad damnum* 20 *l.* Upon not guilty pleaded, verdict was given for the plaintiff upon the firſt count, and 5 *l.* damages; and as to the ſecond count the verdict was for the defendant. And judgment for the plaintiff. And error brought in this court, and general errors were aſſigned. And for the plaintiff in error Mr. *Raymond* argued, that the judgment was erroneous. 1. Becauſe the declaration was ill; for it cannot be pretended, that this action is maintainable upon the common cuſtom concerning innkeepers, becauſe it is not ſhewn, that the plaintiff was a gueſt: then it is the premium to be given to the defendant for the maintaining of theſe horſes, which alone can maintain the action; but then it ought to be ſhewn in the declaration, that the defendant agreed to maintain and keep the horſes for a premium; which is not done here, and therefore the declaration is ill. *Sed non allocatur.* For ſince it appears by the declaration, that the horſe was delivered to the defendant himſelf, to be kept, *&c.* for a reaſonable price to be paid to the defendant by the plaintiff, one cannot intend, but that the defendant agreed to it.

Cauſe of an action brought in an inferior court ought to appear to ariſe there.

Then he aſſigned another error, that it does not appear, that the cauſe of action aroſe within the juriſdiction of the *Marſhalſea* court; for though it is ſaid, that the defendant *adtunc et ibidem* negligently kept the horſe, yet it is not ſaid, that he was rid and abuſed *adtunc et ibidem.* Now the damages, which the plaintiff ſuſtains by the riding of the horſe, are the ground of this action, and not the negligence of the defendant in keeping him. And in caſe of inferior courts nothing is ever intended to ariſe within the juriſdiction, unleſs it is expreſsly averred to do ſo. 1 *Saund.* 73. *Peacock v. Bell and Kendal. T. Jones* 103. 3 *Keb.* 677. *Harvey v. Holland.* 1 *Ventr.* 28. *Berkley v. Paine.* 1 *Ventr.* 2. in the caſe of *Heely v. Ward. T. Jones* 230. *Wallis v. Squire.* 1 *Sid.* 95. *Raym.* 63. *Littlebury v. Wright,* caſe for calling the plaintiff whore, laid to be within the juriſdiction of the court, *per quod* ſhe loſt her marriage, and does not aver that to have been within the juriſdiction of the court: judgment for the plaintiff in the Palace court, and upon error reverſed, becauſe the loſs of the marriage, which was the ground of the action, and without which it would not lie, was not alledged to be within the juriſdiction of the court. 1 *Roll. Abr.* 545. *pl.* 3. *Ivie v. Storie. Cro. Car.* 571. *W. Jones* 451.

E contra it was argued by Mr. *Ward* for the defendant in error, that the negligence of the defendant is the original cauſe of the action. And for that he cited *Raſt. Entr.* 3. *Regiſt.* 106. And that the riding, *&c.* were only aggravation of damages, and not the *git* of the action; and then though it was done in another place out of the juriſdiction of the court, yet the ſaid court may have juriſdiction of it. And for that he relied upon the caſe in *Cro. Car.* 570. *Ireland* v. *Blockwell.*

But *Powell*, *Powys*, and *Gould* juſtices, were of opinion for the plaintiff in error, that the riding, *&c.* was the cauſe of action, without which it would not lie; and therefore it ought to have been averred to ariſe within the juriſdiction of the court. And *Powell* juſtice ſaid, it was impoſſible for the defendant, to maintain his judgment. But upon the importunity of Mr. *Ward* it was adjourned, *abſente Holt* chief juſtice. And afterwards *Mich.* 3. adjudged, that the judgment ſhould be affirmed, *mutata opinione* of the three judges.

Finn *verſ.* Hutchinſon.

A man in cuſtody at the ſuit of another may give a warrant of attorney to confeſs judgment, though his own attorney is not preſent. But the courts hold that ſome attorney muſt be preſent.

UPON a reference to the maſter, to examine the regularity of obtaining a judgment againſt the defendant; the maſter reported, that the defendant was in priſon in the gaol of the town of *Newcaſtle* at the ſuit of *J. N.* and during his confinement there, he at the requeſt of the plaintiff, but voluntarily, gave a warrant of attorney to the plaintiff, to enter judgment againſt him in the King's Bench, for a debt owing by him to the plaintiff: but at the time of the delivery of the warrant of attorney the defendant's attorney was not preſent. And whether this were cauſe, to ſet aſide the judment entred up on the ſaid warrant, after execution executed upon it a year before, was the queſtion. And, *per curiam*, the defendant not being then in priſon at the plaintiff's ſuit, might very well give ſuch warrant in the abſence of his own attorney. For the reaſon of the rule, that the attorney of the defendant being under confinement, ſhall be preſent, when he gives a warrant to confeſs judgment, is to avoid all practices on the part of the plaintiff, and to ſee that it is done without dureſs of impriſonment. But the ſaid cauſe fails here, where the defendant is not in priſon at the plaintiff's ſuit, nor abuſed by any artifice uſed by him. And therefore the whole court held the judgment well given, and diſcharged the rule of reference. Mr. *Lechmere* council with the defendant, Mr. *Raymond* with the plaintiff.

Regina *verſ.* inhabitantes Aberford Eaſt.

Mich. 12 *Will.* 3. n. 8.

Original order at the ſeſſions, that church-wardens ſhould make a pound rate, and aſſeſs ſuch lands.
1 Keb. 685.

AN original order made at the general quarter-ſeſſions for the Weſt Riding of *Yorkſhire* (whereof the tenor was thus, *viz.* It is ordered that the churchwardens and overſeers of the poor of the pariſh of *Abberford* do make an aſſeſſment to the church and poor by a pound rate, and in the ſaid aſſeſſment do aſſeſs *Grayſtonfield* lands and all other lands within the ſaid conſtabulary to the uſe aforeſaid equally by a pound rate) was removed with other orders *in B. R.* upon a *certiorari*. And Mr. *Raymond* moved to quaſh this order, becauſe the juſtices have not any juriſdiction to make ſuch original order at the quarter-ſeſſions, though it had been otherwiſe if it had come before them by appeal. And a day was given, to hear council of both ſides. At which day no body appearing to maintain the order, he moved to quaſh it the next day. Which was granted by *Powell*, *Powys* and *Gould* juſtices, *abſente Holt* chief juſtice, *Powell* juſtice ſaying, that it was impoſſible to make it good.

Shortridge *verſ.* Lamplugh.

Intr. *Trin.* 12 *Will.* 3. B. R. Rot. 454.

Mich. 10 *Will.* 3. C. B. Rot. 659.

S. C. 2 Salk. 678, 679.
Farreſ. 71.
Lutw. 351.
7 Mod.
Dier 146.
Covenant brought by the aſſignee of the reverſion againſt the aſſignee of the term for non-payment of rent.

ERROR upon a judgment given *in C. B.* in an action of covenant brought by *Thomas Lamplugh* againſt *Elizabeth Shiers.* The plaintiff declared, that *Thomas Aſhby* being ſeiſed in fee of a piece of ground in *Weſtminſter*, the eleventh of *May* 3 *Will. & Mar.* by indenture then bearing date demiſed it to *John Griffith* for ſixty one years, rendering a pepper-corn rent for the firſt year, and 100 *l. per annum* for the ſixty years enſuing; in which indenture *Griffin* covenanted for himſelf, his heirs and aſſigns, to pay the ſaid rent, and to maintain the houſes agreed to be built upon the ſaid ground in good repair; that *Thomas Aſhby* by indenture dated the twenty-eighth day of *September* 3 *Will. & Mar.* in conſideration of 5 *s.* bargained and ſold the premiſſes to Sir *Philip Medows* and others for one year; and that the ſaid *Thomas Aſhby* by indenture dated the twenty-ninth of *September* following releaſed and confirmed the ſaid premiſſes to the ſaid Sir *Philip Meadows* and the others in fee; by virtue of which indentures of bargain and ſale and releaſe, and by virtue of the ſtatute of *Henry* 8. for transferring uſes into poſſeſſion, they were ſeiſed of the reverſion in fee; then he ſhews a leaſe and releaſe from Sir *Philip Meadows* and the other grantees to *Lamplugh*, in the ſame manner as he had pleaded the former leaſe and releaſe; then he ſhews, that the intereſt of *Griffin* came by aſſignment the twenty-firſt of *May* 4 *Will. & Mar.* to *Elizabeth Shiers*; and then he aſſigns a breach in non-payment of rent due for five years and a half, and in default of repairs. The defendant demurred to this declaration, and ſhewed for cauſe, that the declaration *eſt duplex et caret forma.* And after argument, judgment was pronounced in *C. B.* for the plaintiff, and a writ of inquiry was awarded, and damages given 760 *l.* and then final judgment was entred for the plaintiff. Upon which *Elizabeth Shiers* the defendant brought a writ of error; and pending it, ſhe died. And *Shortridge* as executor to *Elizabeth Shiers* brought a writ of error *coram vobis reſidet*, and aſſigned the general errors. And it was argued by Mr. *Peere Williams* and Mr. *Raymond* at ſeveral days for the plaintiff in error, and by Mr. ſerjeant *Darnall*, Mr. *Broderick* and Mr. *Weld*, for the defendant in error. And the council for the plaintiff argued, that the judgment was erroneous, and ought to be reverſed, becauſe the plaintiff had not intituled himſelf to his action of covenant; for he makes title to it as grantee of the reverſion, and he has not intituled himſelf well to the reverſion, becauſe he makes title to it by leaſe and releaſe, but he has not ſhewn, that the releaſe was made upon any conſideration, nor is there any uſe declared; the conſequence of which is, that although the eſtate in law paſſed by the releaſe from the releaſor to the releaſee, yet the uſe remained in the releaſor, which drew back to it the eſtate in law again; and ſo the reverſion continues, notwithſtanding any thing that appears to the contrary, in *Thomas Aſhby* and his heirs; and therefore that the plaintiff could not maintain this action. And they urged, that although at common law he who had the eſtate in the land had alſo all that one could have there, uſes not being then invented (for they were afterwards invented by the men of religion, after all other attempts had been fruſtrated, to avoid the ſtatutes of mortmain, *Mag. Chart. cap.* 36. 7 *Edw.* 1. *de religioſis*, *Weſtm.* 2. *cap.* 32. as appears by 2 *Leon.* 14. *Brent*'s caſe, 2 *Inſt.* 75. and in the time of the wars between the houſes of *Lancaſter* and *York* they were encouraged for the mutual convenience of both parties, in the preventing of eſcheats and forfeitures): nevertheleſs, after that they were invented, and that feoffments to uſes were become a ſort of common conveyance (which happened in the reigns of *Henry* 6. and *Edward* 4. as appears by the reports) the eſtate in the land,

and the uſe of it, were regarded as diſtinct things: and then a man might have conveyed the eſtate to another, and retained the uſe to himſelf; or might have paſſed the eſtate to *A.* and the uſe to *B.* or might have granted the uſe, and retained the eſtate to himſelf: but the conveyance of the eſtate in the land did not convey the uſe, unleſs a good conſideration was mentioned in the conveyance; or that the intent of the parties appeared, that the uſe ſhould paſs, as well as the eſtate. Therefore before the ſtatute of 27 *Hen.* 8. *cap.* 10. if *A.* made a feoffment, levied a fine, or ſuffered a common recovery, without a uſe declared, and without conſideration, of lands, *&c.* the feoffee, conuſee, and recoveror, ſtood ſeiſed of the ſaid lands to the uſe of *A.* Then ſince the ſtatute of *Henry* 8. the law as to this matter is not altered; for the ſaid ſtatute intended only to execute the uſe in the poſſeſſion, and by that means to deſtroy the uſe; but it did not intend to make any other thing paſs by the conveyance, than that which paſſed before. And therefore the uſe, not paſſing by the releaſe in this caſe, drew back to itſelf the eſtate paſſed by it; and the ſtatute executed it in poſſeſſion. And to prove, that a feoffment made without conſideration or uſe declared would at this day be to the uſe of the feoffor, *Dyer* 146. 2 *Roll. Abr.* 781. *F. Co. Litt.* 271, 23. were cited. The ſame law of a fine, 2 *Co.* 58. *Beckwith*'s caſe. The ſame law of a recovery, *Latch* 82. *Palm.* 462. *Argoll v. Cheyney.* Now there is the ſame reaſon, that the uſe ſhould not paſs by the releaſe without conſideration or uſe declared, as for a feoffment, fine, or recovery. As to the precedents cited by the council for the defendant in error, where feoffments are pleaded without conſideration ſhewn or uſe declared, *Co. entr.* 410, 11. *Herne* 25. *Winch entr.* 1120. 2 *Brown. entr.* 152. *Robinſ. entr.* 468. releaſe pleaded to leſſee for life without conſideration or uſe ſhewn. *Co. entr.* 69. *Raſt.* 694, *&c.* it was anſwered, that all theſe books paſſed *ſub ſilentio*; but that one cannot ſhew any caſe, where it was adjudged, that ſuch a releaſe would be to the uſe of the releaſee; and that there are books, where the pleading is, to ſhew the conſideration or uſe. 2 *Saund.* 11, 277. 2 *Ventr.* 120. *Co. entr.* 264, 220, 474. and the reaſon of the law as aforeſaid is agreeable. As to the objection made by the defendant in error's council, that in this caſe it was ſufficiently averred, that this releaſe was to the uſe of the releaſee, becauſe it is ſaid, that *virtute cujus* he was ſeiſed, *&c.* And for this *Dyer* 254. *b. Cro. Eliz.* 678. *Cro. Car.* 221. *W. Jones* 245. *Cro. Ja.* 549. 2 *Roll. Rep.* 466. 3 *Co.* 44. were cited, where it is held, that an averment with *virtute cujus* is ſufficient. It was anſwered, that this was a concluſion without premiſſes, or upon premiſſes that will not warrant ſuch a concluſion; and therefore it will not avail. And as to the caſes cited, they were for the moſt part after verdict, which aids many defects. Another objection urged by the council of the other ſide was, that this releaſe

Averment by *virtute cujus*, where ſufficient.

leaſe enured by way of enlargement of the leaſe for a year, and therefore would participate of the conſideration of it, and that the leaſe and releaſe made but one conveyance. But to that it was anſwered, that the leaſe and releaſe made but one conveyance as to the paſſing of the fee; but that they were in truth diſtinct conveyances, and had different operations, the one by the ſtatute of 27 *Hen.* 8. the other by the common law. And as to what is ſaid, that the releaſe enures by way of enlargement of the eſtate of the leſſee; it is true, that it gives him a greater eſtate than he had before, but that notwithſtanding it deſtroyed the eſtate for years by merger; and it cannot participate of the conſideration contained in the leaſe, which is perfectly diſtinct. And the council for the plaintiff in error relied much upon the caſe in 3 *Levinz* 233. *Edwards v. Morgan*, where in covenant brought by the aſſignee of the reverſion againſt the leſſee, judgment was ſtaid, becauſe the plaintiff did not make mention in his declaration to whoſe uſe the grant of the reverſion was, nor the conſideration of the grant; which caſe ſeems to be in point. *Sed non allocatur.* For *per Holt* chief juſtice, before the ſtatute of 27 *Hen.* 8. *cap.* 10. ſuch pleading as in this caſe had doubtleſs been good, and the ſtatute has not altered the way of pleading; but ſince the ſaid ſtatute, pleading of a feoffment, without ſhewing the uſe or the conſideration, with an averment *virtute cujus*, &c. has been held good. *Plowd.* 478. And the reaſon is, becauſe though no uſe or conſideration is ſhewn in pleading of the feoffment, it does not follow from thence, that ſuch feoffment will be to the uſe of the feoffor; for that is matter of fact extrinſecal from the deed, which might have been declared by parol before the ſtatute of 29 *Car.* 2. *cap.* 3. and now by writing, though it be not a deed; and therefore if it was made to the uſe of the feoffor, it ought to be averred accordingly. But it would be hard, that the judges ſhould conſtrue ſuch a feoffment, or the releaſe in this caſe, to the uſe of the feoffor or releaſor, where it does not appear; but if they were made to ſuch uſe, it ought to be ſhewn on their ſide; and until that be ſhewn, they muſt be intended to be made to the uſe of the feoffee and releaſee; eſpecially ſince the ſtatute of 27 *Hen.* 8. for now if a feoffment or releaſe ſhould not be intended to be to the uſe of the feoffee or releaſee, they would be vain and to no purpoſe; for according to the caſe *Rolle v. Oſborn*, *Hob.* 20. he would have his old eſtate, and the warranty would remain; and if the lands were of the part of the mother, they continue ſo. And therefore the reaſon of ſuch feoffments and releaſes differs much from what they were before the 27 *Hen.* 8. for then there might be ſome reaſon to conſtrue the uſe to remain in the feoffor, &c. becauſe notwithſtanding that, it was to ſome purpoſe, *viz.* to defraud the lord of his guardianſhip, or to conceal the tenancy of the freehold, &c. The caſe in *Co. Litt.* 23. is only, that where

2 Mod. 252.
7 Mod. 74.
arg.

If a releaſe be pleaded without ſhewing the conſideration of it, it will be to the uſe of the releaſee.
7 Mod. 77.

where a man makes a feoffment without valuable conſideration to divers particular uſes, ſo much of the uſe, as he makes no diſpoſition of, remains in him; and that is reaſonable, becauſe the reaſon of the making of the feoffment appears, *viz.* the raiſing of the particular uſes. But in this caſe no reaſon of the making of the releaſe appears, if it was not to the uſe of the releaſee; and therefore it muſt be to the uſe of the releaſee, till the contrary appears. But he agreed, that if particular uſes had been limited upon the releaſe, all the other uſes, that had not been limited, would be to the uſe of the releaſor, according to *Co. Lit.* 23. All the other judges agreed with *Holt* chief juſtice. And *Gould* juſtice ſaid, that in the caſe of *Reynoldſon v. Blake, in C. B. Paſch.* 9 *Will.* 3. [See 3 *Salk.* 25, 40.] the grant of a rectory was pleaded without averment of the conſideration or uſe; and adjudged, that it was well enough, the exception being taken by himſelf. Like the caſe of a confirmation of a rent-ſervice to the tenant for life of it, to hold to him and to his heirs; by this a fee paſſes to the tenant for life. *Littlet. ſect.* 549. *Vaugh.* 44.

That a man by a bargain and ſale for a year, and by a releaſe, and by virtue of the ſtatute of 27 H. 8. was ſeiſed, &c.

Demurrer with *caret forma* only, without ſhewing what form, is general.

Variance.

Another error was aſſigned in this, that the plaintiff in the original action has declared, that he by virtue of the indentures of bargain and ſale and releaſe, and by virtue of the ſtatute of *Henry* 8. for transferring uſes into poſſeſſion, was ſeiſed, &c. whereas the releaſe does not operate by virtue of the ſtatute of uſes, but by the common law; and therefore it is informal at leaſt, and the defendant has demurred ſpecially for want of form. *Sed non allocatur.* For though it is informal, yet the demurrer is general. For it is not enough to ſay, *quod caret forma*; but the particular want of form muſt be ſhewn. Want of a writ of inquiry was alſo aſſigned for error; but upon diminution alleged, a writ of inquiry was returned. And Mr. *Raymond* aſſigned for error, 1. That the writ of inquiry could not be the writ of inquiry in this action, becauſe the writ of inquiry recited all the facts in the preſent tenſe, *viz.* that the rent *adhuc inſolutus exiſtit*, and the tenements *adhuc* are out of repair; whereas the action of covenant is only for rent in arrear, and tenements not repaired, at the time of the original ſued: but this *adhuc* in the writ of inquiry refers to the time of the *teſte* of the writ of inquiry. 2. The plaintiff ought to recover only for the damages that he hath ſuſtained at the time of the action brought; but here the jury upon the writ of inquiry have given damages that the plaintiff ſuſtained after the bringing of the action, *viz.* until the writ of inquiry ſued, which is erroneous. 2 *Saund.* 169. *Hambleton v. Vere*; *Hob.* 189. *Harbin v. Green*; *Trin.* 9 *Will.* 3. *B. R. Prince v. Moulton.* [See before, 248.] But it was anſwered by the chief juſtice, 1. That the writ of inquiry recited the declaration *in haec verba*, which was well enough. 2. That it was not like the caſes cited, where more damages were given than ought to have been given; becauſe the jury in this caſe ought to give ſo much in damages as would repair the tenements, and put them into ſuch condition as they ought to be in, and damages alſo for the rent; and therefore if the tenements were become in a worſe condition ſince the action brought, they ought to give damages for them. And the judgment was affirmed by the whole court.

Damages in covenant.

Watts *verſ.* Roſewell.

Intr. *Trin.* 1 *Ann.* B. R. Rot. 125.

S. C. 1 Salk. 274. Farr. 53, 105. 7 Mod. 105. Plowd. 66. b. Hob. 246. Comb. 86, 311, 479. 6 Mod. 217.

DEBT upon bond. The defendant pleaded, that he delivered it to *J. S.* as an *eſcrowe*, to be delivered to the plaintiff upon conditions to be performed by the plaintiff, which were not performed by him, *&c. et ſic non eſt factum*; *et hoc paratus eſt verificare*. The plaintiff demurs ſpecially, and ſhews the cauſe of it to be, becauſe the defendant has not aptly concluded his plea. And it was urged, that the plea ought to have concluded to the country, it being an expreſs negative to the declaration. 1 *Ventr.* 210. *E contra.* 3 *Keb.* 142. *Manning v. Bucknal. Intr. Hil.* 24 & 25 *Car.* 2. *B. R. Rot.* 1035. was cited by Mr. *Raymond*, where it was held, that ſuch plea might conclude the one way or the other. But *abſente Holt* chief juſtice, the whole court gave judgment for the plaintiff, holding that ſuch a plea ought to conclude to the country.

In debt upon bond the defendant pleads delivery as an *eſcrowe*, he ought to conclude to the country. See before 787.

Note, That no judgment was entred upon the roll in the caſe of *Manning v. Bucknall.* And Mr. *Lutwyche* told me, that his father and ſerjeant *Girdler* (who were counſel in the ſaid caſe) remembered it, and ſaid, that judgment was given for the plaintiff there afterwards, the court being upon the firſt motion of the ſaid caſe of opinion as reported in 3 *Keb.* but afterwards changing it.

The ſame judgment the ſame term between *Bedell & Tempeſt. Intr. Trin.* 1 *Ann. B. R. Rot.* 64. in which *Cheſhyre* was counſel for the plaintiff, and *Raymond* for the defendant.

Bedell v. Tempeſt.

Regina *verſ.* Sir John Bucknall. See before 792.

S.C. Farr. 54.

A man cannot be charged to repair a bridge, barely as lord of the manor.

Shaw's Pariſh Law, cap. 60. ſ. 4.

AN information was exhibited againſt the defendant for not repairing a bridge; and it was alleged in the information, that the defendant ought to repair the bridge, *eo quod ipſe nunc eſt et per diverſos annos ultimo elapſos fuit dominus manerii de B. &c.* Upon not guilty pleaded, it was tried before *Holt* chief juſtice at *Hertford*, laſt *ſummer* aſſiſes, where a verdict was given for the Queen. And now Mr. *Broderick* moved in arreſt of judgment, that it does not ſufficiently appear by this information, that the defendant is obliged to repair this bridge; for regularly the county ought to repair the publick bridges; and no man ſhall be charged with the reparation of them, except *ratione tenurae* or by preſcription; and therefore it ought to have been ſhewn here, by which of theſe two means the defendant became chargeable with theſe repairs. And he cited *Noy* 93. *Latch* 206. *Stile* 108. *Sir H. Spiller's caſe, and* 400. And at the aſſiſes, as alſo upon the firſt motion here, *Holt* chief juſtice ſaid, that this amounted to a *ratione tenurae*. But judgment was ſtayed, *quouſque, &c.* But afterwards at another day, Mr. *Williams* moving for judgment for the Queen, *Holt* chief juſtice *mutata opinione*, ſaid, that although the defendant was lord of the manor, yet that was no reaſon, that he ſhould repair the bridge; but ſome particular charge ought to be ſhewn, as *ratione tenurae*, or by preſcription. And in ſuch caſe, where a man is obliged to repair a bridge, his tenant for years being in poſſeſſion will be obliged to do it; and if he fail, he will be indictable for it. But he ſaid, that where a man is obliged to make fenſes againſt another, it is enough to ſay, that *omnes occupatores* ought to repair, *&c.* becauſe that lays a charge upon the right of another, which it may be, he cannot particularly know. See *Cro. Ja.* 665. *Holbatch v. Warner*. All the other judges were of the ſame opinion, and judgment was arreſted.

Tenant for years indictable for not repairing a bridge.

Snow *verſ.* manucaptores Firebraſs.

Intr. *Trin.* 1 *Ann.* B. R. Rot. 360.

S. C. 2 Salk. 439.

Variance in the averment of the performance of a condition.

IN a *ſcire facias* againſt the defendants upon their recogniſance, *&c.* the writ of *ſcire facias* in aſſigning the breach ſaid, that *Firebraſs* did not render himſelf *priſonae marreſcalli marreſcalciae dicti nuper regis*, and did not ſay, *coram ipſo dicto nuper rege*, as the recogniſance was, *&c.* And Mr. *King* for the defendants urged, that the breach for this reaſon was not well aſſigned, for this marſhal, mentioned in the breach, muſt be underſtood of the earl marſhal of *England*, or of the King's houſhold, and not of the King's Bench; and the defendants were only bound, that *Firebraſs* ſhould render, &c. to the marſhal of the King's Bench; and therefore it does not appear, that the condition of the recogniſance was not performed. *Sed non allocatur.* For it was ſaid, *ea occaſione*; and, *per curiam*, that will ſupply the want of the words, *coram ipſo dicto nuper rege*, if they were neceſſary. But, *per curiam*, it would be a foreign intendment, to intend this of the marſhal of the houſhold, or of *England*. And therefore judgment was given for the plaintiff. Note, That the defendants pleaded, no *capias ad ſatisfaciendum*, and concluded to the country; the plaintiff demurred; and the plea was held ill by all for that reaſon. And *Holt* chief juſtice ſaid, that the marſhal of this court was part of the office of the earl marſhal of *England* formerly, as appears by the book of 39 *Hen.* 6. 32. *b.* and that this office of this court was derived out of the other in the time of King *James* I.

Poſt. 1177.

Plea of *nul ca. ſa.* ought not to conclude to the country.

Marſhal of the King's Bench taken out of the office of marſhal of *England*.

Juſtin *verſ.* Ballam.

S. C. 1 Salk. 34. Hob. 11, 12. Molloy 229, 235. Noy 95. Lat. 252.

BALLAM libelled in the admiralty againſt a ſhip of *Norway*, for that ſhe being in great diſtreſs for want of an anchor and cable, *Ballam* had contracted with the maſter of the ſaid ſhip, and delivered them on board, &c. Upon which a motion was made in this court for a prohibition, to be directed to the judge of the admiralty, to prohibit him from proceeding in the ſaid ſuit, upon a ſuggeſtion that the ſaid contract was made upon the land, *viz.* at *Ratcliffe* upon the river *Thames*, the ſaid ſhip then being in the ſaid river *Thames* there. And a rule was made, that the defendant ſhould ſhew cauſe, why a prohibition ſhould not go. Upon which Mr. *Broderick* ſhewed for cauſe, 1. That of late times the admiralty had been always encouraged, and that they ought to have cogniſance of all things incident to the navigation; therefore they ſhall have cogniſance of a ſuit for mariners wages. 2. That in this caſe the defendant would be without remedy, if a prohibition ſhould be granted; becauſe the maſter of the ſhip, with whom the contract was made, was dead, and the part-owners were foreigners. 3. That the contract being upon the land will not hinder the admiralty to hold plea; as was held in the caſe of *Coſtard* v. *Lewſtie*; where a libel was in the admiralty againſt a ſhip upon a hypothecation made of her at land, and that appeared upon the inſtrument of hypothecation, which mentioned it to have been made at *Rotterdam*; and yet a prohibition was denied after great conſideration. Now here though the anchor, &c. were ſold upon the land, yet the ſtreſs of weather, which diſabled the ſhip, was

Prohibition granted, to ſtay a ſuit in the admiralty againſt a ſhip hypothecated by the maſter of it at *Ratcliffe* for a cable, &c.

Ante 576.
12 Mod. 406.
Ante 152.
Poſt. 983.
6 Mod. 79.
Comb. 135.

2 Roll. Rep. 111. q.

upon the high ſea; and therefore the original cauſe being within the juriſdiction of the admiralty, will draw the reſidue to it as incident. *Sed non allocatur.* For, *per curiam,* this is not like the caſe of *Coſtard* v. *Lewſtie.* 1. Becauſe it does not appear in this caſe, that this ſhip was in her voyage, when ſhe became in diſtreſs for want of an anchor, *&c.* and at the time of the contract. 2. There was no hypothecation here, as there was in the caſe cited; now where there is an hypothecation, if the admiralty ſhould be prohibited to proceed, *&c.* the party would be without remedy, for no ſuit can be againſt the ſhip at common law upon it. Now it is true, that by the maritime law every contract with the maſter of a ſhip implies an hypothecation; but it is otherwiſe by the law of *England.* Therefore this being a contract made with the maſter upon the land, it is the common caſe. The admiralty cannot have cogniſance of ſuch a ſuit. And therefore a prohibition was granted. But at the importunity of the defendant's counſel the court gave order, that the plaintiff ſhould declare upon it, *&c.*

Withers *verſ.* Harris.

S. C. 1 Salk. 258.
2 Salk. 600.
Farr. 50, 64.
3 Danv. Ab. 331. p. 11. 332. p. 6.
7 Mod.
Habere facias poſſeſſionem cannot iſſue after the year expired after judgment in ejectment without a *ſcire facias* to revive the judgment.
Comb. 250.
2 Keb. 307.
Skin. 427.

THE plaintiff recovered judgment in ejectment againſt the defendant; and after that a year after the judgment was expired, he ſued an *habere facias poſſeſſionem,* and execution thereupon was executed. Upon which Mr. *Mountague* moved, that the ſaid execution might be ſet aſide as irregular, becauſe the plaintiff could not ſue execution upon the ſaid judgment after a year after the judgment given, without a *ſcire facias.* Upon which a day was given to hear counſel of both ſides. And at the day Mr. *Peere Williams* for the plaintiff urged, that the execution was regular. He admitted, that if the plaintiff would ſue an execution for the damages after the year, he ought to ſue a *ſcire facias*; or in ſuch a caſe as this he might ſue a *ſcire facias* if he pleaſed, but that it was not neceſſary to ſue ſuch a writ. He ſaid, he did not know, that before the time of *Charles* II. any *ſcire facias* had been brought upon a judgment in ejectment. And in 2 *Keb.* 55. 1 *Sid.* 317. it was looked upon as a new caſe. That the law would not permit any man, who had recovered a right, to be without remedy; therefore a *ſcire facias* lay upon judgments in real actions after the year, and debt in perſonal actions; and by the ſtatute of *Weſtm.* 2. a *ſcire facias* was given upon recovery in perſonal actions; but at common law the plaintiff had no remedy after the year upon a judgment in ejectment, unleſs he might ſue execution; becauſe no *ſcire facias* lay, it not being a real action; which would be ſuch an inconvenience, as the common law would not have permitted: therefore of neceſſity the plaintiff might ſue execution after the year at common law. And if he might, then he may do it ~~at this~~ day; becauſe no ſtatute deprives him of the ſaid remedy. That the reaſon why a *ſcire facias* lay upon a recovery in a real action at common law was to the end that the tenant might have an opportunity to ſhew his right, without being driven to a higher action: but ſuch reaſon does not hold place in caſe of an ejectment, becauſe by recovery in ſuch action the poſſeſſion is only recovered, and the defendant is not driven to a higher action, but may have another ejectment, and try it the next aſſiſes. He urged farther, that ejectments are favoured by the law, and would lie of things, of which a real action would not lie, as *de cottagio, pomario, &c. Cro. Eliz.* 818, 854. *Stile* 215. That it could be no inconvenience, to allow of ſuch execution without a *ſcire facias*; but it would be very inconvenient of the other ſide, to drive the recoveror in ejectment to a *ſcire facias* after the year after the judgment, becauſe it is uſual in mortgages to have judgment confeſſed in ejectment by the mortgagor to the mortgagee; and if in ſuch caſe the mortgagee after the year ſhould be driven to a *ſcire facias*; he would be in no better condition, than if he were driven to ſue an ejectment originally. That in this caſe the plaintiff might have entred without ſuing an *habere facias poſſeſſionem*; for where the land recovered is certain, the recoveror may enter at his own peril, and the aſſiſtance of the ſheriff is only to preſerve the peace. 2 *Sid.* 156. 1 *Roll. Rep.* 213. *Noy* 71. *Palm.* 263. therefore that the ſuing of it will not vitiate. And laſtly, he relied upon 1 *Sid.* 351. 2 *Keb.* 307. *Okey v. Vicars*, as a caſe in point, that a *ſcire facias* need not be ſued after the year after judgment in ejectment. *Sed non allocatur per curiam.* For (by them) as to the poſſeſſion an ejectment is in nature of a real action at common law, and therefore by common law a *ſcire facias* would lie upon a judgment in it. This was the proper remedy by common law for a termor for years to recover his term, and ſuch a recovery bound him who had the inheritance, and he and his heirs could not falſify it no more than a recovery in a real action. Now there is the ſame reaſon therefore, that a *ſcire facias* ſhould lie after the year upon a judgment in ejectment, as upon a recovery in a real action. And *Holt* chief juſtice ſaid, that perhaps if the recoveror was delayed of his execution, by ſuing of a writ of error, that might alter the caſe: For if the defendant brings error after the year after judgment given, and afterwards becomes nonſuit, the defendant in error may ſue out execution without a *ſcire facias*. [See *Cro. Eliz.* 706, 7, 416. *Cro. Jac.* 364. 1 *Roll. Abr.* 889. 5 *Co.* 88. *Garnon's* caſe.] And that is an anſwer to the caſe of *Okey v. Vicars*. And he ſaid, that he was not at all ſatisfied with the opinion of *Coke*, 2 *Inſt.* 469. in his comment upon *Weſtm.* 2. *cap.* 45. that no *ſcire facias* lay upon judgments in perſonal actions

Scire facias lay upon a judgment in ejectment at common law.

Scire facias lay upon judgments in perſonal actions at common law.

at common law; for the general words, *ſive alia quacunque irrotulata, &c.* following, *conventiones, recognitiones, &c.* cannot be underſtood of judgments, according to his own rule of conſtruction, 2 *Co.* 46. *b.* ſince judgments are of a ſuperior nature to what was mentioned before. But *Powell* juſtice ſaid, that all the books warrant *Coke*'s opinion, and the conſtant opinion of all the judges ſince, *viz.* that no *ſcire facias* lay upon judgments in perſonal actions before *Weſtm.* 2. And yet he himſelf ſaid, that a *ſcire facias* lay upon a judgment in annuity after the year at common law. [*Ideo quaere*, for the ſaid aſſertion fortifies the opinion of the chief juſtice *Holt.*] *Holt* chief juſtice ſaid farther, that the reaſon why *ſcire facias's* were rarely ſued in ſuch caſe is, becauſe the plaintiff generally ſues execution immediately. Where there are ſeveral plaintiffs or defendants, and one of them dies, execution may be ſued by or againſt the ſurvivors, upon ſuggeſtion of the death made upon the roll. But where there is but one defendant, and he dies, it is a queſtion, whether execution may be ſued without a *ſcire facias.* In perſonal actions doubtleſs it cannot, becauſe a new perſon will be charged. But in ejectment the plaintiff ought to have execution only of the land recovered. *Shelley*'s caſe, 1 *Co.* 93. will not warrant it, becauſe there the death was the ſame day, that the *habere facias ſeiſinam* bore *teſte*, and ſo it was held to be a death after the *teſte.* He ſaid farther, that it was held in this court in the caſe of *Badger v. Loyd*, that the plaintiff might enter pending the writ of error upon the judgment in ejectment, if he could find the poſſeſſion empty; for the writ of error binds the court, but not the right of the party. But he muſt take care, that he do not enter with force. They all held, that the *ſcire facias* ought to have been againſt the defendant and terre-tenants alſo; but that this might have been made good, by ſuing of an *habere facias poſſeſſionem* within the year, and by an entry of *vicecomes non miſit breve*; and therefore that is a means for mortgagees who have judgment in ejectment acknowledged to them; though *Holt* chief juſtice ſaid, that it was a uſurer's trick, and not to be encouraged. And *Powell* juſtice ſaid, in the caſe *in C. B.* of lady *Allibon*, it was held, that the mortgagee, who had a judgment confeſſed to him of the lands mortgaged in ejectment, could not ſue an *habere facias poſſeſſionem* after the year after the judgment, but might prevent any inconvenience, by ſuing of an *habere facias poſſeſſionem*, and by entry of a *vicecomes non miſit breve.* The execution was ſet aſide as irregular, and reſtitution granted.

Several plaintiffs or defendants, one dies, execution may be ſued by or againſt the ſurvivors.

Qu. If the defendant dies?

Badger v. Loyd, Holt 199.

Plaintiff may enter pending the writ of error upon the judgment in ejectment.

Lady Allibon's caſe.

Galliſand *verſ.* Rigaud.

Intr. *Trin.* 1 *Ann.* B. R. Rot. 121.

IN an attachment upon a prohibition the caſe was thus. The defendant libelled againſt the plaintiff in the Eccleſiaſtical Court, for having ſolicited the chaſtity of a woman, after the plaintiff had been indicted for an aſſault upon the ſame woman with intent to raviſh her, and convicted and fined upon it, and after that the woman had ſued an action of aſſault and battery againſt him for the ſame offenſe, which action was depending at the ſame time that the proſecution was in the Spiritual Court. All this matter appeared upon the pleadings; and the queſtion was, whether the prohibition ſhould ſtand, or whether a conſultation ſhould be granted. And Mr. *Mountague* argued, that a conſultation ought to be granted, becauſe the ſolicitation of the chaſtity of a woman was properly of eccleſiaſtical cogniſance. 2 *Inſt.* 488. Then though the defendant be convict upon an indictment, and though an action depends for the ſame cauſe, yet it is no cauſe of prohibition. 1. Becauſe the ſpiritual and temporal courts in ſome caſes have concurrent juriſdiction, as in caſes of penſions claimed by preſcription, *&c.* 2. They proceed *diverſis rationibus*, the one for puniſhing by fine, or giving damages, *&c.* the other *pro ſalute animae.* That this difference is obſerved in *Artic. cler. cap.* 6. and is confirmed by the common caſe of having laid violent hands upon a clerk.

S. C. 2 Salk. 552.
Farr. 78.
7 Mod.

After a man is convicted on an indictment for having aſſaulted a woman with intent to raviſh her, he cannot be ſued in the Spiritual Court for it.

1 Roll. 295.
2 Inſt. 488.

E contra, it was argued by Mr. *Eyre*, that the prohibition ought to ſtand. Of which opinion the whole court ſeemed to be, becauſe though the ſolicitation, *&c.* was of eccleſiaſtical conuſance, yet the force added to it, which is temporal, makes it cogniſable by the temporal courts. As if *A.* calls *B.* whore and thief, the action ſhall be ſued at common law, and *B.* cannot ~~libel~~ againſt *A.* in the Spiritual Court for the word whore, and have an action at common law for the word thief. See 2 *Roll. Abr.* 295. It is alſo one continued act, and therefore not *mere ſpiritualia.* 2 *Inſt.* 488. *Coke* ſays, *mere ſpiritualia ſunt, quae non habent mixturam temporalium.* As to the caſes cited, where notwithſtanding a recovery by the huſband in treſpaſs and aſſault upon his wife, *&c.* yet the Spiritual Court proceeded to puniſh the man for adultery; they are not to this purpoſe, becauſe in the ſaid caſe for the adultery there could not be a proſecution at common law; and in the ſaid caſes the huſband and wife could not join in an action of treſpaſs. And *Holt* chief juſtice ſaid, that the uſual way of declaring

If *A.* calls *B.* whore and thief, *A.* cannot be ſued in the Spiritual Court.

2 Roll. Abr. 296. (N.) p. 15, 16.
Jo. 44.
12 Mod. 242, 248.

Huſband and wife cannot join in aſſault and battery, for having aſſaulted the wife and raviſhed her.
See Cro. Ja. 538.

in the ſaid actions for having defiled a man's wife, is not ſo good; and as ſome of the ſaid declarations have been, it might have been a queſtion, whether they had been good, though it is a treſpaſs *quoad* the huſband; but the proper action is, *quare uxorem ſuam rapuit*. *Raſt. treſpaſs* 662. 6. And *Powell* juſtice ſaid, that the preſent caſe was like the caſe of the abbot of *St. Albans* in 22 *Edw*. 4. 20. cited 4 *Co*. 20. *a*. where the ſolicitation of chaſtity, being mixed with impriſonment and force, was become of temporal cognizance. But though the opinion of the court was as aforeſaid, at the prayer of the defendant's counſel they gave order, that this caſe ſhould be argued by civilians. But afterwards an apparent fault being in the pleadings, they refuſed to hear the civilians. And judgment therefore was given, that the prohibition ſhould ſtand.

Greenway *verſ.* Freeman.

S.C. Farr. 83.
7 Mod.
Want of averment that he abſconded for debt.
Poſt. 811.
Southouſe v. Rutter.

DEBT upon judgment. The defendant pleaded a compoſition made with two thirds of his real creditors, *&c.* and the act of parliament; and in his plea he avers, that he *ſe ab uſuali loco commorantiae ſuae* ſuch a day *ſubtraxit et abſcondidit*, being unable to pay his debts, but does not ſay that he abſconded for debt. And for this fault judgment was given for the plaintiff, as it had been before in a caſe in this court between *Southouſe* and *Rutter*.

Eaſt *verſ.* Eſſington.

S. C. 1 Salk. 130.
Farr. 85.
S. C. 3 Salk. 400.
Indorſement of a bill.
12 Mod. 345.

CASE upon a bill of exchange. The plaintiff declared upon the cuſtom of merchants, upon a bill directed to the defendant in this manner: Pray pay this my firſt bill of exchange, the ſecond and third not being paid; and then he ſhews, that the bill was indorſed by the drawee to himſelf in this manner: *viz.* that the drawee *indorſavit ſuper billam illam contenta billae illius fore ſolvenda* to the plaintiff, *&c.* Upon *non aſſumpſit* pleaded, verdict for the plaintiff. And Mr. *Lee* for the defendant moved in arreſt of judgment. 1. That it is not averred, that the ſecond and third bills were not paid; and without that the plaintiff is not intituled to his action, for if the ſecond or third was paid, the defendant is not bound to pay this bill; and the nonpayment is *quaſi* a condition precedent, which ought to intitle the plaintiff to this action; and therefore it ought to be averred. *Sed non allocatur*. For, *per curiam*, though it had been ill upon

Want of averment aided by verdict.

demurrer, yet it is aided by the verdict; for if the ſecond or

I third

third had been paid, the jury would have found *non aſſumpſit* here. 2. A ſecond exception was, that the indorſement ſhewn in the declaration is not ſuch as will transfer the property of the bill, and therefore the plaintiff is not intituled to this action. *Sed non allocatur.* For, *per curiam*, it is aided by verdict; as want of attornment in debt for rent by the aſſignee of the reverſion, is aided by verdict. And judgment was given for the plaintiff. Mr. *King* for the plaintiff.

Nicholls *verſ.* Tirrett.

DEBT upon bond. The defendant pleaded the act of compoſition, &c. Exception was taken to the plea, that the defendant only ſays, that he abſconded the ſeventeenth of *November* 1696. and does not ſay, that he abſconded at the time of the making of the act. For the ſeventeenth of *November* extends only to the being a priſoner for debt, but the abſconding ought to be at the time of the act, &c. And for this reaſon the plea was held ill, and judgment for the plaintiff. *Ex relatione m'ri Jacob.* The ſame point was reſolved *Trin.* 2 *Ann. B. R.* between *Couſins and Callcutt*, after conſideration had by the court of the different penning of the act. Mr. *Salkeld* counſel with the plaintiff, Mr. *Branthwaite* with the defendant.

S. C. Far. 96. 7 Mod.
Abſconding ought to be at the time of the making of the act.
Ante 810.

Couſins v. Callcutt.

Henry *verſ.* Cole.

UPON iſſue joined in an action, the writ of *niſi prius* was awarded in the name of the King, and then entry was made upon the record, that before the day in bank the King died; and at the day in bank the writ is returned by the juſtices of the Queen. And Mr. *Ward* moved, that it did not appear, that the King died before the day of *niſi prius*; and if not, the execution of the writ by the juſtices of the Queen was erroneous. *Sed non allocatur.* For, *per curiam*, they will take notice on what day the King died, which was the eighth of *March*, and conſequently before the twenty ſeventh of *April*, which was the day of *niſi prius*. And therefore the execution of the writ by the juſtices of the Queen good. And judgment was given for the plaintiff. See the late act of parliament. *Stat.* 1 *Ann. cap.* 8.

S. C. Farr. 103. 7 Mod.
Writ awarded by the King returned in the time of the Queen.

Notice of the death of the King.

How *verſ.* Prinne.

S. C. 2 Salk. 694. Farreſ. 107. Lutw. 1293. 7 Mod. 2 Mod. 26. Don't give your vote for Mr. *How*, &c.

CASE for words. The plaintiff declared, that he was a juſtice of peace, and deputy lieutenant for the county of *Glouceſter*, and that he had been repreſentative of the ſaid county in parliament, and then was candidate to be choſen knight of the ſaid ſhire, &c. that the defendant, intending to defame him, and to hinder him from being elected, ſaid to *J. S.* in the hearing of divers freeholders of the ſaid county: "Don't give your vote for "Mr. *Howe*, for he is a *Jacobite*, and is for bringing in the prince "of *Wales* and popery, to the deſtroying our nation;" then he lays another count, averring himſelf to be a privy counſellor, &c. and that the defendant ſaid of him, &c. "I have been arreſted "this morning at the ſuit of the honourable *John How* eſquire, "and it has coſt me five ſhillings and ſix pence for my breakfaſt, "and if you do not vote for him, he will ſerve you ſo too; I "know why it is, it is becauſe I would not give my conſent to "him, to bring in popery and the prince of *Wales*." Not guilty pleaded. Verdict for the plaintiff, and 400 *l.* damages. Upon which Meſſieurs *Mountague*, *Weld*, *Parker*, and *Lechmere*, moved in arreſt of judgment, that the words were not actionable. And it was argued on the other ſide for the plaintiff by Mr. ſolicitor general *Harcourt*, Mr. *Grove*, and Mr. *Banniſter*. And this day, the twenty-ſeventh of *November*, *Holt* chief juſtice pronounced the opinion of the court to be, that they were actionable, being ſpoken of a man, who enjoyed ſuch offices, &c. But they would not determine, whether they would have been actionable or not, being ſpoken of a private man. And the principal reaſons of their judgment were, 1. That they ought to intend the words bringing in, to be underſtood of bringing into *England*, being ſpoken by an *Engliſhman* (for every man ſhall be intended here to be an *Engliſhman*, if the contrary does not appear. 5 *Co.* 7. *b. Cawdry*'s caſe) and eſpecially the words, to the deſtroying of our nation, being added. 2. That it is notorious, who was meant by the words, prince of *Wales*; for the law took notice, that there was a pretended prince of *Wales*, as appears by the 7 & 8 *Will.* 3. *cap.* 15. which enacts, that the aſſerting, that the pretended prince of *Wales* hath any right to the crown of *England*, ſhall be a *premunire.* Then theſe words being ſpoken of a juſtice of peace, &c. will be actionable; becauſe they charge him, with maintaining ſuch principles, as ſuch an officer ought not to have, and for which he ought to be diſcharged from his office. 3 *Lev.* 50. *Raym.* 482. Sir *Thomas Clarges v. Rowe*, a caſe ſtrong in point. 3 *Cro.* 191. 1 *Leon.* 335. *Cro. Ja.* 202. *Yelv.* 104.

Objection. That the words may be underſtood, that Mr. *How* would bring in popery and the pretender by act of parliament, which was lawful; and then to ſay ſo, did not import any ſcandal.

Anſwer. That is too foreign an intendment.

Objection. That the words do not charge Mr. *Howe* with the doing of any act.

Anſwer. No act was charged to have been done in the caſes cited in 3 *Lev.* 50. and 3 *Cro.* 191. and yet they were held actionable. And words will be actionable, if they charge men with evil inclinations and principles. 1 *Brownl.* 5. He will play of both ſides. 1 *Roll. Abr.* 86. He will cut him out of doors.

Objection. That theſe offices are not offices of profit, *&c.*

Anſwer. Yet if the words ſpoken charge ſuch an officer criminally, they will be actionable; otherwiſe if they only import ignorance. 1 *Lev.* 52. *Bill v. Field.* But farther theſe words do more than charge the plaintiff with evil principles only; for one muſt preſume, that he who heard Mr. *Prinne* ſpeak theſe words, would preſume, that he knew the matter charged, by ſome diſcourſe, or overt-act, of Mr. *How*'s; how otherwiſe could Mr. *Prinne* know Mr. *How*'s inclinations? And ſuch overt-act would be criminal, and the words importing it actionable. And upon this conſideration perhaps the words would bear an action in the caſe of a private man. The ſame reaſon will maintain the action for the words in the ſecond count. And therefore judgment by the whole court was entred for the plaintiff.

Afterwards error was brought upon this judgment in parliament, and exception taken, that the verdict was ill found, becauſe he was found guilty *quoad* the words *primo et ſexto mentionata.* And after long debates at ſeveral days, judgment was affirmed by forty-eight lords againſt thirty-four, *Monday January* 29, 1704.

Ingledew *verſ.* Cripps.

Intr. *Hil.* 13 *Will.* 3. B. R. Rot. 438.

S. C. 2 Salk. 658. Farreſ. 87. 7 Mod. The obligee hath election, either to ſue for the penalty, or for particular ſums, in the penal bill.

Debt upon bill uncertain.

Agreement cannot be apportioned.

DEBT. The plaintiff declared upon a bill penal, ſealed and delivered by the plaintiff to the defendant, reciting, that whereas the plaintiff had agreed with the defendant to ſell to him ſo many ſtacks of wood, the defendant for that covenanted to pay to the plaintiff 35 *l.* for every hundred of the ſaid ſtacks; and bound himſelf in the penalty of 100 *l.* to do it; then the plaintiff ſhews, that there were ſo many ſtacks, *&c.* and brings his action for 310 *l.* *&c.* as the total for all the ſaid ſtacks. The defendant demurred. And it was objected by Mr. *Branthwaite* for the defendant, 1. That ſince there is a penalty of 100 *l.* in the bill, the plaintiff cannot have an action for more than the 100 *l.* *Sed non allocatur.* For *per Holt* chief juſtice the plaintiff has election, to ſue for the penalty, or for the rate agreed, although it be more than the penalty. And he may ſue for the 310 *l.* *&c.* for the wood, and for the 100 *l.* penalty alſo. For this penalty was only inſerted, to inforce the payment for the wood. And it cannot be intended, that if the plaintiff ſold wood to the value of 1000 *l.* he ſhould be content with the penalty only. 2. It was objected for the defendant, that admitting that the plaintiff might ſue for the wood ſold, yet he ought to have covenant and not an action of debt, becauſe the duty was not certain, for the agreement is to pay ſo much for every hundred ſtacks that ſhould be in ſuch a place, and it is altogether uncertain how many hundred ſtacks were there. *Sed non allocatur.* For *per curiam,* the plaintiff may have debt or covenant at his election. For the rate being certain, *viz.* 35 *l.* for every hundred ſtacks of wood; when the defendant has the wood, the agreement becomes certain, for which debt lies. 3. A third exception was, that the plaintiff has demanded more than as appeared by his own ſhewing could be demanded; becauſe he demands ſo much for fifty ſtacks, and the agreement is only, that the plaintiff ſhould be paid for every hundred ſtacks; otherwiſe it had been, if the agreement had been, that the defendant ſhould pay *ſecundum ratam* of 35 *l.* for every hundred, *&c.* *Alleyn* 9. *Stile* 12. *Needler* v. *Gueſt.* 2 *Lev.* 124. *Rea* v. *Burnis,* in point. *E contra* it was argued by Mr. *Acberley* for the plaintiff, that this covenant or agreement ought to be conſtrued according to the intent of the makers of it; and it could not be imagined, that the plaintiff intended to give fifty ſtacks of wood for nothing. And he cited 1 *Lev.* 140. *Keyme* v. *Goulſton.* *Sed non allocatur.* For *per curiam,* the agreement is only for every hundred; and ſince it is not ſaid *ſecundum ratam*, the plaintiff cannot recover any thing for it by this agreement. 4. A fourth exception taken by the defendant was, that the agreement is, that the defendant ſhall have liberty to take the wood in ſuch a place, and that he ſhall pay 35 *l.* for every hundred ſtacks upon tail: and the plaintiff has not averred, that the defendant had all the hundred ſtacks, for which this action is brought; but the plaintiff has only averred, that they were all at the place, *&c.* at the time of the articles made. Now 1. It was neceſſary to aver, that the defendant had the ſtacks, *&c.* becauſe otherwiſe the defendant is not obliged to pay for them. For the agreement is, to pay for, *&c.* which is a condition preceedent, which muſt be performed, before the plaintiff can be intituled to his action. 15 *Hen.* 7. 10. 1 *Lev.* 70. 2. The plaintiff ought to do the firſt act, *viz.* to tell them; for the payment is to be made for every hundred ſtacks upon tale. *Sed non allocatur.* For *per Holt* chief juſtice, there is no condition preceedent, nor firſt act to be done or performed by the plaintiff; for he has ſold all his intereſt in this wood, and the defendant may and ought to tell it. Then Mr. *Acherley* moved the court, that the plaintiff might have leave to enter a *remittit* for the 17 *l.* 10 *s.* demanded, more than ought to be, for the fifty ſtacks; and that he might have his judgment for the reſidue. And day was given to argue that. And Mr. *Branthwaite* for the defendant urged, that the plaintiff in this caſe could not enter a *remittit.* For the difference is, where the demand is intire, and where ſeveral. Where the demand is ſeveral, and part is well demanded, and part ill; the plaintiff may have judgment for that which is well demanded, and may be barred for the reſidue, as in *Hob.* 178. *Andrews v. De lay Hay*, in an action of debt upon ſeveral bonds, one of which was not payable at the time of the action brought; yet the plaintiff ſhall have judgment upon the reſt. But where the demand is intire, an abridgment of it cannot be, neither can the plaintiff have judgment for part. *E contra* it was argued by Mr. *Acherley* for the plaintiff, that a *remittit* may be entred for the 17 *l.* 10 *s.* *&c.* and that the plaintiff ſhall have judgment for the reſt. For (by him) where the money is certain and intire upon the face of the contract, the demand of more than is due is ill, and cannot be aided by the entry of a *remittit:* but where the money recoverable is compoſed of ſeveral parcels; there if the plantiff demand more than is due, he may enter a *remittit* for the overplus; for there he ought to recover that which he can prove to be due, and not according to his demand; and therefore the plaintiff may as well waive that which is not due, by the entry of a *remittit*, as the jury may, it not being proved at the trial. And for that he cited *Cro. Ja.* 498, 529. 1 *Saund.* 206. and the caſe

Condition preceedent.

Thwaites v. Lady Aſhfield, 5 Mod. 212.

of *Thwaites v.* Lady *Aſhfield, intr. Hil.* 7 *Will.* 3. *B. R. Rot.* 469. in debt for rent the plaintiff declared as aſſignee by virtue of a decree made by the commiſſioners at *Clifford's Inn* for the determination of differences about the fire of *London,* and the plaintiff demanded 8 *l.* more than was due, as appeared by his declaration; the defendant pleaded *nul tiel record*; which being for the plaintiff, the defendant brought a writ of error, and moved the court, that the plaintiff ſhould not enter his judgment without leave of the court; and a rule was made accordingly; and afterwards a motion was made, to ſet aſide that rule, and that the plaintiff might have leave to enter a *remittit* for the 8 *l.* and have judgment for the reſt; and the caſe of *Barber and Pomeroy.* 1 *Roll. Abr.* 785. *Stile* 175. was cited as a caſe in point; and though it is ſaid in 1 *Saund.* 286. by *Hale* chief juſtice, that no judgment was entred in the ſaid caſe, yet that was miſtaken, as appears by the ſight of the record, which was then brought into court; and the entry of it is *Hill.* 24 *Car.* 1. *B. R. Rot.* 951. and upon the ſaid authority the plaintiff had leave given him, to enter a *remittit* for the 8 *l.* which put an end to the writ of error; which caſe is in manner a caſe in point. And of that opinion was *Holt, Powell,* and *Powys,* juſtices. And they agreed the diſtinction taken by Mr. *Acherley*; for, by *Holt,* the demand here is no more intire, than every action of debt for rent, or other thing; the demand is intire as to the action, but not as to the *lien:* and therefore the difference is, where upon a covenant to pay a ſum certain debt is brought, the variance of the ſum contained in the deed will vitiate; but where the deed relates to matter of fact, there though the plaintiff demand more than is due, he may enter a *remittit.* And the caſe of *Barber and Pomeroy* is full in point. But *Gould* juſtice *contra,* held that this was an intire contract, and therefore that a *remittit* could not be entred for part; no more than there can be an abridgment of an intire thing at common law. And he cited *Dier* 65. 10 *Hen.* 6. 5. *Yelv.* 66. That this differs from the caſe of *Barber and Pomeroy,* becauſe the ſaid caſe was after verdict; but here it would be hard, to take away the defendant's good cauſe of demurrer, which he had at the time when he demurred. But *per Holt* chief juſtice, the verdict makes ſuch a caſe worſe, for there the jury find the intanglement; and yet the court, ſeeing the verdict to be impoſſible, will give leave to enter a *remittit.* Judgment was given for the plaintiff for what was due, with leave to enter a *remittit* for the reſidue.

Error aided by entry of a *remiſit damna.*

Regina *verſ.* Dr. Thomas Watſon formerly biſhop of St. Davids.

S. C. 7 Mod. 56, 117: Excommunication.

Plea to the return of a *habeas corpus.*

Plea pleaded as *in cuſtod. marr.* where he was not, rejected.

2. Becauſe no concluſion: *Excommunicato capiendo* lies againſt a biſhop.

THE defendant was brought into the King's Bench upon a *habeas corpus* directed to the ſheriff of *Middleſex*; to which writ the ſheriff made a long return, in which the *ſignificavit* and *excommunicato capiendo* were ſhewn at large, by which it appeared, that the defendant was in cuſtody of the ſheriff, being arreſted upon *an excommunicato capiendo*, being excommunicate for non-payment of coſts, in which he was condemned by commiſſioners delegates *in quadam cauſa officii ſive correctionis ex promotione Lucy*, *&c.* And the return of the *habeas corpus* being filed (though the defendant was informed that the *ſignificavit* was bad, and that by exception taken to it he might be diſcharged) his council offered a plea ingroſſed, and ſigned by council, that he long before, *&c.* and at the time of the, *&c.* and now, is *epiſcopus Menevenſis*; that he was ſummoned to parliament, 7 *Will.* 3. and ſat there as biſhop, *prout patet per recordum*; *et petit judicium*, *&c.* And the intent of this plea was, to have the judgment of the King's Bench upon it, and upon the ſaid judgment to bring a writ of error in parliament, where he hoped to have judgment in his favour as to the right of the biſhoprick, of which he was deprived by the archbiſhop, *&c.* And therefore Mr. *Weld* and Mr. *Mountague* for the defendant ſaid, that they inſiſted, that their plea ſhould be received, and that they were ready to try it with the attorney general, whether the defendant was biſhop or not; and that if he is biſhop (as ſaid they he is) then a *capias* will not lie againſt him, becauſe he is a peer of parliament. But the court refuſed at firſt to receive the plea. 1. Becauſe the defendant is not *in cuſtodia marreſcalli marreſcalciae*, and therefore he cannot plead ſo, as he has here. 2. He has not made any concluſion to his plea, and therefore the court does not know, what judgment he deſires, *&c.* 3. All the court held, that biſhops are ſubject to be excommunicated, and if an *excommunicato capiendo* ſhould not lie againſt them, there would be a judgment without a power of executing it, which is abſurd. But afterwards the defendant amended his plea, and pleaded as in cuſtody of the ſheriff of *Middleſex*. And upon the importunity of the defendant's council, the plea was received, and a day given to the Queen's attorney general to reply to it, or demur, as he ſhould judge proper. At which day Mr. *Broderick* for the promoter *Lucy* urged, that the defendant ought to ſue a *ſcire facias* againſt *Lucy*, becauſe he has an intereſt in the coſts. And he cited 2 *Roll. Abr.* 178. *S. Codrington v. Rodman*, that the pardon there was by a general act of parliament, and therefore there was no need to ſue a *ſcire facias* againſt the party that had recovered the coſts in the ſpiritual court; but that it would be otherwiſe in caſe of a pardon by letters patent. But, *per curiam*, the defendant has no occaſion to ſue a *ſcire facias* againſt *Lucy*; for if a man be excommunicate for nonpayment of tithes, and afterwards the Queen pardons the contempt, though the parſon has an intereſt in the tithes, yet if the defendant be afterwards arreſted upon an *excommunicato capiendo*, he ſhall be diſcharged by this court upon pleading the pardon, being brought here by *habeas corpus*, without ſuing a *ſcire facias* againſt the parſon. And that is a ſtronger caſe than this; becauſe coſts were allowed to *Lucy* here but as a promoter, and not as the original cauſe of the ſuit. But the attorney general not being ready for the Queen, he prayed another day. And afterwards he came and declared to the court, that he would not intermeddle in the matter. Upon which the court ſaid, that ſince it appeared to them, that the *ſignificavit* was ill, becauſe it did not appear, that theſe coſts were adjudged in a cauſe of eccleſiaſtical conuſance (for if it had been for coſts alone, without doubt it had been ill) now the words *in cauſa officii ſive correctionis* do not make it better; and it is plain ſince 1 *Eliz. cap.* 23. that the cauſe ought to appear in the writ; for how otherwiſe can this court make judgment of the nine cauſes, in order to award ſeveral proceſſes with penalties? And *Fowler*'s caſe [*Salk.* 203.] was cited, alſo a caſe between the King and *Hill. Paſch.* 13 *Will.* 3. where by the *ſignificavit* it appeared, that *Hill* was excommunicate *propter manifeſtum contemptum in non ſolvendo octo libras cuidam J. S.* in which *Hill* was condemned *in quodam negotio concernente eruditionem puerorum abſque licentia* of the biſhop, *&c.* and the *excommunicato capiendo* was quaſhed, and a *ſuperſedeas* granted, becauſe it did not appear, that this matter was of eccleſiaſtical conuſance; for it may be, *Hill* was a writing-maſter, which is not within any of the canons, nor compellable to take a licence of the biſhop, but a mere temporal office; or tutor in the univerſity, *&c.* The court quaſhed the writ of *excommunicato capiendo*, and diſcharged the defendant, and refuſed to take any notice of the plea.

Scire facias.

See Cro. Car. 196.

Rex v. Sanchee.

Rex v. Hill, Salk. 294.

Gibbons *verſ.* Saunders.

Intr. *Hil.* 13 *Will.* 3. B. R. Rot. 582.

ERROR. Debt upon a judgment given in debt before the mayor, *&c.* of the ſtaple upon a bond. And upon error brought the error aſſigned was, 1. That it is not averred, that the parties were merchants at the time of the debt contracted; it is averred, that they were merchants at the time of the plaint levied; but that is not enough, for the ſtatutes of 27 *Edw.* 3. *cap.* 8. and 36 *Edw.* 3. *cap.* 7. require, that one of them at leaſt ſhall be a merchant. 2. It does not appear, that the bond was given for a matter concerning merchandiſe. But the writ of error was quaſhed, becauſe the writ was directed *majori aldermannis et vicecomitibus civitatis Briſtol,* to remove the record of a judgment given upon a plaint levied before them; and the record removed was of a judgment given upon a plaint levied before the mayor and conſtables of the ſtaple.

Debt on ſtatute ſtaple.
Winch 83.

Variance between the record and the writ of error.
Writ of error may now be amended by the late ſtatute.

Tomkins *verſ.* Pinſent.

DEBT for 14*l.* for rent. The plaintiff declared upon a demiſe made the twenty-fifth of *Auguſt* 11 *Will.* 3. of a meſuage in *St. John's Lane* in *Clerkenwell*, *habendum et tenendum* to the defendant for ſeven years, *incipiend.* from the twenty-fourth day of *June* preceding, *reddendum proinde quarteriatim ad quatuor maxime uſualia feſta in anno ſeu infra viginti dies proxime poſt quodlibet dictorum quatuor feſtorum ſummam trium librarum et decem ſolidorum, prima ſolutione inde fienda ad feſtum ſancti Michaelis proxime ſequens dimiſſionem illam, et ſic deinceps in quolibet anno ad quarterialia feſta uſualia ſequentia, viz. St. Thomas, Lady day* and *Midſummer*; *et quod quatuordecim librae de redditu praedicto pro uno anno integro finito* the twenty fourth of *December anno* 13 *Will.* 3. *ſolubiles decimo Januarii ſquente aretro fuerunt et inſolutae et adhuc inſolutae exiſtunt, per quod actio accrevit* to the plaintiff to demand the ſaid 14*l.* The defendant demurred generally. And Mr. *Mompeſſon* took exception, 1. That the rent is reſerved payable at the four uſual feaſts, but the [*viz.*] contains but three, therefore that it is ill. But *per curiam*, the [*viz.*] being repugnant, ſhall be rejected as void. 2. A ſecond exception was, that the year did not end the twenty-fourth of *December*, but the twenty-firſt, according to the *reddendum*, according to which the plaintiff ought to demand his rent in the action. And

S. C. 1 Salk. 141.
Far. 96.
7 Mod.
Demand of rent ought to be according to the *reddendum*.
See Skin. 309.

A *viz.* repugnant is void.

of this opinion *Holt*, *Powell*, and *Gould* juſtices were. *Contra Powys* juſtice. And therefore judgment was given for the defendant. For where there are ſpecial days of payment limited upon the *reddendum*, the rent ought to be computed according to the *reddendum*, and not according to the *habendum*; but where the reſervation is general, as half-yearly, or quarterly, and no ſpecial days are mentioned, there the half-year, or quarter, muſt be computed according to the *habendum*.

Regina *verſ.* Plint.

Variance.

A *Certiorari* iſſued out of this court, to remove all convictions of the defendant, for having removed foreign ſalt, *&c.* without having a permit, *&c.* The order removed was, for removing of ſalt generally. And adjudged, that this order was not removed by the *certiorari*; and therefore the *certiorari* was quaſhed. *Ex motione m'ri attorn. gen. Northey.*

Regina *verſ.* Gouch.

S. C. 2 Salk. 441, 442.

Order made by juſtices of peace for payment of 2 *l.* 2 *s.* and 4 *d.* for husbandry works and labours in huſbandry.

5 Mod. 419. 2 Salk. 485. p. 40.

Norfolk, ſſ. AT the general quarter-ſeſſions of the peace held the eighth of *May* 13 *Will.* 3. an order was made, upon complaint made to the juſtices there by *Nicholas Bone* of *Hoe* labourer againſt the ſaid *Thomas Gouch*, that 2*l.* 2*s.* and 4*d.* for huſbandry works and labours in huſbandry done by the ſaid *Bone* for the ſaid *Gouch*, beſides other money, as by a bill thereof now in court produced and proved by the ſaid *Bone*, are due to him; and that this court directed and required the ſaid Mr. *Gouch*, preſent in court, to pay without farther trouble; but the ſaid Mr. *Gouch* obſtinately refuſed ſo to do; it is therefore ordered by this court, that the ſaid *Thomas Gouch* do forthwith, upon demand and ſight of this order, pay unto the ſaid *Nicholas Bone* the ſum of 2 *l.* 2 *s.* and 4 *d.* for his ſaid work and labours in huſbandry without further trouble or delay at his peril. This order being removed into the King's Bench by *certiorari*, Mr. *Peere Williams* moved to quaſh it, becauſe the juſtices of peace have no juriſdiction over any wages due to ſervants, except in huſbandry for perſons bound according to the ſtatute. Now it appears here, that this order appoints the payment of other money; and therefore the order is ill. But *e contra* it was urged by Mr. *Cheſhyre*, that the juſtices have juriſdiction; for the words of 5 *Eliz. cap.* 4. are general; and if it appears, that the wages were due for labours in huſbandry, though it is not expreſſed ſo in the order, *&c.* As *Paſch.* 1691. *B. R. Gould* then ſerjeant moved to quaſh an order for payment

Day-labour.

Rex v. Darner.

of 2*s.* and 4*d.* for day-labour and work done, becauſe it was not ſaid to be due in huſbandry; but it was denied, becauſe it appeared that it was done for huſbandry; and that caſe was between the King and *Darner*. He cited alſo *T. Jones* 47. *Rex v. Deval*, and ſaid, that though it was ſaid here to be due for labours in huſbandry, beſides other money as by a bill now in court produced appears, he ſaid, that he had the bill in his hand, and that there was nothing there but matters of huſbandry. And he urged, that his client was poor, and the matters in queſtion very ſmall. And the order was confirmed by *Powell*, *Powys*, and *Gould* juſtices, *abſente Holt* chief juſtice, after ſeveral motions.

Atwood *verſ.* Burr.

Intr. *Paſch.* 13 *Will.* 3. B. R. Rot. 46.

S. C. 1 Salk. 89, 402. 2 Salk. 603. Far. 3. 5 Mod. 397. Carth 447. Lill. Ent. 225, 290, 403. 7 Mod. 3. *Poſt.* 1142 & 1252. 3 Salk. 369. Carth. 447. *Ante* 553.

First *ſcire facias* with *vicecomes non miſit breve.*

ERROR upon a judgment given in the court of *Maidſtone* in *Kent*, in a *ſcire facias* againſt the bail upon their recogniſance there entred into in a cauſe between *Atwood* and *Drue*. Several errors were urged by the council for the plaintiff in error, the greateſt part of which were over-ruled by the court. But when they ſaw the court inclined to affirm the judgment, they quaſhed the writ of error for ſome variance; and then the plaintiff in error ſued out a new writ of error; and ſo he did for ſeveral times together, ſo that he ſued eight writs of error. And now the council for the plaintiff in error, having received a rebuke from the court for theſe proceedings, inſiſted upon a new error, obſerved in the record firſt by the chief juſtice *Holt*; which was, that the firſt *ſcire facias* was not returned, but the entry was, that the ſerjeant at mace (to whom the precept in nature of a *ſcire facias* was directed) *non miſit*, &c. and then an *alias* was awarded, &c. and ſo continuances were made; and at laſt the defendant appeared at a *ſcire feci* returned, and after imparlance demurred to the ſaid *ſcire facias*, becauſe it was *minus ſufficiens ad praedictum* the plaintiff *Atwood executionem ſuam verſus praedictum* the defendant *habendum manutenendum*, &c. *et petit quod* the plaintiff *ab executione ſua verſus eum praecludatur*; the plaintiff joined in demurrer, and ſaid, that it was ſufficient to have his execution, &c. and prayed it; and then the court gave judgment, *quod* the plaintiff *haberet executionem*. And the firſt error urged by the council was, that the firſt *ſcire facias* not being returned, it could not be continued, and ſo all the proceedings afterwards were void; for the writ not being returned, was totally loſt. Againſt which it was argued by Mr. *Raymond*, that there was a difference between an original iſſuing out of Chancery returnable in the King's Bench or Common Pleas, and writs iſſuing

Scire facias's heretofore were always entred upon the roll, when they iſſued out of this court.

Judgment.

iſſuing out of the ſaid courts, or other inferior courts, and returnable there; for in the firſt caſe, if the writ is not returned, it is loſt, and the court in which it was returnable cannot proceed, becauſe the cauſe is not depending before them; but *contra* where the writ is returnable in the ſame court from whence it iſſued, for there the party has a day by the roll, and may appear upon the day by the roll. 10 *Hen.* 7. 11. *b.* And he cited ſeveral precedents in this court, to prove, that heretofore writs of *ſcire facias* were always entred upon the roll. *Hil.* 23 *Hen.* 7. *B. R. rot.* 21, *&c.* And he cited 1 *Roll. Rep.* 329. Sir *T. Middleton v. Twinio*, to prove, that though the firſt *ſcire facias* is entred with a *vicecomes non miſit breve*, yet the plaintiff may proceed and ſue out another; for there the caſe was thus; judgment was entred againſt *Twinio* in an action of debt *in C. B.* upon which error was brought, and the plaintiff in error found bail, who entred into recogniſance, that he ſhould proſecute the writ of error with effect: Sir *T. Middleton* ſued a *ſcire facias* againſt the bail, to ſhew cauſe, why he ſhould not have execution againſt them, and aſſigned a breach, in not proſecuting the writ of error with effect, becauſe *Twinio* did not take out a writ of *ſcire facias ad audiendum errores*, when it was granted by the court, returnable *octabis Trinitatis*; the bail pleaded, *quod praeceptum fuit vicecomiti*, to warn the plaintiff in the original action, returnable *octabis Trinitatis*, and that afterwards *Twinio* appeared, *et vicecomes non miſit breve*, and the plaintiff did not come, and that afterwards *Twinio* ſued a *ſcire facias ſicut alias*, returnable at a day certain; and there the ſecond *ſcire facias* was admitted to be well ſued, and yet the firſt writ was not returned; and there the party might plead to the *ſcire facias ad audiendum errores*, as well as in this caſe, *viz.* a releaſe, *&c.* and therefore he urged, that the ſaid caſe was much to the purpoſe. And *Gould* juſtice at the firſt argument ſeemed to be of the ſame opinion. But afterwards in this term the whole court held, that ſince the firſt *ſcire facias* was not returned, an *alias ſcire facias* could not be ſued; and therefore they inclined to reverſe the judgment. And they looked upon the caſe in *Rolle*'s reports as not tantamount to the caſe in queſtion. Another error, upon which Mr. *Broderick* for the plaintiff in error inſiſted, was, that the judgment was erroneous, becauſe it has not determined the matter referred to them by the parties, which was, whether the writ of *ſcire facias* was ſufficient or not, but has, without determining that, awarded execution. And for this *Ow.* 19. *Walter*'s caſe, *Cro. Eliz.* 227. *Cro. Ja.* 372. 1 *Roll. Abr.* 205. were cited. But to this Mr. *Raymond* anſwered, that the court has in effect determined the matter referred to them by the demurrer of the parties; for they have adjudged, that the plaintiff ought to have execution, which is a determination by conſequence, that the writ of *ſcire facias* was good; for if it was not good, the plaintiff could not have execution. But as to this point *Holt* chief juſtice ſeemed to be of opinion, that the judgment was erroneous; but he gave no poſitive opinion to this point; but for the other error, he was ready to reverſe the judgment. Then Mr. *Raymond* took exception to the writ of error, and moved to quaſh it, becauſe the writ of error was to remove *recordum et proceſſum adjudicationis executionis judicii ſuper praedictum praeceptum de ſcire facias*, and the record removed was of an adjudication of execution *ſuper recognitionem*. And for this variance the writ of error was quaſhed, notwithſtanding that there were ſeveral precedents produced, to ſhew that the curſitors uſed to make writs of error upon judgments in *ſcire facias* againſt bail in that manner. For, *per curiam*, there is a plain difference between an award of execution in a *ſcire facias* upon a judgment, and in a *ſcire facias* upon a recogniſance. Then the defendant *Burr* ſued another writ of error; upon which a motion was made in Chancery to ſuperſede it, *quia erronice emanavit*, upon ſuggeſtion, that the curſitors would certify, that no man could have more than three writs of error by the courſe of the court. Upon which a day was given to the plaintiff in error, to ſhew cauſe, *&c.* And the curſitors were ordered to attend. And upon hearing council of both ſides the lord keeper *Wright* declared, that a writ of error was a writ of right and that he could not hinder the party from ſuing it. And therefore the order was diſcharged. *Poſt.* 1252.

See 1 Lutw. 25, 26.

Variance.

A man may have more than three writs of error.

Brook *verſ.* Biſhop.

TReſpaſs. The plaintiff declared, that the defendant the ſecond of *April* broke and entred the plaintiff's cloſe, *et herbam ſuam pedibus ambulando conculcavit et conſumpſit, necnon arbores ſuas, viz. decem populos, &c. ſuccidit, cepit et aſportavit, tranſgreſſiones praedictas a praedicto ſecundo die Aprilis diverſis diebus et vicibus uſque* the twenty eighth of the ſaid month of *April continuando*. Upon not guilty pleaded, verdict was given for the plaintiff, and intire damages. Upon which Mr. *Branthwaite* for the defendant moved in arreſt of judgment, that the cutting of the trees could not be laid with a *continuando*; and therefore intire damages being given, the jury ſhall be intended to have given for that as well as for the other treſpaſſes. And therefore judgment ought to be arreſted, becauſe no damages ought to have been given for that. And *Holt* chief juſtice ſaid, that it was time that this exception ſhould be ſettled; and that in order to effect it, they would conſider among themſelves, and give judgment after deliberate conſideration had. And afterwards at another day *Holt* chief juſtice declared, that they were all of opinion, that the plaintiff ought to have his judgment, becauſe they held the *continuando* as to the trees

S. C. 2 Salk. 639.
Farr. 152.
7 Mod.
Comb. 427.
Treſpaſs of divers things laid with a *continuando*, where part cannot be laid with a *continuando*, is good after a verdict, becauſe no damages ſhall be intended to be given, *&c.*
Jo. 194.
Sid. 224, 249.
Skin. 42.
2 Show 196.
Vent. 363.
Raym. 396.

3 Lev. 93. See 1 Lev. 210.

to be void, becauſe the cutting of trees does not lie in continuance; and then they would intend, that no part of the damages was given for it; but the *continuando* ſhall be applied to the treſpaſſes that lie in continuance. And as to the objection, that the plaintiff at the trial, perhaps, gave evidence of cutting at ſeveral days, by reaſon of the *continuando*; he anſwered, that that ſhall not be intended, ſince in point of law only evidence of one cutting could be given, for the *continuando* is void. The proper way to declare, where a man will give evidence of ſeveral treſpaſſes, which do not lie in continuance, is to ſay, that the defendant *diverſis diebus inter* ſuch a day and ſuch a day cut divers trees; and then he may give evidence of a cutting upon any of the days between the days mentioned in the declaration. See 21 *Hen.* 6. 43. Judgment for the plaintiff.

Marsfield *verſ.* Marſh.

Trover by an adminiſtrator upon a poſſeſſion and loſs by the inteſtate, the defendant cannot give in evidence, that there is an executor.

S. C. 1 Salk. 285 by the name of *Blainfield v. Marſh.* 7 Mod. 141. S. C. 2 Salk. 555. Farr. 150. 1 Salk. 281, 283.

TRover by an adminiſtrator. The plaintiff declared of a poſſeſſion in the inteſtate, and of a loſs by him in his life-time (among other things mentioned particularly in the declaration) *de duodenis thecis, Anglice* caſks *de ſpirit. et de quinquagint. galon. aquae caldae, &c.* and then he lays the converſion to be in his own time, *&c.* Upon not gulty pleaded, and a trial at *Guildhall* before *Holt* chief juſtice, *Tueſday* the twenty ſixth of *January* 1702, *Hilary* term, 1 *Ann.* Mr. *Branthwaite* offered to give in evidence, that there was an executor alive; and then (by him) that will deſtroy the property in the plaintiff. And in *trover* he cannot recover; but perhaps it might have been otherwiſe in treſpaſs, becauſe the bare poſſeſſion would have been enough. *Sed non allocatur per Holt* chief juſtice. For (by him) the defendant ſhould have pleaded it in abatement; and it cannot be given in evidence upon not guilty pleaded, becauſe here the property is laid in the inteſtate. But if the plaintiff had declared upon a property in himſelf, and it had appeared upon the evidence, that he claimed the goods but as adminiſtrator to *J. S. &c.* there the evidence of an executor, *&c.* had been a bar to the plaintiff, becauſe it would have defeated his property, upon which his action is founded. And a verdict was given for the plaintiff, and intire damages. Upon which Mr. *Branthwaite* moved in *B. R.* in arreſt of judgment, that the words, *thecis de ſpirit.* with a daſh, and *galon.* were ſo uncertain, that the court could not underſtand what the plaintiff meant by them; and therefore that the damages being intire, they were given for them as well as for the other things; and therefore that judgment ought to be arreſted. But after conſideration had of it, *Holt* chief juſtice pronounced the opinion of the court to be, that the words, *thecis de ſpirit.* were certain enough, without ſhewing what ſort of ſpirits they

Trover de 12 *thecis, Anglice* caſks, *de ſpirit. et de* 50 *galon. aquae caldae.*

they were, ſince they were contained in the caſks. And he compared it to the caſe of *trover* for a library of books, without ſpecifying the particulars, and good; and that the words *de ſpirit.* with a daſh muſt be underſtood *de ſpiritibus*. 2. They held, that the word *galon.* was very proper. In *Spelman*'s gloſſary *galonis, galona, galonae*, is expounded to be a galon. He cited alſo the ordinance of meaſures, 51 *Hen.* 3. and the ſtatute *de piſtoribus, cap.* 8. the ſaid word uſed in the ſame ſenſe. Judgment for the plaintiff.

Williams *verſ.* Cutting.

ERROR *C. B.* In *aſſumpſit* the plaintiff declared upon the cuſtom of merchants upon a note payable upon demand; and there was alſo another count upon an *indebitatus aſſumpſit*. Upon *non aſſumpſit* pleaded, the jury gave ſeveral damages; but the judgment was entred, that the plaintiff ſhould recover *damna ſua per juratores praedictos in forma praedicta aſſeſſa.* And upon error brought, the error aſſigned by Mr. *Pengelly* was, that the firſt count was not maintainable, and the judgment, being given for the damages given by the jury upon the ſaid promiſe, was erroneous Againſt which it was urged by Mr. *Weld*, that the judgment ought only to be reverſed *quoad* and affirmed for the reſt. And to prove that, he cited *Hob.* 6. 1 *Roll. Rep.* 24. *Jacob* v. *Mills*, and *Moor* 708. Againſt which Mr. *Pengelly* cited *Allen* 74, 75. 1 *Roll. Abr.* 775. *pl.* 4. 1 *Keb.* 232. *Stile* 121, 125. 3 *Keb.* 199, 213. 1 *Ventr.* 27, 39. 2 *Keb.* 506, 535. and that the reſolutions have been always contrary to the ſaid caſe of *Jacob v. Mills*; and ſo it was adjudged, *Cro. Ja.* 424. within three years after the ſaid caſe of *Jacob v. Mills*; and that the plaintiff ſhould have entred a *remittit* for the damages upon the firſt promiſe, and taken judgment for the reſt, as 2 *Saund.* 378. And it was held by the whole court, that the judgment being intire, could not be reverſed for part. And *Holt* chief juſtice ſaid, that he had known it ruled accordingly in his time upon debate, and that the caſes in *Hobart* and *Moore* were not ſupported by any ſubſequent authority. Note, all the judges held clearly, that the firſt count was ill, according to the caſe of *Clerk v. Martin*, before, 757. except *Powell* juſtice, who doubted. Judgment was arreſted, *niſi*, &c.

S. C. 1 Salk. 24. 1 Salk. 129. pl. 12. 5 Mod. 13. 6 Mod 29.

Several damages given by the jury upon ſeveral counts, of which one was good and another ill, judgment intire for both ſhall be reverſed for the whole.

Cro. Jac. 348, 350, 557. Vide Stat. 3 & 4 Ann. cap. 9.

Cooper *verſ.* the hundred of Baſingſtoke.

Intr. *Paſch.* 13 *Will.* 3. B. R. Rot. 431.

S. C. 2 Salk. 614. Farr. 157. S. C. 11 Mod. 12. 8. 7 Mod.

A. aſſaults *B.* in the hundred of *D.* and carries him into the hundred of *S.* and there robs him, the hundred of *S.* only is liable to an action upon the ſtatute.

Goldſb. 86. 1 Sid. 263.

AN action upon the ſtatute of hue and cry. Upon not guilty pleaded the jury found a ſpecial verdict, upon which the caſe was thus. Robbers aſſaulted the plaintiff upon the highway in the hundred of *Mitcheldever*, and they carried him out of that way into a coppice near adjoining to that highway; but this coppice lies in the hundred of *Baſingſtoke extra*. The robbers took nothing from the plaintiff in the hundred of *Mitcheldever*, where the aſſault and ſeiſure of the plaintiff's perſon was made; but they robbed the plaintiff of 28*l.* *&c.* in the coppice. And the grand queſtion, whether this action lay againſt the defendants, or againſt the inhabitants of the hundred of *Mitcheldever*, or both, was argued at the bar ſeveral times; for the plaintiff by Mr. ſerjeant *Carthew*, Mr. *Montague*, and Mr. *King*; and for the defendants by Mr. *Peere Williams*, Mr. *Raymond*, and Mr. *Broderick*. And now this term *Holt* chief juſtice pronounced the opinion of the court to be, that the plaintiff ought to have judgment. And the method that he purſued in delivering his opinion was by way of anſwer to the objections taken by the counſel for the defendant at the bar. In order therefore the better to underſtand the reaſons of the chief juſtice, it ſeems neceſſary to repeat the ſubſtance of the arguments and objections made by the defendant's counſel.

1. And firſt they agreed, that this action ought to be brought againſt the hundred in which the robbery was committed, by the expreſs words of the act of parliament. But they argued, that although the goods were not actually taken from the perſon of the defendant in the hundred of *Mitcheldever*; yet ſince the aſſault and ſeiſure were made there, and the goods were immediately taken from the plaintiff; that will relate to the ſeiſure, and amount to a robbery in the hundred of *Mitcheldever*. And to prove that, they cited ſeveral rules of relation, and caſes concerning it, as *Dier* 78. *Plowd. Com.* 260. 14 *Hen.* 6. 47. *A.* being *non compos* gives himſelf a ſtroke, then he recovers his ſenſes, and then dies, he ſhall not be adjudged *ſelo de ſe.* 33 *Aſſiſ.* 7. *Fitzh. corone* 210. If a ſervant intends to kill his maſter, and then he departs from his ſervice, and then he kills his maſter, it is *petit* treaſon, and yet there was a year betwixt the firſt deſign and the act done. 44 *Edw.* 3. 14. 4 *Hen.* 4. 2. *Fitzh. corone* 97. *Hale P. C.* 72. *Staunf. P. C.* 27. So here, the aſſault and ſeiſure, which cauſed the fear, without which there can be no robbery, continued until the taking

Relation.

away of the goods. And if there ſhall he ſo ſtrong a relation, in a caſe where the life of a man is in danger; much more ought it to be encouraged, to intitle a man to a remedy. They cited alſo 1 *Sid.* 263. *Pledall v. the hundred of Thiſtleworth*, where it was held, that if robbers drive, or cauſe the waggoner to drive, his waggon out of the way in the day time, and they do not rob him till night, yet the hundred is liable, and it ſhall be adjudged robbery in the day, becauſe the firſt ſeiſure is the robbery. So if a man be ſeiſed in the highway, and carried into a houſe, and robbed there, the hundred ſhall be liable; and yet for a robbery in a houſe the hundred is not liable. So 1 *Sid.* 367. *Turner and Cary v. Smith*, it is reported, that it was ſaid (which muſt be meant by the court) that if robbers ſeiſe perſons in the hundred of *A.* and lead them into the hundred of *B.* and rob them there, the hundred of *A.* ſhall be liable. And there is great reaſon for ſupporting ſuch reſolutions, becauſe the firſt fault was in the hundred of *A.* &c. For if watch and ward had been kept there, no robbery could have enſued.

But to this objection *Holt* chief juſtice anſwered, that it was evident by the verdict, that the robbery was committed in the hundred of *Baſingſtoke*. For if this fact had happened in two counties inſtead of two hundreds, the robbers muſt have been indicted in the latter county, and tried there. For it is impoſſible to make the aſſault and ſeiſure amount to a robbery; and there is no colour here, to make it a robbery by relation in the hundred of *Mitcheldever*; for relation never holds place, but where the thing, to which the relation is made, is the immediate and efficient cauſe of the thing relating; but here the aſſault is not the efficient cauſe of the robbery, for at moſt it is but *cauſa ſine qua non*. And this caſe is not like the caſes of murder, where the ſtroke is given upon one day, and the party dies upon another day of the ſaid ſtroke, this death will relate to the ſtroke for ſome purpoſes, but not for all; for as to the forfeiture it will relate to the ſtroke, but not for collateral purpoſes. Therefore if the murderer be indicted, and the indictment ſhews, that the ſtroke was upon one day, and the death upon another, and it concludes, that ſo he murdered him upon the former day; it is ill, becauſe no felony was committed till the death: but if it concludes, that ſo he murdered him the day of the death, it is good. 4 *Co.* 42. So if a mortal wound be given, and the party languiſh for a month, and *A.* knowing thereof receives the murderer; or if conſtables arreſt him, and permit him to eſcape, and then the perſon wounded dies; the receivers are not acceſſory to the felony, nor are the conſtables felons. 11 *Hen.* 4. 12. *b.* So here there was no robbery committed, but in the hundred of *Baſingſtoke*, and relation cannot hold place. He cited

Robbers ſeiſe a man in the county of *A.* and lead him into the county of *B.* &c. it is a robbery only in *B.*

An indictment is, that *A.* ſtruck *B.* the firſt of *Auguſt*, and he died of it the tenth of *Auguſt*, and ſo he murdered him the firſt of *Auguſt*; it is ill.

Hutt. 125. as a caſe in point; and ſaid, that *Gouldſb.* 86. admits the preſent queſtion. He ſaid farther, that the true reaſon of this caſe is this, that the hundred is not chargeable becauſe the robbery was done there which they did not prevent; but becauſe the robbers were not arreſted within forty days after, *&c.* And that this is the true reaſon why the hundred is not chargeable, appears from hence, that if they produce the robbers, notwithſtanding that the party robbed has ſuffered very great damage, the hundred will be excuſed. Until a robbery is actually committed, the hundred is not obliged to make hue and cry after the malefactors, and conſequently ought not to be charged for not producing them. And therefore in this caſe there being an aſſault only in the hundred of *Mitcheldever*, but no robbery, and the robbery being in the hundred of *Baſingſtoke*, the hundred of *Baſingſtoke* are obliged to ſeiſe the offenders; and for not having done it, they are chargeable to the plaintiff. As to the objection made, that if *A.* be aſſaulted upon the highway in one hundred in the day, and is carried into another hundred, and is not robbed there till night; that yet the ſecond hundred would be liable. He anſwered, that he was of opinion, that in the ſaid caſe the action failed; becauſe the aſſault was not a robbery, to charge the firſt hundred; and the other hundred cannot be chargeable, becauſe it was done in the night. So if *A.* be ſeiſed in a highway, and carried into a manſion houſe; he held, that *A.* would be without remedy; becauſe for a robbery in a houſe the hundred is not chargeable. 7 *Co.* 6. *Sandhill*'s caſe. 2 *Inſt.* 569. *Moor* 620. *pl.* 848.

A. aſſaults *B.* in the hundred of *D.* in the day, and carries him into the hundred of *E.* and does not rob him till night, *B.* cannot have an action on the ſtatute.

Robbery in a coppice.

Another exception was taken by the defendant's council, that the defendants cannot be charged in this action, becauſe the robbery was committed in a coppice and not in the highway; and (by them) the hundred is only liable, where the robbery is done in the highway, or in ſome publick place where watch and ward may be kept; but it would be hard to puniſh the hundred, where they cannot prevent the robbery by keeping of watch and ward. Now in a coppice they cannot keep watch and ward, becauſe they would be treſpaſſers. And that is the reaſon, why they ſhall not be chargeable for a robbery done in a houſe. By 13 *Edw.* 1. *cap.* 5. highways are to be enlarged by cutting of buſhes, *&c.* and if the lord of the ſoil does not cut the buſhes, he ſhall anſwer for the robbery. They cited alſo *Cro. Car.* 266. *Rex v. Ward and Lime*, where it is ſaid, that the way there was not ſuch, as the inhabitants ought to keep watch and ward, or ſhould be anſwerable for a robbery in; which argues, that it was plainly the opinion of the court, that they ſhould not be chargeable, but for robberies done in the highway.

Holt chief juſtice, the next day after he had delivered the opinion of the court, ſaid that he had in haſt omitted to anſwer this objection. But he ſaid, that they were all of opinion, that it is not neceſſary to be a highway, in which the robbery is done, to charge the hundred.

Another objection was taken by the defendant's counſel, that it was not found, that the robbery was done in the day, and then the hundred will not be liable. 7 *Co.* 6. *b.* And it being a ſpecial verdict nothing ſhall be intended, but it ſhall be preſumed by the court that the jury have found the whole fact.

But to this *Holt* chief juſtice upon the argument ſaid, that it muſt be found, that it was done in the night; otherwiſe it ſhall not be intended, for ſuch evidence ought to be given on the part of the defendants. And he did not regard the ſaid exception, when he pronounced the opinion of the court. See 2 *Inſt.* 569. Judgment for the plaintiff by the whole court.

In an action upon this ſtatute, tho' it is not alleged, that the robbery was in the day, and a ſpecial verdict is found, which does not find it; yet if it is not found that it was in the night, the hundred is liable.

Reading *verſ.* Rawſterne.

Ejectment upon the demiſe of Bernard. Upon not guilty pleaded, the cauſe being tried at *niſi prius*, a caſe was made for the opinion of the court, which in effect was thus. *A.* being ſeiſed of the lands in queſtion in fee, had iſſue two daughters *B.* and *C.* *B.* maaries, and has iſſue *D.* and dies; *A.* deviſes the lands to *D.* and his heirs and dies; *D.* dies; and the heir of *D.* of the part of his father, and the heir of *D.* of the part of his mother, entred into the lands, and took the profits for more than twenty years before this action brought; which action was brought by the plaintiff as deviſee of *Bernard*, who was heir of *D.* of the part of the father of *D.* And this caſe was argued by Mr. *Cowper* of the one ſide, and by Mr. *Mountague* of the other ſide.

S. C. 2 Salk. 423, 242. S. C. Comyns 123. Chan. Prec. 222.

A. ſeiſed in fee of lands hath iſſue *B.* and *C.* his daughters, *B.* hath iſſue *D.* and dies. *A.* deviſes his lands to *D.* in fee *D.* dies without iſſue, his heir of the part of his father ſhall take.

And the firſt queſtion was, whether *D.* took the whole lands by purchaſe, or one moiety by deſcent and the other by purchaſe. And the whole court held, that *D.* took the whole by purchaſe. For though where the ſame eſtate is deviſed to the heir in quantity and quality, as he would have taken by deſcent if there had been no deviſe; the deviſe will be void, and ſuch heir will take by deſcent; as if a man ſeiſed of lands of the part of the mother deviſe them to the heir of the part of the mother, the deviſe will be void,

When an heir takes by deſcent notwithſtanding a deviſe.

and the heir will take by deſcent, 3 *Lev.* 127. *Hedger v. Rowe:* and as where a man deviſed lands to his heir in fee, upon condition that he ſhould pay 20*l.* to *A.* and upon refuſal to pay, *&c.* he deviſed them to *A.* in fee; it was held, that the deviſe to the heir was void, and that it was an executory deviſe to *A.* if the heir did not pay, *Cro. Eliz.* 919. *Ainſworth v. Pretty:* yet in this caſe the deviſe was not to the heir, for one of the daughters, and conſequently her repreſentative, is not heir alone, but *D.* and *C.* were heir to the deviſor, *Co. Li.* 163. *b.* If a man plead a deſcent *uni filiae et cohaeredi*, it will be ill. Beſides, if the court hold, that *D.* took a moiety by deſcent, they ought to hold conſequently, that the deviſe as to the ſaid moiety was void, and then the ſaid moiety ought to deſcend to *D.* and *B.* as heirs to *A.* and conſequently *D.* had but three fourths of the lands, where they were intirely deviſed to him. And therefore this caſe is not within the reaſon of the caſes cited; but of neceſſity it muſt be adjudged, that *D.* took the whole by purchaſe. As to the objection, that a deviſe cannot be good in part and void in part as to one intire thing, the court ſaid, that it could not be ſupported; becauſe if a man deviſe one moiety of *Blackacre* to *B.* his heir in fee, and the other moiety in tail; the heir ſhall take the fee by deſcent, the deviſe as to that being void, and the other in tail he ſhall take by the deviſe by purchaſe.

See Cro. Car. 161.

2. A ſecond queſtion was, whether the taking of the profits by the heir of the part of the mother of one moiety ſhall not bar the heir of the part of the father after quiet enjoyment for twenty years, by the ſtatute of limitations, from bringing an ejectment. And the whole court held, that it ſhould not. For (by them) the ſtatute of limitations does not bar a man, but where there is an actual diſſeiſin. Now here the bare taking of the profits is not an actual diſſeiſin. Beſides, that where two men are in poſſeſſion of land, *&c.* the law adjudges it to be the poſſeſſion of him who hath the right, until he be actually diſſeiſed. *B.* and *D.* were not tenants, for *B.* was a mere ſtranger; and though he took a moiety of the profits, that will not make him tenant in common; for a man cannot diſſeiſe another of an undivided moiety, as he may of ſuch a number of acres. But farther, if they had been tenants in common, it is true, that one tenant in common may diſſeiſe the other; but that muſt be an actual diſſeiſin, as the hindering him from coming upon the land, *&c.* and not by a bare perception of the profits. As to the objection, that the bringing of the ejectment for a moiety admits him to be out of poſſeſſion of it, *Holt* denied it to be ſo. For if *A.* ſeiſed of land makes a leaſe of one undivided moiety, and *J. S.* ouſts the leſſee, he muſt bring his eject-

Statute of limitations does not bar without actual diſſeiſin.

ejectment for a moiety; ſo if they were both put out of poſſeſſion, they muſt have ſeveral remedies, as ſeveral aſſiſes, *&c.* Judgment was for the plaintiff.

Brown et ux. *verſ.* Gibbons.

CASE for words ſpoken of the wife by the defendant, *viz.* Mrs. *Brown* is a whore, and has done all the whores do; *per quod* the plaintiff being a tradeſman loſt ſuch and ſuch, *viz. A. B. &c.* from being his cuſtomers, who were his cuſtomers before, *&c.* Upon not guilty pleaded, the defendant at *niſi prius* gave evidence by way of mitigation of damages, that Mrs. *Brown* was a whore. And the evidence was very ſtrong. Upon which the jury gave damages but 20*s.* to the plaintiffs. And now Mr. *Mountague* moved, that the plaintiffs might have their full coſts; which was oppoſed by ſerjeant *Darnall.* And the court held, that this action is not an action for ſlanderous words within the meaning of the ſtatute of 21 *Jac.* 1. *cap.* 16. becauſe the ſpecial damage is the *git* of the action, without which it would not lie. And therefore ſuch an action lies for the huſband alone, without joining the wife, which is otherwiſe in a common action for words. And *Cro. Car.* 140. *Law v. Horwood* was cited, and allowed by the court to be a caſe in point. And *Powell* chief juſtice ſaid, that if the maſter brought an action of battery againſt *J. S.* for a battery committed upon his ſervant, *per quod ſervitium amiſit*, if the jury upon not guilty pleaded gave damages under 40*s.* the plaintiff ſhould have full coſts, notwithſtanding the ſtatute of 22 & 23 *Car.* 2. *cap.* 9. which allows in common actions of battery no more coſts than damages, where the damages are leſs than 40*s.* And the plaintiff in the principal caſe had full coſts.

S. C. 1 Salk. 206. Farr. 129. 7 Mod. In caſe for words not actionable of themſelves, but made actionable by the *per quod*, tho' the damages are under 40*s.* yet the plaintiff ſhall have full coſts. *Poſt.* 1588. 8 Mod. 371, 372.

Cole *verſ.* Rawlinſon.

Intr. *Trin.* 11 *Will.* 3. B. R. Rot. 113.

EJectment. Upon not guilty pleaded the jury found a ſpecial verdict, upon which the caſe was thus. *Billingſley* ſeiſed in fee of the *Bell* tavern in *St. Nicholas Lane*, *London*, married a widow, who had a ſon by her firſt huſband; and upon the marriage *Billingſley* by leaſe and releaſe conveyed the *Bell* tavern to truſtees, to the uſe of himſelf for life, remainder to his wife for her life, remainder to their firſt ſon in tail, *&c.* remainder to the right heirs of the wife, *&c.* *Billingſley* had iſſue by the ſaid woman *John Billingſley*, and died. The wife afterwards made her will in theſe words *(inter alia)* Item,

S. C. 1 Salk. 234. 3 Danv. Abr. 201. p. 6. Deviſe. Fee or life.

I give, ratify and confirm to my ſon *John Billingſley* all my right, title and intereſt which I now have, and all ſuch term and terms for years, which now is, or at any time after my deceaſe may happen to be, in my power to diſpoſe of, in whatſoever I hold by leaſe of *J. S.* and *J. N.* and alſo the houſe called the *Bell* tavern in *St. Nicholas Lane* together with the ſtable thereunto adjoining. And the queſtion was, whether *John Billingſley* took by the deviſe an eſtate for life in the reverſion after the determination of the eſtate tail, or the inheritance of the reverſion. If he took for life, then judgment ought to be for the plaintiff; if he took the inheritance, then judgment ought to be for the defendant. And the three judges, *Powell*, *Powis*, and *Gould*, were of opinion, that *John Billingſley* took the inheritance, &c. againſt the opinion of *Holt* chief juſtice. This caſe was three times argued at the bar. And now the judges delivered their opinions *ſeriatim*. And the reaſons of the ſaid three judges were, 1. That the intent of the deviſor appeared plainly to be, to deviſe a fee; becauſe ſhe knew, that the deviſee was tenant in tail before by the ſettlement. 2. There is not any end of the ſentence, till one comes to the words [And alſo the *Bell* tavern] and ſo this latter part of the ſentence will borrow the word give from the former part of the ſentence; otherwiſe nothing would paſs by this part [And alſo, &c.] And then for the ſame reaſon they will borrow the words which limit the eſtate, *viz.* all my right. But otherwiſe it had been, if the words, I give, had been repeated; then they would have made it a new ſentence, and disjoined it from the words of the limitation. And for this they cited 1 *Roll. Abr.* 844. *M. pl.* 1, 2. *Moor* 52. So where a man granted hedge-bote, to be taken by the aſſignment of his bailiff, and alſo fire-bote; the words, and alſo fire-bote, borrow the words, by the aſſignment of the bailiff, as well as the word grant, and the grantee cannot take fire-bote without the aſſignment of the bailiff, *per Shelley*, *Dier* 19. *b.* 3. They muſt make this conſtruction, otherwiſe the deviſe would be void, becauſe the deviſee had an eſtate in tail before, and therefore a deviſe to him for life would be uſeleſs and void. *Powys* juſtice ſaid farther, that the word [in] ſhould be underſtood, as if it had been ſaid, And alſo in the *Bell*, &c. for *quod ſubintelligitur non deeſt*. And *Gould* juſtice ſaid, that the words, the *Bell* tavern, &c. were ſufficient to paſs the inheritance in this caſe. To prove which, he cited *Moor* 873. *Whitlock v. Harding*, where a man deviſed his lands for ninety-nine years, and afterwards he deviſed all his lands of inheritance to *B.* though in ſtrictneſs the words, all his lands of inheritance, were a deſcription of the lands, not of the eſtate, yet it was held, that a fee ſimple paſſed; becauſe it appeared, that the deviſor intended to paſs a fee, for an eſtate for life after ninety-nine years was of ſo ſmall value, that it could not be imagined, that he deviſor deſigned to deviſe it. And the ſame reaſon holds in his caſe. *Powell* juſtice added, that it was lawful, to tranſpoſe vords even in deeds, to ſupply the intent of the parties; and nuch more in caſes of wills. Therefore he was of opinion, that hey ought to read the ſentence in this manner, *Item* I give, &c. o my ſon *John Billingſley* all ſuch term, &c. and all my right, &c. in whatſoever I hold by leaſe of *J. S.* or *J. N.* and alſo the *Bell*, &c. this will paſs a fee plainly. And for theſe reaſons heſe three judges concluded, that judgment ought to be for the defendant.

But *Holt* chief juſtice *e contra* was of opinion, that judgment ought to be for the plaintiff, holding that an eſtate for life only paſſed in the *Bell* tavern, &c. And he ſaid, it is a principle known and certain in the law, that upon a deviſe to *J. S.* without limiting any eſtate, *J. S.* will take it but for his life, unleſs there be ſome ſpecial matter in the will, that ſhews, that the intention of the deviſor was to deviſe a larger eſtate. And there is no difference between a deviſe of lands in poſſeſſion, and a deviſe of a reverſion. And in this caſe, if this deviſe had been to a meer ſtranger, who had not had an eſtate-tail before, it would have paſſed but an eſtate for life. And for that purpoſe he cited *Cro. Eliz.* 330. *Dickens v. Marſhal*, where *J. S.* deviſed his lands and goods to his ſon and daughter, after his debts and legacies paid, to be equally divided between them, and held that they took but an eſtate for life; and yet it might be objected, that if the debts and legacies were not paid in the life of the daughter, ſhe would take nothing.

Objection. Theſe words, And alſo the *Bell*, &c. relate to the words, All my right, &c.

Anſwer. That cannot be, becauſe the words, All my right, &c. which I now have, and all ſuch term, &c. are relative words, and muſt have a ſubject, and that is what follows, *viz.* in whatſoever I hold by leaſe, &c. and then the words, and alſo the houſe, &c. follow, which may relate to the words, give, &c. and cannot relate to the words, all my right, &c. which are ſatisfied before by the words, in whatſoever I hold by leaſe, &c. Farther, turn the words into *Latin*, *Item dono*, &c. *omne jus meum*, &c. *et omnes tales terminum*, &c. *in quocunque teneo per dimiſſionem*, &c. *acetiam domum*, &c. and ſo the words are very good grammar, and there is no reference to the word right, and ſo as to the *Bell* tavern the deviſe is, that ſhe gives the houſe called the *Bell* tavern, &c. which will paſs but an eſtate for life.

Objection. The prepoſition In ſhall be underſtood.

Anſwer. It is underſtood ſometimes in *Latin*, never in *Engliſh*.

Objection. The copulative And joins them.

Anſwer. No, becauſe they are not of the ſame nature, *viz.* leaſehold and fee-ſimple. And therefore the words, the houſe, *&c.* cannot relate to the prepoſition In, the *Bell* tavern not being leaſe; and therefore it muſt be the accuſative caſe, and ſo cannot relate to the right, *&c.* but to the words, give, *&c.*

Objection. The words ſhall be tranſpoſed.

Anſwer. That cannot be, becauſe they are good ſenſe and grammar as they are; for that is only done, to make a nonſenſical word ſenſe.

Objection. *Moor* 873.

Anſwer. If the reaſon there given ſhould be admitted to be the reaſon of the judgment, yet it differs from this caſe; becauſe there the term for ninety-nine years appears upon the face of the will, and is created by it. But that was not the true reaſon of the judgment. The reaſon was, becauſe a deviſe of all his lands of inheritance paſſed a fee; and it might be a great queſtion, if it did not paſs a fee, why he deviſed them by the name of his lands of inheritance. And the caſe is reported in *Hob.* 2. to have been adjudged upon the ſame reaſon. Indeed the caſe there is put differently, becauſe it is there a deviſe of the inheritance of his lands, which is a fee without doubt in a will.

Deviſe of lands of inheritance.

Objection. 1 *Roll. Abr.* 844. *M. pl.* 1. *&c.* and the other caſes to the ſame purpoſe.

Anſwer. The ſaid caſes are not parallel to the caſe in queſtion, becauſe there is a plain relation to all that preceeds, as well the words of limitation as of grant; but here the words, right, *&c.* are ſatisfied by, and relate to, leaſes, as is ſaid before. And he cited *Cro. Car.* 447, 449. *Wilkinſon v. Merryland*; where a man deviſed all the reſt of his goods, chattels, leaſes, eſtates, mortgages, debts, ready money, plate, and other goods, whereof he was poſſeſſed, to his wife, and died having a mortgage in fee forfeited; and held that no fee paſſed: and yet mortgage is an extenſive word, but there wanted words of inheritance; which proves, that in the expoſition of wills no regard ought to be had to external accidents, (which *Powell* juſtice agreed in his argument.) And

therefore

therefore the reaſons urged, that this eſtate came from the father of *John Billingſley*, *&c.* are not prevalent.

Objection. That according to this expoſition the deviſe will have no effect.

Anſwer. That is no reaſon to conſtrue a larger eſtate to paſs by the will, than the words will paſs; for it does not appear in the will itſelf. And (by him) for theſe reaſons an eſtate for life only paſſed, and the plaintiff ought to have judgment. But by the other judges judgment was given for the defendant.

Afterwards a writ of error was brought in the Exchequer chamber upon this judgment.

Clerk *verſ.* Udall.

S. C. Farr. 106. 7 Mod. Salk. 649.

Mereretur.

IN *aſſumpſit* upon *quantum meruit*, upon *non aſſumpſit* pleaded, and verdict for the plaintiff, it was moved in arreſt of judgment, that the declaration was ill, becauſe it was to pay ſuch ſums, as the plaintiff *rationabiliter habere mereretur*. Upon which judgment was ſtayed until this term. And now the court held, that it was well enough, and the ſame with *meruit*. Judgment for the plaintiff.

Dike *verſ.* Brown.

Tithes of faggots. Barnard. Rep. 71.

Prohibition after ſentence.

UPON a motion for a prohibition, the caſe was, the defendant libelled in the ſpiritual court for tithes of faggots made of loppings of trees; and the ſuggeſtion for a prohibition was, that theſe loppings were cut from the ſtumps of timber-trees above the growth of twenty years. And it was alleged, that ſentence was given in the ſpiritual court, and therefore the plaintiff comes here too late, to have a prohibition. But *per Holt* chief juſtice the ſentence will not hinder the having a prohibition in any caſe, but in caſe of prohibitions grounded upon 23 *Hen.* 8. *cap.* 9. for citing out of the dioceſe. But becauſe the plaintiff had not pleaded this matter in the ſpiritual court, they denied the prohibition; becauſe the ſpiritual court has general juriſdiction of tithes, and if any ſpecial matter deprives them of their juriſdiction, it muſt be pleaded there. And if it had been pleaded there, and iſſue joined upon it, and upon the trial it had been found not to be *ſilva caedua*, it had been well. But if they had refuſed to admit the plea, a prohibition ſhould have been granted.

Croſs *verſ.* Smith.

Intr. *Mich.* 12 *Will.* 3. B. R. Rot. 191.

S. C. 1 Salk. 148. Farreſ. 138. 7 Mod. f. C. 12 Mod 643. 3 Salk. 79.

Certiorari lies in the Common Pleas, to remove a cauſe in the court of *Ely.*

ERROR upon a judgment given in the court of the biſhop of *Ely* in caſe for words ſpoken the twenty-fifth of *March,* 12 *Will.* 3. of the plaintiff. The error aſſigned was, that a *certiorari* iſſued out of the common Pleas, *teſte* the twelfth of *February* 12 *Will.* 3. returnable in *Eaſter* term following, to remove the cauſe, and it was allowed, and nevertheleſs they proceeded afterwards to give judgment for the plaintiff. The defendant in error pleaded a grant to the biſhop of *Ely* of conuſance of pleas, and an allowance of it in this court 21 *Edw.* 3. and that the cauſe of action aroſe within the juriſdiction of the ſaid court, and that this matter was returned to the Common Pleas upon the writ of *certiorari,* and that ſo the court of *Ely* had good authority to proceed, *&c.* To this plea the plaintiff in error demurred. And it was argued ſeveral times at the bar by Mr. *Parker,* Mr. *Broderick,* and Mr. *Eyre,* for the plaintiff in error, and by Sir *Bartholomew Shower,* Mr. *Ward,* and Mr. *Weld* for the defendant in error. And the points made by them were, 1. Whether a *certiorari* lay out of the Common Pleas to the court of *Ely.* 2. If it lay, whether it would be a *ſuperſedeas* to their proceedings. And the whole court held the affirmative. And *Holt* chief juſtice ſaid, that there are three ſorts of inferior juriſdictions. The firſt is *tenere placita,* which is the loweſt, and is a concurrent juriſdiction; in which caſe the plaintiff may proceed in the inferior court if he will, but that does not deprive the ſubject, of having it tried in a ſuperior court (if he will) of the King's; and that for good reaſon, for if it were otherwiſe, a man who comes by chance into an inferior juriſdiction, might be arreſted there, and detained in gaol a long time for want of bail. The ſecond ſort is conuſance of pleas, which is by grant to ſome lord of the franchiſe; and it is he alone who can take advantage of it, neither the plaintiff nor defendant, for he cannot plead it to the juriſdiction of the court; but the lord of the franchiſe by his bailiff or attorney muſt come in and claim the franchiſe; and though the lord ought to have the action, yet this court is not ouſted by it, but the plea remains under the controul of this court; for day is given here upon the roll to the parties, to be in the inferior court at a day certain, and the parties are commanded there, and the tenor of the record of this court is ſent, for the inferior court to proceed, and if juſtice is done there, all is well, but the record is here; and if juſtice is not done there, as if the court there does not proceed upon

The lord only can take advantage of conuſance of pleas.

Proceedings upon conuſance claimed.

upon the day prefixed, or if the judge miſbehaves himſelf, &c. the plaintiff ſhall have a reſummons. And it is the benefit of the lords only, that is conſidered in this matter. But theſe juriſdictions were hardſhips to the ſubject, and allowed by 27 *Hen.* 8. *cap.* 24. rather for their antiquity than for any other reaſon, and they were detrimental to the prerogative of the crown, and therefore *certioraris* were always allowed, to prevent the grievances of theſe inferior juriſdictions. The third ſort are exempt juriſdictions, as where the King grants to a city, &c. that the inhabitants ſhall be ſued within the city, and not elſewhere. Such a grant may be pleaded to the juriſdiction of the King's Bench, &c. if there is a court there, that can hold plea of the cauſe. But no body can take advantage of it but the defendant; and if he ſues a *certiorari*, it will remove the cauſe, becauſe the defendant has waived his privilege for his own benefit; ſo that there is no juriſdiction, that can reſiſt a *certiorari*. As in the caſe of a cuſtomary proceeding by foreign attachment, if the defendant cannot find bail below, he may ſue a *certiorari*; and upon putting in bail in the ſuperior court the cauſe will proceed there. The ſtatutes 43 *Eliz. cap.* 5. 21 *Jac.* 1. *cap.* 23. admit, that a *habeas corpus* and *certiorari* have always been allowed, though the 43 *Eliz. cap.* 5. does not mention expreſsly a *certiorari*, but under the general words, other writ or writs. As to the diſtinction taken between the King's court and that of lords of franchiſes, that a *certiorari* will lie to the former, but not to the latter; it is no concern to the ſubject, to whom the court belongs. Farther, ſuppoſe that the King grants to a corporation, that the mayor and aldermen ſhall be juſtices of peace, and that they ſhall hold a court of ſeſſions; this franchiſe is as much a right to the town, as this of the biſhop of *Ely*; and yet in common experience *certioraris* are granted to them every day.

Exempt juriſdictions.

Objection. It is unreaſonable, that theſe *certioraris* ſhould ſuperſede the proceedings of inferior courts; becauſe upon the return of the *certiorari* the court cannot proceed upon the record returned, but the plaintiff muſt ſue a new original.

Anſwer. The ſame objection extends to a *habeas corpus* granted by the Common Pleas, which hath never been queſtioned. The juriſdiction here is but a bare conuſance of pleas, and it is a great queſtion, whether an exempt juriſdiction can be in any caſe, but in that of a corporation. There is no colour to ſay, that this is a county palatine. The 24 *Edw.* 3. 62. *pl.* 5. cited by Mr. *Ward*, to warrant that, has no ſuch opinion. And therefore a *certiorari* lies there, as well as to any other inferior court that hath only conuſance of pleas. And a *certiorari* will be a *ſuperſedeas*, as

T. Jones 209.

well as a *habeas corpus*. And that a *habeas corpus* is a *ſuperſedeas*. *Cro. Car.* 261. is in point.

A *recordari* and *certiorari* remove all things done between their *teſte* and return.

Another point was made, whether this plaint was removed by this *certiorari*, becauſe the writ was *teſte* the twelfth of *Febr.* 11 *Will.* 3. to remove a plaint *tunc nuper levatam ſive affirmatam*, returnable *Eaſter* term 12 *Will.* 3. and the plaint was entred the twenty-fifth of *March* between the *teſte* and return of the writ. And the whole court held, that this writ removed the plaint, becauſe a *certiorari* is like a *recordari*, and removes all things done in court between the *teſte* and return. The ſame law of a writ of error. 1 *Ventr.* 68. 1 *Roll. Abr.* 395. *Fitzh. Nat. Bre.* 71. *a.* 3 *Hen.* 6. 30. *b.* And for precedents of that form of writs, *New Theſ. Brev.* 37. 3 *Brownl.* 335. And the judgment was reverſed by the whole court.

Gould *verſ.* Johnſon.

S. C. 1 Salk. 25. 2 Salk. 422. Farr. 143. 7 Mod.

Non aſſumpſit infra ſex annos, not pleadable in *aſſumpſit* upon an executory promiſe.

See 1 Mod. 70. Lev. 298. 10 Mod 104. And. 294. Vent. 191.

It is not ill, though it appears upon the declaration, that the cauſe of action accrued more than ſix years before.

ERROR upon a judgment of the Common Pleas in *aſſumpſit*, where the plaintiff declared, that the defendant, in conſideration that the plaintiff would receive *A. B.* and *C.* into her houſe *ut hoſpites*, and provide for them meat, drink, *&c.* to pay ſo much as ſhe ſhould deſerve; and then the plaintiff avers, that ſhe received them into her houſe but does not ſay *ut hoſpites* and provided meat, drink, *&c.* The defendant pleaded *non aſſumpſit infra ſex annos*. Upon which the plaintiff demurred. And judgment in the Common Pleas for the plaintiff. And it was agreed by all, that the plea was ill, for this being an executory collateral promiſe, the defendant cannot plead *non aſſumpſit infra ſex annos*, but ſhould have pleaded, *cauſa actionis non accrevit infra ſex annos*; for if the cauſe of action accrued within ſix years, it matters not when the promiſe was made; but if it had been *indebitatus aſſumpſit*, that plea had been good. Then Mr. *Chetham* and Mr. *Broderick* for the plaintiff in error aſſigned two faults in the declaration. 1. That it appears upon the declaration, that the cauſe of action accrued more than ſix years before, *&c.* and therefore it is not neceſſary to plead the ſtatute, becauſe it appears upon the declaration. And for that *Cro. Car.* 115. was cited as a caſe in point. *Sed non allocatur.* For the ſtatute in this caſe, as well as in all others, ought to be pleaded; for it may be, the original was ſued within ſix years after the cauſe of action; and therefore the defendant ſhall plead the ſtatute, to the end that the plaintiff may have an opportunity to reply ſuch matter.

Averment.

Another exception to the declaration was, that it is not averred, that ſhe received them *ut hoſpites*; and there is a difference between receiving a man generally, and *ut hoſpitem*; and in ſuch a caſe as this they ought to ſhew a preciſe performance of the conſideration of the promiſe, to intitle them to the action. And many caſes were cited, to all which the chief juſtice gave a full anſwer, and ſaid that they came not up to the caſe in queſtion.

Objection. *Cro. Jac.* 45. *A.* was bound in a recogniſance, that *B.* ſhould appear to an action upon eight days warning, and if he was condemned, ſhould ſatisfy the debt; but it was not averred, that he had eight days warning. Anſwer. There *A.* a ſtranger was to be affected by the appearance, *&c.* and therefore there ought to be preciſely ſuch an appearance, as was mentioned in the condition of the recogniſance; and though *B.* appeared upon other terms, that would not charge *A.* a third perſon. As if *J. S.* be bound in a bond to *J. N.* to pay *J. N.* money; *J. N.* may accept of a horſe inſtead of it: but if *J. S.* be bound to *J. N.* to pay *A.* money; *A.* cannot accept a horſe.

Objection. *W. Jones* 441. *Leate*'s caſe; *Aſſumpſit* in conſideration that *J. S.* at the requeſt of the plaintiff ſhould relinquiſh adminiſtration, and permit the defendant to have it, to do ſuch an act; and avers, that *J. S.* relinquiſhed adminiſtration, *&c.* but does not ſay at the requeſt of the plaintiff.

Anſwer. There the requeſt was an act to be done by the plaintiff; and if he did not do it, there is no reaſon, that he ſhould have the recompenſe.

Objection. 2 *Leon.* 53.

Anſwer. *Cro. Jac.* 404. is ſince adjudged to the contrary, that it is not neceſſary, to aver a requeſt.

Objection. *Cro. Jac.* 245. *Yelv.* 175. *Aſſumpſit* upon good conſideration to pay to the plaintiff ſo much *ante inceptionem itineris proximi* of the plaintiff to *London*, avers that he *incepit iter ſuum* ſuch a day, *&c.*

Anſwer. The ſaid caſe is not law, for it appears, that the money was due; for if that was not the next journey, yet the money was due, becauſe then there was a journey before. Now in this caſe, receiving a man, and providing meat, drink, *&c.* is a receiving as a gueſt. And if the plaintiff received them upon another account, that ought to have been ſhewn of the other ſide. And if the words *ut hoſpites* had been omitted in the agreement, yet it would have been underſtood the ſame thing; therefore the inſerting of them will make no alteration. 2 *Saund.* 373. *Tate v. Lewin*, and *Stile* 163. *Johnſon v. Abington*, prove it. And judgment was given for the plaintiff by the whole court, *viz.* the judgment of the Common Pleas was affirmed.

Green *verſ.* Young.

S. C. 2 Salk. 444. If the government lay an embargo upon a ſhip, and afterwards ſeiſe her, and convert her into a fireſhip, the inſurers are liable.

Deviation.

IN evidence upon the trial in an action upon a policy of inſurance the caſe appeared to be, that the inſurers agreed to inſure the ſhip from her arrival at   in *Jamaica* during her voyage to *London*; and an embargo was laid upon the ſhip by the government; and afterwards they ſeiſed the ſhip, and converted her into a fireſhip, and offered to pay the owners. And the queſtion was, if this would excuſe the inſurers? And *Holt* chief juſtice ſeemed to incline, that it would not, and that this was within the words, detention of princes, &c. but he gave no abſolute opinion, becauſe the cauſe was referred to the three foremen of the jury. In the ſame caſe he ſaid, that if a policy of aſſurance be made to begin from the departure of the ſhip from *England*, until, &c. and after the departure damage happens, &c. and then the ſhip deviates; though the policy is diſcharged from the time of the deviation, yet for the damages ſuſtained before the deviation, the inſurers ſhall make ſatisfaction to the inſured.

Tilly *verſ.* Richardſon.

S. C. 1 Salk. 97. Far. 120. 7 Mod. 8 Mod. 79. Error upon a judgment of the Common Pleas, bail put in after error in parliament ought to be new bail.

Not putting in bail does not hinder the proceeding of the other court.

RIchardſon brought an action againſt *Tilly* warden of the priſon of the *Fleet in C. B.* for a debt due to him from *Tilly*, and recovered there; upon which *Tilly* brought a writ of error upon the judgment of the Common Pleas returnable *in B. R.* to which bail was put in, and the judgment of the Common Pleas was affirmed. Then *Tilly* brought another writ of error upon the judgment of the King's Bench, returnable in parliament. And Mr. *Broderick* moved, that the laſt writ of error might be allowed without putting in bail; becauſe the bail upon the firſt writ of error was ſufficient to ſecure the plaintiff for what damages he might ſuffer by the delay, and for his coſts. And he ſaid, that this caſe was not within the ſtatute, which requires bail upon error. *Sed curia contra*, That new bail muſt be put in; for the King's Bench cannot take notice, whether bail was put in in the Common Pleas or not. For if no bail was put in there, yet the King's Bench would proceed upon the writ of error; becauſe the not giving bail does not hinder the proceedings upon the writ of error, but only hinders the writ of error from being a *ſuperſedeas* to the execution.

Peers

Peers *verſ.* Henriques.

Intr. *Mich.* 1 *Ann.* B. R. Rot. 46.

Aſſumpſit upon ſeveral promiſes, one of which was upon an *inſimul computaſſet* for 101 *l.* &c. As to 95 *l.* the defendant pleaded a good plea in bar, &c. but omitted to give an anſwer to the reſidue. Upon which the plaintiff replied, and offered an iſſue to the matter pleaded in bar. The defendant demurred. And *per curiam*, the whole is diſcontinued; for the plaintiff ſhould have taken judgment by *nil dicit* for that which was omitted in the plea in bar. But Mr. *Eyre* for the plaintiff objected, that the defendant could not ſever the 101 *l.* in his plea; becauſe it was in an *inſimul computaſſet*, which was intire. But *per Holt* chief juſtice, notwithſtanding that, the defendant might plead payment to part, and other matter to the reſidue.

S C. Farr. 124. 7 Mod. Plea to part only, the plaintiff demurs, it is a diſcontinuance.

Bennett *verſ.* Verdun.

Indebitatus aſſumpſit for money *Hiſpaniolae.* 10 Mod 315, 11 Mod. 196. Jenk. 296, pl 49. Hob 88. pl. 116. 3 Lev. 110. A man cannot join an action in his own right, and alſo as executor. 1 Salk. 10. p. 1. Show. 366. Carth. 335, 336. 10 Mod. 170. *Hooker v. Quilter*, *Trin.* 21 Geo. 2. S.P.

Indebitatus aſſumpſit, for that, that the defendant being indebted to the plaintiff in 28 *l.* of money *Hiſpaniolae*, *aſſumpſit* to pay it, &c. Upon *non aſſumpſit* pleaded, the verdict was for the plaintiff. And Mr. *Branthwaite* moved in arreſt of judgment, that the plaintiff ought to have ſaid, *ad valorem*, &c. it being foreign coin. For the defendant cannot be indebted in foreign coin, no more than in hogs, &c. *Sed non allocatur.* For a man may be indebted in hogs, &c. but in ſuch caſe the action muſt be brought in the *detinet* only, not in the *debet* and *detinet*. Farther, there is a verdict here, and therefore all the court held it good. But afterwards judgment was arreſted, becauſe the plaintiff brought this action for money due to himſelf in his own right, and alſo for another ſum in another count due to him as executor to *J. S.* which cannot be joined.

Hart *verſ.* Langfitt.

S.C. Far. 148. 7 Mod. *Indebitatus aſſumpſit* for nurſing a ſtranger.

Indebitatus aſſumpſit upon ſeveral promiſes. There were eight counts in the declaration. As to four the defendant pleaded *non aſſumpſit*; and as to the other four the defendant demurred, by the advice of Mr. ſerjeant *Agar*. And the firſt exception that Mr. *Raymond* took to the firſt count was, that it was an *indebitatus aſſumpſit*, for that, that the defendant being indebted to the plaintiff

in

Count repugnant.

in 20*l.* *pro nutriendo cujuſdam Edvardi Langfitt infantis* by the plaintiff at the requeſt of the defendant, he aſſumed to pay; and that an action would well lie upon a collateral promiſe, but not *indebitatus aſſumpſit*, becauſe it will not raiſe a debt. And to prove that, he cited *Moor* 701. *pl.* 975. *Indebitatus aſſumpſit*, in conſideration that the plaintiff would ſell to *D.* the defendant's factor, at the inſtance of the defendant, two hundred hogs to the uſe of the defendant; adjudged, debt did not lie, in error brought. *Cro. Car.* 107, 193. and 1 *Roll. Abr.* 549. *lit. F. pl.* 2 *Cogan v. Green.* 2 *Ventr.* 36. *Rozer v. Rozer. Sed non allocatur.* For *per totam curiam*, it will raiſe a debt; for if *A.* comes into the ſhop of *B.* and ſays to him, deliver ſuch goods to *C.* and I will pay you; this will raiſe a debt in *A.* and *C.* is not to pay for the goods, nor is he liable to *B.* for it is a gift from *A.* to *C.* and a debt for them from *A.* to *B.* And the caſes cited depend upon a repugnancy in the declaration, for the declaration is of a ſale to a third perſon, and he is liable; and the defendant is only a guarrantee, and it is only a collateral promiſe in him. And as to the caſe in *Cro. Car.* 193. *Sands v. Trevilian* (by which authority ſerjeant *Agar* was induced to demur) *Holt* ſaid, that the attorney had a remedy againſt the party for whom he acted, notwithſtanding that he was imployed by the defendant. The exception to the three other counts was, that they were for the ſame time of nurſing, and yet he declared upon ſeveral agreements, *viz.* one for three ſhillings a week, another for two ſhillings and ſix pence a week, another for two ſhillings, and he has not ſaid [other]; and it appears, that they were for the very ſame weeks. And the court held this exception good, becauſe the one count falſified the others, and the plaintiff has contradicted himſelf. But upon the firſt count judgment was given for the plaintiff. See *Moor* 864. *pl.* 1193.

Regina *verſ.* Whiſtler & al'.

S. C. 2 Salk. 542.
Farreſ. 129.
7 Mod.
Conviction of aiding and aſſiſting men in deer-ſtealing, upon 3 & 4 Will. & Mar. cap. 10.
Foſter 121 to 131, 126, 127, 343, 360, 361, 362, 364, 368, 369, 372, 373, 374.

ROlſe, *Stone*, and *Whiſtler*, were convict upon the 3 & 4 *Will. & Mar. cap.* 10. made againſt deer-ſtealers, *viz.* *Rolſe* and *Stone*, for the killing of five deer in the park of Sir *Cecil Biſhop*, and *Whiſtler*, for that, that he *fuit illicite et injuſte auxilians et aſſiſtens Rolſe et Stone in occiſione damarum illarum in incitando et perſuadendo Rolſe et Stone* to kill the ſaid deer, *et accommodando eiſdem Rolſe et Stone equum et canem* for the ſaid purpoſe. This conviction was removed into the King's Bench by *certiorari*, and exceptions were taken to it by the council at the bar. And they were argued ſeveral times by Mr. *Mountague*, *&c.* for the defendant, and by Mr. *Broderick*, Mr. *Cheſhyre*, *&c.* for the Queen. And the grand queſtion was, whether the defendant *Whiſtler* was convict of any offenſe within the ſaid act of parliament? And now this term the judges pronounced their opinions in ſolemn arguments, *viz. Powell*, *Powys*, and *Gould* juſtices, that the conviction was good, and ought to be affirmed; and *Holt* chief juſtice, that it was bad, and ought to be quaſhed. *Gould* juſtice declared the reaſon of his opinion to be, 1. Becauſe the defendant was included within the words of the act, aiding or aſſiſting therein. 2. Becauſe (by him) if the ſaid words had been omitted; yet ſince in treſpaſs all perſons concerned are principals, the defendant ſhould be included within the words, hunt and kill. And as to the firſt he ſaid, that if the words of the act had been, aiding or aſſiſting thereto, the defendant without doubt had been compriſed within ſuch words: then the word Therein has the ſame import as Thereto; and therefore that he was compriſed within the words of the act. Beſides which he ſaid, that it is apparent, that ſuch offenders as the defendant are within the intention of the act; and that appears from the preamble of the ſtatute, which recites, that there were confederacies of ſuch perſons, and that they indemniſied their aſſociates; and then the ſtatute enacts, that ſuch perſons offending in ſuch manner, ſhall forfeit, *&c.* That is to ſay, that ſuch perſons, who are in confederacy and combination, and by ſuch means aiding and aſſiſting, *&c.* And as well he, as *Powys*, relied much upon the intent of the act. And *Gould* juſtice farther ſaid, that he relied much upon the word Such in the act, which couples the body of the act with the preamble, and makes it of equal extent. As upon the ſtatute of 34 *Hen.* 8. *cap.* 20. which diſables donees in tail of the gift of the King from barring their iſſues by common recovery, the word Such in the body of the act refers to the preamble, and includes all like caſes, that is to ſay, which are ſuch in the miſchief and inconvenience. 2 *Co.* 14. *b. Co. Lit.* 373. So where the act of 23 *Hen.* 8. *cap.* 1. takes away clergy from ſeveral offenders; and among them from burglars, robbers upon the highway, and burners of houſes; and then the 25 *Hen.* 8. *cap.* 3. among other things takes away clergy from burglars, and robbers upon the highway, who do the act in one county and then fly into another county, and are there taken with the mainer and indicted; and then the ſtatute 1 *Edw.* 6. *cap.* 12. enumerating ſeveral offenſes, takes away clergy from them, but omits burners of houſes, and the caſe of burglars and robbers in one county who fly into another; and by a general clauſe reſtores clergy to all other offenſes, *&c.* by which means clergy was reſtored in the two caſes before; and then 5 *&* 6 *Edw.* 6. *cap.* 10. reciting the ſeveral ſtatutes before mentioned, and farther the inconvenience that clergy was reſtored in the caſe of burglary, *&c.* committed in one county where the offender fled and was convict in another county, which they could not have had, if the ſaid act of 25 *Hen.* 8. *cap.* 3. had been in

Therein and Thereto the ſame.

Expoſition of Such.

force; it is therefore enacted, that the ſaid act of 25 *Hen.* 8. touching the taking away of clergy from ſuch offenders, touching ſuch offenſes from thenceforth to be done, ſhould ſtand in full force: theſe words, ſuch offenders, and ſuch offenſes, muſt be interpreted ſuch in miſchief and inconvenience, and will extend, to take away clergy from burners of houſes, notwithſtanding the particular recital of the ſaid particular inconvenience, 11 *Co.* 33. *Alexander Poulter*'s caſe. And the ſtatute 5 & 6 *Edw.* 6. is a penal ſtatute. And for the ſame reaſon here the abettors, procurers and aiders, though abſent, being equally miſchievous and of ill conſequence with thoſe who do the act, they muſt be taken to be within the ſtatute; eſpecially ſince the word Aid in its natural extent includes perſons abſent, who counſel, abet, *&c.* as 2 *Inſt.* 192. explains it. 2. By him, if the ſaid words had been omitted, the defendant had been within the words, hunt and kill; for in treſpaſs, where all are principals, he who abets the doing of a fact, is the doer of the fact. So in treaſon, 12 *Co.* 81. There is no difference between this caſe and felony, unleſs that in felony there may be acceſſories; for it is a rule, that when a ſtatute makes a fact felony, which was not ſo before, all the acceſſories before and after the fact are felons, 3 *Inſt.* 17. and conſequently in a law where there cannot be acceſſories, they muſt be principals. And he, as well as *Powys* juſtice, relied ſtrongly upon 13 *Hen.* 7. 12, 13. where it is held, that the requeſting of another to hunt is a hunting within 3 *Edw.* 1. *cap.* 20. *de malefactoribus in parcis*; for the commanders ſhall be treſpaſſers, as well as the very treſpaſſers; and yet it is a penal law, which ſhall not be taken by equity. 2 *Inſt.* 199. And *Powis* juſtice was of the ſame opinion with *Gould* juſtice, though upon the arguments he was ſtrongly of another opinion. And he founded his opinion principally upon the intent of the act, as is ſaid before in the argument of *Gould* juſtice. *Powell* juſtice differed from his brothers, in their conſtruction made by the preamble. For (by him) being a penal law, it cannot be taken by equity. But he was of opinion that this conviction was good, because the defendant was comprehended within the very words of the act. For (by him) he is is a hunter, killer, *&c.* in conſtruction of law; and upon iſſue joined, whether he was ſuch or not, this evidence ſhewn in the conviction would maintain that he was. And (by him) the diſtinction made, where the penalty is annexed to the offenſe, and where to the perſon offending, which governs the caſe of *Evans* v. *Finch*, *Cro. Car.* 473. is nice; for whereas the ſtatute of *Weſtm.* 2. *cap.* 34. enacts, that if a man raviſhes a woman, *&c.* he ſhall be a felon; nevertheleſs the perſons aiding and abetting are raviſhers, and yet there is nothing that can be more a perſonal act than that; the ſame law of a woman aiding, though ſhe is incapable of doing the fact. So upon the act of 3 *Hen.* 7. *cap.* 2. which makes the

Penal law not taken by equity.

taking of a woman with force and marrying her, to be felony; though by the ſaid act the acceſſories before the fact are made principals, yet perſons aiding and abetting the raviſher after the fact are felons. So upon the ſtatute *de malefactoribus in parcis*, which is a penal law, and by which the penalty is annexed to the perſons, as here, miſdoers in parks and ponds, *&c.* The firſt caſe upon the ſaid ſtatute was 30 *Edw.* 1. 10. where it was adjudged, that no treſpaſs was within the ſaid act, unleſs it was a treſpaſs in hunting. The next caſe was the 5 *Hen.* 5. 1. where the breaking the park with intent to hunt was adjudged to be within the ſtatute. Then follows the 13 *Hen.* 7. 12, 13. where it is reſolved, that the requeſting of another to hunt is a hunting within the ſtatute. Alſo where the 30 *Hen.* 8. *cap.* 12. makes ſuch perſons as enter the parks of the king or prince, with painted faces, or kill the deer there, felons, by a proviſo in the ſame act it is enacted, that no perſons ſhall be adjudged acceſſories, but thoſe who ſhall abet or procure ſuch offenſe to be done: which was provided to exempt acceſſories after the fact, from being felons, as otherwiſe they would have been, notwithſtanding that the perſon offending was made the felon. For it is always a rule, where a fact is made felony, that all perſons aiding and abetting to it ſhall be acceſſories, whether it be, that the offenſe is made felony, or the perſons offending felons. And for the ſame reaſon the procurer in treſpaſs ſhall be principal, ſince there is no acceſſory in treſpaſs. As to the objection, that the caſe of *Finch v. Evans, Cro. Car.* 473. and *Page v. Harwood, Alleyn* 43, 44. make this difference, where clergy is taken away from the offenſe, and where from the perſon offending, and in this caſe the penalty is confined to the perſon actually doing the fact; he anſwered, that the ſaid caſes being caſes of life, the judges in favour of life conſtrued the ſtatutes tenderly; otherwiſe it ſeems abſurd, to take away clergy from him who was upon the top of the ladder, and give it to him that was at the bottom; for if both had entred the room, and one of them had had the money in his cuſtody at the requeſt of the other, both of them would have been deprived of their clergy. And as to the caſe of *Page v. Harwood* he ſaid, that it ſeemed to him, that the offenſe conſiſted in the manner of doing of it, becauſe the *Scots* carried ſhort daggers, and frequently upon differences ariſing at table, *&c.* ſtabbed others unprovided. But in the ſaid caſe if *A.* had given the dagger to *B.* it ſeems, that *B.* would have been within the act. But (by him) the ſaid reſolutions being in caſes of life, they will not be rules, to govern caſes of ſmaller crimes. He concluded, that ſince in caſes of all penal laws, as in thoſe which make felonies, aiders and aſſiſters are included, *a fortiori* it ſhall be accordingly in caſes of treſpaſs, where ſuch perſons are principals, and where

Raſt. tit. Foreſt.

where the law not being ſo penal, there is not ſo much reaſon to make a ſtrict conſtruction.

But *Holt* chief juſtice delivered his opinion, that the conviction was not good within the ſtatute, and therefore that it ought to be quaſhed. For (by him) this is a penal ſtatute, and therefore ought not to be conſtrued by equity; but in making conſtruction one muſt adhere to the letter, and one cannot extend it to facts equally criminal with thoſe ſpecified in the letter, if they are not contained in it. That this act is penal, appears by the penalty inflicted by it, by the ſubjecting of offenders to a new method of proſecution before a private juriſdiction contrary to the ancient liberties of *Engliſhmen* confirmed to them by *Magna Charta*, to be tried by their peers. Now this act does not inflict any penalty upon the confederates concerned in the offenſe. It is true, the preamble recites, that there were combinations, *&c.* but the enacting part of the ſtatute does not inflict any penalty, but has made the offenſe very penal to the actors, perhaps by reaſon of theſe confederacies. But ſince the act has not inflicted puniſhment upon them, we ought not. For one may imagine with great reaſon, that ſince the ſtatute mentions confederates, and does not inflict puniſhment, that it did not intend that they ſhould be puniſhed, but only the actors. The words of the act are, aiders and aſſiſters therein. Now that is the actors themſelves; and if the act had intended confederates, it would have ſaid thereto. A man who provides a horſe to rob a park, is an aider of the fact, but not in the doing of the fact. In an indictmment againſt the abettor they always ſay, that he was *præſens comfortans et auxilians, &c.* but in the indictment of the acceſſory they ſay, that he before the fact *conſuluit, mandavit, procuravit, et abbettavit*; or that he after the fact *recepit, auxiliavit, et comfortavit:* and by the firſt they mean aiders and aſſiſters; therefore if a ſtatute takes away clergy from aiders and abettors, yet acceſſories ſhall have their clergy. See this difference in the indictment of an abettor and an acceſſory, *Dier* 186.

Penal ſtatutes are to be conſtrued according to the letter, and not according to equity.

Indictment againſt abettors.

Indictment againſt acceſſories.

Clergy taken away from aiders and abettors does not take it from acceſſories.

Objection. That this offenſe is of an inferior nature, and therefore all are principals.

Anſwer. If the penalty had been inflicted upon all the treſpaſſers, it had included all, becauſe all are included within the denomination of treſpaſſers. But here the penalty is inflicted upon perſons by a particular deſcription; and that is the true reaſon of the caſes adjudged upon the ſtatute *de malefactoribus in parcis*, becauſe the penalty is there inflicted upon the treſpaſſers in parks, *&c.* which compriſes all. But if the ſaid ſtatute had impoſed a penalty upon the hunters and chaſers, &c. or any other offender by particular deſcription; no body had been within the ſaid ſtatute, but thoſe particularly deſcribed. And he relied ſtrongly upon the caſe of *Evans* and *Finch*, as ſtrong in point, which he had ſeen upon the roll; and he put it at large as it is there, which agrees with the report of it in *Cro. Car.* 473. *Evans* went up a ladder to the window of Mr. *Audley*'s chamber, and broke it, and took out 40 *l.* *Finch* ſtood watching at the foot of the ladder, and aſſiſted the doing of the felony: it was held, that *Finch* ſhould have his clergy notwithſtanding the 39 *Eliz. cap.* 15. which takes away clergy from men convict of the felonious taking of goods, &c. of the value of 5 *s.* &c. out of any manſion houſe, &c. no perſon being in it. Now *Evans* and *Finch* were principals in the felony; but becauſe clergy was not taken away from the offenſe, but from the perſon taking, &c. the ſtatute was reſtrained to the letter, *viz.* to the perſons actually taking. But if clergy had been taken away from the offenſe, as in caſe of robbery upon the high way; he who ſtood at the end of the way, to watch, ſhall not have his clergy, no more than he who actually did the robbery.

Objection. If a fact, which at common law was but treſpaſs, be made felony; or if felony be made treaſon; the procurers are felons or traitors: and by parity of reaſon they ought to be included within this law.

Anſwer. That in the caſes cited the nature of the crime is altered, and it is made a crime of another ſpecies; and therefore the perſons concerned in it cannot be treſpaſſors or felons, but felons or traitors. He cited alſo the caſe of *Page and Harwood*, as a caſe founded upon the ſame reaſon as that of *Finch and Evans*, and corroborating it. Therefore the ſtatute in the preſent caſe deſcribing particularly, what perſons ſhall be puniſhed, *viz.* courſers, hunters, &c. it ſhall not be extended to any perſon, who cannot be compriſed within the deſcription, within which (as is aforeſaid) the defendant is not. He was of opinion, that the conviction ought to have been quaſhed. But by the opinion of the other three judges it was confirmed.

Foxworthy's Caſe.

S. C. Farr. 153.
2 Salk. 500.
7 Mod.
A man pleading a pardon ſhall not be charged with an action.
T. Raym. 370.
5 Rep. 50.

See the remark on this case in next. C.

Foxworthy being attainted of felony, was brought into the King's Bench, in order to plead a pardon granted him by the Queen, upon condition that he ſhould go beyond the ſea within a time prefixed, and there abide, &c. And after allowance of the pardon, the creditors of *Foxworthy* moved the King's Bench, that they might have leave to charge him with civil actions, as *in cuſtodia mareſcalli marreſcalciae*. But the motion was denied by the court, becauſe it would defeat the effect of the Queen's pardon, by rendring *Foxworthy* incapable of performing the condition of going beyond the ſea; and if he had not been pardoned, the attainder would have continued, and *Foxworthy* had been hanged: and there is no reaſon, why the pardon ſhould put the creditors in a better condition than they would have been without it, to the prejudice of the party for the benefit of whom it was granted.

Regina *verſ.* Chalice, mayor of Thetford.

S. C. 1 Salk. 192.
6 Mod. 25.
Acts of record, as a return of a *mandamus*, &c. will bind a corporation, tho' they are not under their common ſeal.
10 Rep. 68.
Mo. 676. pl. 920.
1 Leon. 184.
1 Ro. Rep. 82.

A *Mandamus* was directed to the corporation of *Thetford*, to command them to reſtore an alderman. To which a return was made in the name of the corporation, but not under their common ſeal, nor under the hand of the mayor. Upon which the party grieved, having brought his action for a falſe return, and fearing that he ſhould not have ſufficient evidence, to prove that this return was made by the corporation, moved by Mr. *Sloane* (who promoted this diſpute, the ſucceſs of his election to be burgeſs there depending much upon it) the laſt day of this term, that this return ſhould not be received without the ſeal of the corporation, or a ſigning by the mayor. But it was denied *per curiam*. For upon ſearch of precedents, there are many returns made by corporations as here. And *per curiam*, the ſeal of the corporation is not neceſſary to be affixed; becauſe this act being upon record, will bind the corporation, though not ſealed with their common ſeal; *contra* of acts done by them *in pais*. The city of *London* every year make a warrant of attorney for the city in the King's Bench, without ſigning or ſealing it. And if an action be brought againſt the corporation, they will be eſtopped to ſay, that this was not their return, becauſe it is ſaid, *Reſponſio majoris*, &c. upon record. They held alſo, that the mayor is not obliged to ſubſcribe his name; for at common law no officers were obliged to ſign their returns. The ſtatute of *York* obliges ſheriffs, to ſign their returns; but it does not extend to any other officers. And if the mayor procure a falſe return to be made, it will be ſufficient evidence againſt him, that the *mandamus* was delivered to him, and that the *mandamus* has ſuch a return made; and that will be preſumptive againſt him, that he made that return, unleſs he ſhews the contrary. For the mayor, or any other member of the corporation, or other, who ſhall procure a falſe return to be made, are liable in their private capacity. See *Enfield v. Hills*, 2 *Lev*. 236.

Bennett *verſ.* Purcell.

Intr. *Mich.* 1 *Ann.* B. R. Rot. 313.

IN caſe upon ſeveral promiſes brought againſt the defendant by the name of *Tobias Purcell armiger*, the defendant pleaded in abatement, that *Tobias Purcell verſus quem billa exhibita eſt per nomen Tobiae Purcell armigeri* is a gentleman, and not eſquire. The plaintiff replied, that the defendant *habitus et reputatus fuit* as well an eſquire as a gentleman; and then he goes on with a long hiſtory, that he was an eſquire *tam ratione dignitatis ſuae et parentelae ſed praeſertim digniſſimae occupationis*, &c. To which the defendant demurred. And Mr. *Broderick* for the defendant argued, that the plaintiff ought to have replied poſitively, that the defendant was an eſquire, and not a gentleman; and that the alleging it with a *habitus et reputatus fuit* was not good, becauſe the addition ought to be the true addition, and not maintained with a *habitus et reputatus*, &c. only. And *Powell* juſtice ſeemed to be of that opinion. But *Holt* chief juſtice held, that in theſe caſes the addition was only a deſcription of the perſon; and common reputation was ſufficient for it, the ſuit being by bill. But it would have been otherwiſe upon original, upon which proceſs of outlawry lies; becauſe the ſtatute of *Hen*. 5. requires an addition in ſuch caſe. And judgment was given, that the defendant anſwer over.

Where the ſuit is by bill, that the defendant is a gentleman and not an eſquire, is not pleadable in abatement.
12 Mod. 211.

26 Hen. 6. 54.
11 Hen. 6. 11. pl. 25.
19 Hen. 6. 51,

Odes *verſ.* Woodward. Ante 766.

UPON the report of Mr. *Clerk* the ſecondary this caſe appearing to be, as was ſaid before, 766. Mr. ſerjeant *Hooper*, &c. moved the court, that this judgment might be vacated; 1. Becauſe by the death of Dr. *Woodword* the authority was revoked, and ſo there was no warrant, to enter this judgment. 2. Becauſe ſince now the ſtatute of frauds, 29 *Car*. 2. *cap*. 3. has directed,

S. C. 2 Salk. 87.
Far. 2, 93.
A judgment entred againſt a man after his death as of a term precee-dent is good.

Revocation.

Execution after the death of the defendant.

Fine.

Rolls of the court.

directed, that the day of the ſigning of the judgment ſhall be entred upon the margin of the roll, it will appear upon the record, that the judgment was ſigned after the death of the defendant, and therefore cannot relate to the foregoing term. *Sed non allocatur.* For, *per curiam*, as to the objection of the revocation of the authority; a man, after he has given a warrant to enter a judgment, cannot revoke it by the courſe of the court; and if he endeavour to revoke it, yet notwithſtanding the court of King's Bench will give leave to the plaintiff, to enter the judgment. And as to the objection of ſigning, *&c.* that will not alter the caſe; becauſe the judgment, notwithſtanding the ſtatute of 29 *Car.* 2. will be a judgment of the preceeding term; though it will not affect purchaſers, but from the ſigning. And they held, that the practiſe, to enter judgments in a vacation as of the term preceedent, is undeniable, and they will be good judgments of the preceedent term. As if *A.* recovers judgment againſt *B. B.* dies in the vacation within the year; at the end of it *A.* may ſue a *fieri facias* as of the preceedent term, and levy the goods of *B.* in the hands of his executors. So if a fine be acknowledged before commiſſioners in the country in the long vacation, and before the next term the conuſor dies; though no writ of covenant was ſued, nor King's ſilver entred; yet the Common Pleas will permit the conuſee to enter the fine as of the *Trinity* term preceeding. But in this caſe upon inquiry it appeared, that the roll upon which the judgment was entred, was not brought into the office till after the eſſoin day of the ſubſequent term; and for that reaſon the court refuſed to permit the roll to be filed, ſince purchaſers or others might be prejudiced by it. And they held, that by the courſe of the court all rolls of the former term ought to be brought into the office before the eſſoin day of the ſubſequent term, and ought to be bound in the bundle of rolls of the former term; and that is the reaſon, why all acts before the eſſoin day of the ſubſequent term are looked upon as the acts of the term preceedent. And a roll cannot be brought in and filed with *poſt terminum* without leave of the court.

Wenmouth *verſ.* Collins.

Suit in the Spiritual Court for brawling in the belfrey.

MR. *Robert Eyre* moved, to have a prohibition granted to the eccleſiaſtical court, to ſtay a ſuit there againſt *Wenmouth*, for brawling in the belfrey, and ſtriking a man there, upon ſuggeſtion of the ſtatute of 5 & 6 *Ed.* 6. *cap.* 4. and alleging, that all ſtatutes are conſtruable by the common law, and that *Wenmouth* came there as mayor to ſuppreſs a riot. But the court *(abſente Holt* chief juſtice) denied a prohibition, becauſe this offenſe was conuſable in the eccleſiaſtical court before this ſtatute, *ratione loci*; and that the ſtatute, though it provides a penalty, does not alter the juriſdiction. But see Co. Litt. 96. b.

Hollingſhead's caſe.

Hollingſhead was brought into the King's Bench upon a *habeas corpus*; and the return was, that ſhe was committed by commiſſioners of bankrupts, for refuſing to be examined by them; and the concluſion of the warrant of commitment was, that ſhe ſhould remain in cuſtody, until ſhe ſhould be otherwiſe diſcharged by due courſe of law. And by reaſon of this concluſion the court held the commitment to be ill, and diſcharged the defendant; becauſe the power given by the ſtatute 1 *Jac.* 1. *cap.* 15. is to commit the party, until he ſubmit himſelf to the commiſſioners, and ſhall be by them examined. And there is no mention made, of being diſcharged by due courſe of law. And for this exception *Bracy*, committed for ſuch account, was diſcharged. *Mich.* 8 *Will.* 3. 1696. *Ante*, 99.

S. C. 1 Salk. 351.
Commitment by commiſſioners of bankrupts.
Carth. 153.
5 Mod. 308.

Geery *verſ.* Hopkins.

THE plaintiff brought an action againſt the defendant for money received to his uſe, and upon other promiſes. And the queſtion aroſe upon the acceptance of one of Mr. *Shepherd* the goldſmith's notes, who was become bankrupt, *&c.* And notice for trial being given, Mr. *Raymond* moved, 1. For a *habeas corpus ad teſtificandum*, to bring *Shepherd* out of the *Marſhalſea*, where he was in execution, to *Guildhall*; which was granted. 2. To have a rule, that the caſh book of the old *Eaſt India* company, kept by their treaſurer, and alſo their transfer-book, and alſo a note of acceptance of 1000 *l.* Bank-ſtock ſigned by the defendant, kept by the accountant of the company, ſhould be brought to the trial at the plaintiff's expenſe. And it was granted. For *per Holt* chief juſtice, if the Bank deal in transfer of their ſtock, and that cannot be done by any other means than by entry made in their books, it is very reaſonable that they ſhould be produced for the benefit of the party, as well as corporation books, *&c.*

S. C. Farr. 129.
7 Mod.
Books of the *Eaſt India* company produced.
Habeas corpus ad teſtificandum.

Bird *verſ.* Major.

UPON an iſſue directed in Chancery, to be tried before the lord chief juſtice *Holt* for his opinion, the caſe upon the trial before him at *Guildhall* the ſitting after this term appeared to be thus. A ſcrivener, who was not liable to be a bankrupt before the

Scrivener bankrupt.

the ſtatute of 21 *Jac.* 1. *cap.* 19. committed an act, which was made an act of bankruptcy by the ſtatute of 1 *Jac.* 1. *cap.* 15. *viz.* abſconding, *&c.* and he had alſo a ſhare in the Stationers company. And the queſtion was, whether he was not a bankrupt by that? And *Holt* chief juſtice held, that ſince the 21 *Jac.* 1. *cap.* 19. had made a ſcrivener liable to be a bankrupt, it had ſubjected him to all the old acts, which by the former ſtatutes made a man a bankrupt, as well as to the acts mentioned in the ſtatute of 21 *Jac.* 1. *cap.* 19. But as to the ſhare in the Stationers company, he ſeemed to incline, that that would not make him a bankrupt. See for that the 13 & 14 *Car.* 2. *cap.* 24. where it enacts, that the having a ſhare in the *Eaſt India* company, *&c.* will not make a man bankrupt. And a judgment given to the contrary in 1653 was by the ſaid act declared illegal. But the lord keeper held the ſcrivener to be a bankrupt by both the points. Upon the importunity of the council it was reſerved as a caſe, as to both points, for the farther conſideration of the chief juſtice.

Share in the Stationers company.

See the late ſtatute.

Puered *verſ.* Duncombe.

Where the bond is admitted, and need not be produced in evidence upon a trial, the plaintiff has no need to produce a ſpecification.

DEBT upon bond of 1400*l.* The defendant pleaded the ſtatute of uſury. And upon the trial of it, iſſue being joined, before *Trevor* chief juſtice of the Common Pleas, the ſitting after this term at *Weſtminſter*, the queſtion was, whether the plaintiff ſhould be compelled to give in evidence a ſpecification? And this point was reſerved for his opinion at his chambers. Where afterwards it was argued by ſerjeant *Hooper* for the plaintiff, and by Mr. *Raymond* for the defendant. And he held clearly the negative: becauſe the bond was admitted by the plea; and where the party is not bound to give the bond in evidence, he is not bound to give in evidence the ſpecification. And the *poſtea* was delivered to the plaintiff.

Eaſter Term

2 Annae reginae, B. R. 1703.

Weſt *verſ.* Sutton.

Intr. *Hil.* 1 *Ann.* B. R. Rot. 504.

S. C. 1 Salk. 2, 4, 274. *Poſt.* 1243. Farr. 51, 53, 105. 1 Vent. 210. Co. Lit 126. Dier 121. 1 Sid. 182. Comb. 86, 311. Cro. El. 283, P. 7. 573. pl. 20. Co. Lit. 303.

THE plaintiff ſued a *ſcire facias* upon a judgment in aſſiſe obtained againſt the defendant, for the office of marſhal of the King's Bench. The defendant pleaded in abatement, that the plaintiff was an alien enemy, *&c.* The plaintiff replied, that he was *indigena*, born at *Weſtminſter*, *et hoc paratus eſt verificare.* The defendant demurred, and ſhewed for cauſe, that the plaintiff ought to have concluded his replication to the country. And of that opinion was *Holt* chief juſtice, becauſe every plea concerning the perſon pleaded in abatement, is triable where the action is brought; but where ſuch plea is pleaded in bar of the action, the *venue* ſhall be alleged, and it ſhall conclude with an averment; becauſe ſuch plea is not to the perſon, but pleaded to the right. But by the whole court the plea is ill, becauſe this matter ought to have been pleaded in the original action. For now the plaintiff being admitted to be able to recover judgment, he cannot be diſabled from having execution upon it by matter precedent to the judgment. And therefore *reſpondes ouſter* was awarded. Then the defendant pleaded in bar to the *ſcire facias*, that after the judgment obtained by the plaintiff, the defendant waived the poſſeſſion, and the plaintiff entred, and made a leaſe of it for five years to the defendant, *&c.* The plaintiff replied, *proteſtando* that he was never ſeiſed of it ſince the judgment, for plea he ſaid, that the defendant always continued in poſſeſſion, *abſque hoc* that he waived it, *&c.* The defendant demurred. And adjudged for the plaintiff; 1. Becauſe a leaſe made by a man before entry after recovery is void. 2. This being an office, the demiſe by parol is void. Mr. *Mountague* for the defendant took exception to the writ of *ſcire facias*, becauſe it being grounded upon a judgment

Alien pleaded in abatement, if the plaintiff reply that he is *indigena*, he ought to conclude to the country. See 6 Mod. 57, 91.

Alien nee not pleadable in *ſcire facias* upon a judgment.

Leaſe made after recovery before entry is void.

3 Salk. 320. *Scire facias* upon a judgment in aſſiſe returnable at *Weſtminſter* at a day certain is good.

ment in an aſſiſe, which is an original, ought to have been returnable *ubicunque*; whereas this was returnable at a day certain. But *per Holt* chief juſtice, it is good the one way or the other. Judgment for the plaintiff.

Regina *verſ.* Summers.

S. C. 1 Salk. 55. If the defendant has been before the maſter, and coſts taxed, the proſecutor ſhall not move to aggravate the fine.

UPON a motion to aggravate the fine after the defendant, being convict of a riot and treſpaſs, had been before the maſter, and coſts had been taxed, the court ſaid, that this motion was not regular, after the defendant had been before the maſter, and the proſecutor had been conſidered by him in coſts. And therefore they ſaid, that if Mr. *Eyre*, who moved it, inſiſted to have the fine aggravated, they would ſet aſide the coſts taxed.

Adams *verſ.* terretenants of Savage.

Intr. *Mich.* 13 *Will.* 3. B. R. Rot. 318, or 168.

S. C. 1 Salk. 40. 2 Salk. 679, 680 6 Mod. 134, 199, 226. Lill Ent. 398. Upon a leaſe and releaſe by A. a uſe was limited to *A.* tenant for 99 years, remainder to truſtees for 25 years, remainder to the heirs male of the body of *A.* remainder to his right heirs; *A.* not having iſſue, is ſeiſed in fee.

A *Scire facias* was ſued by the plaintiff as adminiſtrator to *J. S.* upon adminiſtration granted to him by the archdeacon of *Dorſet*, upon a judgment recovered by the inteſtate againſt *Savage* in this court. And the iſſue after pleading was, whether *Savage* was ſeiſed of the lands, *&c.* in fee? Upon which the jury found a ſpecial verdict, that *Savage* being ſeiſed in fee, conveyed the lands by leaſe and releaſe to truſtees and their heirs, to the uſe of himſelf for ninety-nine years, if he ſhould ſo long live, remainder to the truſtees for twenty-five years, remainder to the heirs male of his body, remainder to his own right heirs. And the queſtion was, if *Savage* during his life, not having heirs male of his body, ſhould have a uſe reſult to him for his life, and ſo become tenant in tail in poſſeſſion; or if no uſe could reſult, and then there being no freehold to ſupport the contingent remainder to the heirs male of the body of *Savage*, the ſaid remainder would be void, and *Savage* ſeiſed in fee as before. And this was argued by Mr. *Eyre* for the plaintiff, and by Mr. ſerjeant *Darnall* for the defendant, *Hilary* term laſt and this term. And the court held, that no uſe could reſult to *Savage* during his life, and therefore the remainder to the heirs male was void, and *Savage* ſeiſed in fee. And their reaſons were, becauſe the limitations to himſelf for ninety-nine years, and to the truſtees for twenty-five years, and the heirs male, were new uſes and new eſtates. As if a man by leaſe and releaſe, or by covenant to ſtand ſeiſed, limit the uſe to himſelf for life, or in tail, theſe are new eſtates, and not parcel of the old eſtate, according to 7 *Co.* 13. *b.* *Englefield*'s caſe. And where in ſuch caſe upon a conveyance ſuch uſes are limited, as (ſuppoſing the limitations to be good) would paſs the whole eſtate, there no uſe will reſult contrary to the expreſs limitations of the party.† But if the limitations are void, the conveyance of neceſſity will fail. If a man ſeiſed in fee conveys his eſtate by leaſe and releaſe to the uſe of himſelf for life, remainder to truſtees for their lives, remainder to the heirs of his body; he hath an eſtate tail in him, but he is but tenant for life in poſſeſſion: otherwiſe, if there had been no intermediate eſtate in the truſtees for their lives. And in the former caſe, if a man makes a feoffment, it is no diſcontinuance, but only diveſts the eſtate. And for the ſame reaſon in this caſe, where the firſt limitation is only for years, the remainder to the heirs of the body of the tenant for years is a contingent remainder, and void. Theſe are the reaſons of the chief juſtice *Holt*.

Where a uſe will reſult.

† But the earl of Bedford's case Abr. 2. Ans. 197. seems contra.

And *Powell* juſtice ſaid, that there was a difference, where the limitation was upon a covenant to ſtand ſeiſed, and where upon a leaſe and releaſe. For where the limitations are to take effect out of the eſtate of the covenantor, there if the limitations were ſuch as could not take effect immediately, or not till after the death of the covenantor, as in the caſe of *Pybus v. Midford*, 2 *Lev.* 75. there the law may mould the eſtate remaining in the covenantor into an eſtate for life: but that cannot be where the limitations are to take effect out of the eſtate of the truſtees for want of a limitation, much leſs againſt an expreſs limitation. And therefore (by him) if there had been an expreſs limitation in the caſe of *Pybus v. Midford*, limited to the covenantor, the judgment would have been otherwiſe. And for theſe reaſons the whole court ordered laſt *Hilary* term, that judgment ſhould be entred for the plaintiff, unleſs cauſe ſhould be ſhewn to the contrary the firſt day of this term. And the firſt day of this term *Darnall* Queen's ſerjeant ſhewed for cauſe, that the plaintiff could not have judgment, becauſe it appeared upon the *ſcire facias* that he was not intituled to it; becauſe the adminiſtration was granted to him by the archdeacon of *Dorſet*, and therefore the grant of it was void; for the judgment of this court, upon which the *ſcire facias* is founded, is *bona notabilia*. 2. If it will not make *bona notabilia*, yet this grant of adminiſtration will be void *quoad* this judgment, becauſe it lies out of the limits of the juriſdiction of the archdeacon of *Dorſet*. Againſt which it was urged by Mr. *Eyre* for the plaintiff, that this court cannot take notice of the boundaries of dioceſes; and it may be, that this court is within the archdeaconry of *Dorſet*, for that archdeaconry may be within the dioceſe of *London*; and this court will not intend the contrary, ſince the contrary does not appear

Difference between a limitation upon a covenant to ſtand ſeiſed, and upon a leaſe and releaſe.

Note that in Penhay & Hurrel's case 2. Freem. 307. & 326. this difference is denied by Powell & the Lord Chancellor, & it was held that there was a resulting use equally in both cases suffic.t to support the contingent rem.rs. See my note on Vernon's report of Penhay & Hurrell in 2. Vern. 372. See the 3d point in Hopkins v. Hopkins 1. Atk. 595.

Grant of adminiſtration by the archdeacon of *Dorſet* is void *quoad* a judgment of the King's Bench.

The King's Bench will take notice of eccleſiaſtical juriſdiction.

appear to them. But *per Holt* chief juſtice, this court will take notice of the limits of eccleſiaſtical juriſdiction, which is part of the law of the realm, under which we live; and conſequently it will take notice, that a judgment of the King's Bench is not within the juriſdiction of the archdeacon of *Dorſet*. And for this reaſon the whole court held, that judgment ought to be given for the defendant.

Regina *verſ.* Watſon.

Tenant at will muſt repair as to the publick.

THE defendant *Watſon* was indicted, for that that he was ſuch a day poſſeſſed of a houſe in *Lynn Regis* adjoining to the common bridge; that he ought to repair the ſaid houſe *ratione tenurae*; but that he permitted it to be ſo much out of repair, that it was ready to fall upon the Queen's ſubjects paſſing over the ſaid bridge, *&c.* Upon not guilty pleaded, the jury found a ſpecial verdict; that *Watſon* was but tenant at will of the ſaid houſe, and conclude with a ſpecial concluſion, praying the judgment of the court, whether he were obliged *ratione tenurae*, to repair the houſe. And after argument by Mr. *Mountague* for the defendant, and by Mr. *Weld* for the Queen, it was adjudged, that the defendant, as tenant at will only, ought to repair the houſe, ſo that the publick be not prejudiced by the want of repairs; but that he is not compellable to repair as to his landlord. And that is ſhewn well enough in this indictment. The only objection is, that he is not chargeable to repair *ratione tenurae*; but though that is improper, yet it ſhall be intended of the poſſeſſion, and not of a ſervice. And judgment was given againſt the defendant.

Poſt. 1091.

See Moor 103.

Turner *verſ.* Turner.

Intr. *Mich.* 1 *Ann.* B. R. Rot. 207.

S. C. 1 Salk. 177, 179. Lilly Entr. 13.

Diſcontinuance denied to be granted after judgment *niſi*, *&c.*

1 Lev. 48, 192, 298.

DEBT upon bond. The defendant pleaded the compoſition act. And after demurrer joined, exceptions were taken to the plea, and all over-ruled; upon which judgment, *niſi*, *&c.* was given for the defendant. Whereupon Mr. *Mountague* moved to have leave to diſcontinue; and cited for it 1 *Saund.* 39. 2 *Saund.* 73. and 1 *Saund.* 23. leave given to diſcontinue after argument of the council at the bar, and of the judges upon the bench. But the motion was denied, *abſente Powell* juſtice. Becauſe after a rule for judgment, *niſi*, *&c.* and then a peremptory rule for judgment (as was in this caſe) *Holt* chief juſtice ſaid, he never knew leave given to diſcontinue. And the rule in the old books is, that if after the exception ſtirred, the court has pronounced their opinion, and yet the plaintiff demurs; he does it at his peril: and if the exception be over-ruled, judgment ſhall be given againſt him.

Morris *verſ.* Sir Richard Reynolds.

S. C. 1 Salk. 73.
Arbitrators choſen by conſent, and upon a ſubmiſſion by rule of court, ordered to attend, &c.
3 Keb. 446.

SErjeant *Darnall* moved, that an award made by arbitrators choſen by the conſent of the parties at *niſi prius* at *Guildhall*, and whoſe ſubmiſſion was made by rule of court there, and afterwards the ſaid rule made a rule of the King's Bench, might be ſet aſide, upon *affidavit* of the miſmanagement of the arbitrators, and that they refuſed to hear what the defendant could ſay, after they had heard the plaintiff. *Holt* chief juſtice oppoſed this *totis viribus* as contrary to all practiſe, that he had known in his experience; which was, that in ſuch caſe the integrity of the arbitrators (whom the parties by conſent have choſen to be their judges) ſhall never be arraigned, no more than the integrity of any other judge. But *Powell*, *Powys*, and *Gould*, juſtices ſaid, that it was abominable, to give any countenance to ſuch proceedings; and that therefore they ought to be puniſhed, becauſe they abuſed the office of a judge. And a rule was made that they ſhould attend. And the examination was made in court by *affidavit* of all their proceedings. And upon that great miſmanagement appeared to be among them.

Regina *verſ.* Cave.

Indictment for words.

MR. *Broderick* moved, that an indictment found againſt the defendant, for ſpeaking theſe words of the proſecutor *John Bradſhaw in auditu quamplurimorum, viz.* That he had made an aſſault upon *Priſcilla Tinſdale*, and had carnally known her, without the conſent of the ſaid *Priſcilla Tinſdale*; with intent to procure money from the ſaid proſecutor; ſhould be quaſhed: becauſe it was not matter, for which an indictment lies. And it was quaſhed accordingly.

Regina

Regina *verſ.* Kime.

S. C. 1 Salk. 357. Indictment for not repairing ſtreets in *London* upon 22 & 23 Car. 2. cap. 17. ſect. 6.

AN indictment was found againſt the defendant, for not working in the repair of the highways in *London*, upon the 22 & 23 *Car.* 2. *cap.* 17. *ſect.* 6. Upon not guilty pleaded, he was found guilty. And it was moved in arreſt of judgment, that it was ſaid in the indictment only, that ſix days were appointed between ſuch and ſuch days for the work, but the particular days were not mentioned. And for this reaſon the court held the indictment bad, for the appointment ought to be of ſuch days in particular, *viz.* the twentieth of *April*, *&c.* and notice ought to be given accordingly; otherwiſe the appointment is ill. And though it was objected by ſerjeant *Darnall*, that it was aided by the averment in the indictment, that the defendant did not come upon any of the days; yet it was over-ruled, becauſe if the appointment was ill, the defendant was not obliged to come at all. And the judgment was arreſted.

Regina *verſ.* Chaffey.

S. C. 3 Salk. 66.
Order to ſeiſe goods of the reputed father of a baſtard, *&c.*
See Shaw's Pariſh Law, cap. 37. ſ. 29.

SEveral orders made by the juſtices of peace in *Wilts*, againſt the defendant, for being the putative father of a baſtard child, were removed into the King's Bench by *certiorari*. And Mr. *Broderick* moved, to quaſh one of them, which was made by the juſtices, that the church-wardens and overſeers of the poor ſhould ſeiſe of the defendant's goods, what they ſhould judge proper, to ſecure the pariſh from the maintenance of the child; becauſe by the 13 & 14 *Car.* 2. *cap.* 12. they have only authority to make an order, to empower the church-wardens and overſeers, *&c.* to ſeiſe, what the juſtices ſhould judge proper, and not what the church-wardens, *&c.* ſhould judge proper, *&c.* And for this reaſon it was quaſhed. Then an exception was taken to the original order, becauſe it ordered, that the defendant ſhould give ſecurity for payment of the ſum by them impoſed for the maintenance of the child; when it did not appear, that the defendant had diſobeyed the order in point of payment. And by 18 *Eliz. cap.* 3. an order for ſecurity cannot be made till after contempt. And for this reaſon the order was quaſhed as to that part, and was confirmed as to the reſidue. And *per curiam*, when an order is confirmed in this court, an attachment lies for non-performance of it; and therefore this court will not take ſecurity of the party for performance of it. But if the original order had been at the ſeſſions, not removed hither, the court would have taken ſecurity of him, to appear there.

Order cannot be made for ſecurity till after contempt.
Attachment for not obeying an order of the King's Bench.

Lapiere *verſ.* Sir John Germain knight and baronet and the ducheſs of Norfolk.

S. C. 1 Salk. 50. 3, 47. Amendment. 2 Salk. 451.

IN caſe againſt the defendants, Sir *John* in the declaration was ſued only by the title of baronet. The defendant pleaded in abatement, that he was knight and baronet. The plaintiff replied that he was baronet *tantum*, and offered iſſue; which was joined. And thereupon Mr. *Raymond* moved, to have leave to amend upon payment of coſts, and to make the declaration [knight and baronet] all being in paper. But it was denied, becauſe there was nothing by which this amendment could be made, the *latitat* not being ſo. And though all was in paper, yet the defendant had taken advantage of this ſlip. And therefore the court would not make a rule for the amendment. Then Mr. *Raymond* was informed, that the *latitat* was knight only; and therefore he prayed leave, to make the declaration agreeable to the *latitat*; urging that the omiſſion of baronet in this caſe, being a ſuit by bill, was not material; becauſe baronet is not part of the name, as knight is. And ſuits by bill are not within the ſtatute of additions. And *Powell* juſtice ſeemed to be of that opinion, ſaying that the books warrant ſuch a difference. And he cited 32 *Hen.* 6. 30. *a.* which ſays, that a baron has no need to be named but as knight or eſquire in a writ. *Holt* chief juſtice agreed with the ſaid caſe, but ſaid that the reaſon of it was, that then barons were ſo by tenure, and were ſummoned to parliament by writ; and were not then created by letters patent, as at this day: but that then the law was otherwiſe of titles of dignity, as of earl, which was part of the name. And now it is otherwiſe of barons, when they are created by letters patent; for now it is a title of dignity, and parcel of the name. The ſame law of baronet, which is made a title of dignity by letters patent, and therefore a baronet ought to be named ſo in all judicial proceedings, otherwiſe they will abate. And it is no objection, that it is a new title; for ſo is viſcount, begun in the time of *Henry* 6. marquis in the time of *Richard* 2. and duke in *Edward* 3. And though they are new titles, they ſhall be named ſo in all proceedings againſt them. Then he moved, that the bill might be abated for their own expedition. And it was granted.

Baronet is part of the name.

Tonkin *verſ.* Crocker.

Intr. *Mich.* 12 *Will.* 3. B. R. Rot. 269.

S.C. also Ald. Rep. 41.

S. C. Lutw. 1211.
2 Salk. 604.
Carth 520.
12 Mod. 369.
Vide Co. Lit. 70, 83 & 107.
3 Lev. 21.
4 Rep. 8, 9, &c.

ERROR *C. B. Tonkin* brought replevin of a braſs pan taken by the defendant in a place called *The kitchin apud parochiam St. Agnes in Cornwal.* The defendants as bailiffs of *William Mohun* Eſquire make conuſance of the taking, *&c.* for that that they ſay, that before the time, *&c.* one *Hugh Tonkin* eſquire was ſeiſed of one meſuage, *&c.* whereof the place, *&c.* is, and the ſame time which, *&c.* was parcel, in fee; and that he held the ſaid meſuage, *&c.* of the ſaid *William Mohun ut de manerio ſuo de M.* by fealty, rent of 4 *s. per annum, necnon per ſervitium faciendi ſectam* ad *curiam manerii praedicti bis per annum apud manerium illud tenendam, &c.* whereof the ſaid *William Mohun* was ſeiſed, *&c.* and for 4 *s.* for the rent aforeſaid for one year ended *Michaelmas* 5 *Will. & Mar.* arrear, and for that that the ſuit of court at the court of the ſaid *William Mohun manerii ſui praedicti* within the manor aforeſaid the twenty-fourth of *October* 5 *Will. & Mar.* for the manor aforeſaid held *fuit infecta*, they make conuſance of the taking, *&c.* The plaintiff in bar of the conuſance, *proteſtando* that *William Mohun* was not ſeiſed of the ſaid ſervices, *&c.* for plea ſaith, that the ſaid *Hugh Tonkin* held the ſaid meſuage, *&c.* of the ſaid *William Mohun ut de manerio ſuo de M. praedicto per redditum quatuor ſolidorum, &c. abſque hoc* that he held by the rent of 4 *s. necnon per ſervitium faciendi ſectam ad curiam manerii praedicti bis per annum apud manerium praedictum, prout* it is alleged in the conuſance, *&c.* And to this bar the defendants replied, and maintained their conuſance, and offered an iſſue. And the plaintiff joined iſſue, and at the trial at *niſi prius* the jury find a ſpecial verdict, that long time before the time, *&c.* the manor of *M.* within mentioned was an ancient manor, whereof the ſaid *William Mohun* is, and at the time in which, *&c.* was ſeiſed in fee; and that time whereof, *&c.* there was an ancient court held before the ſteward of the manor *bis per annum, et habuit ſeparales liberos tenentes, Anglice* freehold tenants, *et ſeparales ſectatores, Anglice* ſuitors, who did ſuit at the court aforeſaid of the ſaid manor; and that the ſaid *Hugh Tonkin* and all his anceſtors were freehold tenants of the ſaid manor, and held the ſaid meſuage, *&c.* of the ſaid *William Mohun* and his predeceſſors, lords of the ſaid manor of *M.* by fealty, and 4 *s.* rent every year at the feaſt of *St. Michael* the archangel *ſolvendum, necnon per ſervitium faciendi ſectam ad curiam manerii praedicti bis per annum apud manerium illud tenendam prout in advocatione infraſcripta interius mentionatur:* and the jurors farther find, that within the ſaid manor of *M.* there is, and for twenty years laſt paſt there hath been, *unus ſolummodo liber tenens, viz.* the ſaid *Hugh Tonkin*; but that *infraſcripto tempore quo, &c. necnon* time whereof, *&c.* there were and now are ſeveral cuſtomary tenants, *&c.* of the ſaid manor: then they find, that for rent and ſervices in arrear the defendants as bailiffs of the ſaid *William Mohun* at the time in which, *&c.* took, *&c. ſed ſi ſuper totam materiam praedictam* the aforeſaid *Hugh Tonkin* held, *&c.* by fealty, rent, and ſuit of court, *&c.* the ſaid jurors know not, but pray the advice of the court, *et ſi, &c.* And after ſeveral arguments at the bar *in C. B.* judgment was given for the defendants; upon which a writ of error was brought by the plaintiff, and the general errors were aſſigned. And it was argued at the bar ſeveral times by *Darnall* King's ſerjeant, Mr. *Broderick*, and Mr. *Raymond* for the plaintiff in error, and by Mr. *Cooper* King's council, Mr. *Cheſhyre*, and Mr. *Parker* for the defendants in error. And the firſt objection was, that the tenure found in the verdict varies in its nature, from that which the conuſance mentions, and conſequently that the verdict does not maintain the iſſue; and therefore the judgment, being given for the defendants, is erroneous, and ought to be reverſed. And the reaſons upon which the plaintiff's council founded this objection were, becauſe the ſuit to the court mentioned in the conuſance muſt be intended to be ſuit to the court baron, tenure at common law; but the ſuit to the court found by the verdict is cuſtomary tenure, becauſe it is ſuit to the cuſtomary court. *Curia manerii* muſt be intended to be a court-baron. It is the peculiar ſtile of the court. 4 *Inſt.* 268. *Co. Li.* 58. It is the deſcription of a court-baron in the writ framed upon *Magna Charta* for affeering amercements impoſed in a court-baron. *Fitzh. Nat. Bre.* 76. *d. quod ipſos tenentes cum in curia ejuſdem manerii in miſericordiam inciderint, &c.* and this is the court, which is incident of common right to all manors. Farther if the court mentioned in the conuſance ſhall be taken to be another court than the court-baron, *viz.* a cuſtomary court; then the conuſance is ill, for want of making title to it by preſcription. For the law takes no notice of any cuſtomary court, without a preſcription ſhewn to warrant it. And the defendants cannot juſtify the taking of a diſtreſs for ſuit to ſuch a court, without a cuſtom alſo ſhewn to diſtrain for it. For though a diſtreſs is incident of common right to all manner of ſervices, *Litt. ſect.* 226. *Co. Li.* 150. *b.* and conſequently to ſuit of court; yet for ſuit to a cuſtomary court, diſtreſs will not be incident without a cuſtom. And he likened it to the caſe of herriots, where for herriot ſervice the lord may diſtrain, 8 *Hen.* 7. 10. *Cro. Car.* 260. but for herriot cuſtom he cannot diſtrain; but may ſeiſe the beſt beaſt though out of his fee. *Gouldsb.* 97. And for theſe reaſons they urged, that this court mentioned in the conuſance muſt be intended a court-baron; but the court found in the verdict is a cuſtomary court, and may be good by preſcription, but is not the court-baron incident to every manor of common right, 1. Becauſe it is held before the ſteward, whereas the court baron is held before the ſuitors. *Co. Lit.* 5, 8. *Cro. Eliz.* 792. 4 *Co.* 26. And as to the caſe of *T. Jones* 23. to the contrary, it is an obſcure caſe, and an unneceſſary reſolution there. And *Cro. Eliz.* 791. *Noy* 20. *Pill v. Towers. Cro. Jac.* 582. Sir *William Armyn v. Appletoffe*, are expreſs, that the court-baron cannot be held before the ſteward by preſcription. 2. A preſcription is found for the court found by the verdict, but a man cannot preſcribe for a court-baron. It is ill pleading to do it, *Noy* 20. becauſe it is incident to the manor of common right. 3. A court-baron muſt be held from three weeks to three weeks, *Co. Litt.* 58. but this in the verdict can be held but twice in the year; therefore this court in the verdict may be good by preſcription; as *Co. Entr.* 118. though the court ought to be held from three weeks to three weeks; or like that in *Leon.* 216. *Lord Cobham and Brown*'s caſe. But it cannot be a court-baron; and conſequently the ſuit in the verdict differs from that in the conuſance. It was argued farther, that if it ſhould be admitted, that it was not neceſſary, to make title to the court in the conuſance; yet they ſhould have ſhewn ſome characteriſtical diſtinction, to ſhew that they did not mean the court-baron, otherwiſe it ſhall be taken to be the court-baron at common law, and then it cannot be maintained in evidence by ſhewing a cuſtomary court. For where a man intitles himſelf generally by common law, he cannot make it good in his replication or rejoinder by cuſtom. As *Keilw.* 76. *A.* charged *B.* in account generally as bailiff; the evidence was, that there was a cuſtom to elect one, &c. to ſerve as bailiff *ratione tenurae*, who was to collect the rents, &c. upon demurrer to the evidence it was held, that the evidence did not maintain the declaration. And ſeveral other caſes were cited, to prove the ſaid rule, *Cro. Jac.* 551. *Loder v. Somnell. Co. Li.* 304. *Dier* 291. *Cro. Jac.* 583. 1 *Anderſ.* 192. *pl.* 227. *Moor* 271. *pl.* 425. *Ewer v. Aſhwick. Moor* 679. *Gregory v. Harriſon. Cro. Eliz.* 462. *Wells v. Partridge.* 1 *Sid.* 142. *Mould v. Wallis.* The defendant's council relied ſo much upon the finding of the verdict, that they did not regard this objection. But though the court pronounced their judgment for another reaſon, as ſhall be ſaid afterwards, yet *Holt* chief juſtice, though he did not give an abſolute opinion, ſaid it ſeemed to him, that the avowry was well enough; becauſe the ſuit claimed in the conuſance, being ſuit to the court of the manor *bis per annum*, it ſhews that the ſuit muſt be intended ſuit to ſome other court of the manor, and not to the court-baron, which ought to be held from three weeks to three weeks; and conſequently may well be intended, to be ſuit to the court held before the ſteward, and found in the verdict. And ſuch courts to be held before the ſteward are good by cuſtom. 1 *Leon.* 316. [And ſo *Powell* juſtice ſaid that it was held by all the court of the Common Pleas in this caſe.] And ſuch courts are held in ſeveral honours and manors at this day, to inquire of the rents and ſervices arrear to the lord; and they are good. And this ſhall be intended to be ſuch a court. And the ſuit to this court muſt be intended to be a ſervice created by reſervation upon a gift of the land by the lord to the tenant before the ſtatute of *Quia emptores terrarum*, as 12 *Hen.* 7. 18. Replevin, the defendant avowed for ſuit to a court-leet, for that that the plaintiff held twenty acres of land, to do ſuit twice a year at the view of frankpledge of the defendant; and it was objected, that ſuit to his view of frankpledge generally ſhould be intended ſuit real (which is due from the reſiants only) and the plaintiff lived out of the juriſdiction of the court, and not ſuit-ſervice: but the court held, that it ſhould be ſuit-ſervice; and that it was reſerved upon the gift of the land, to oblige the tenant to attend there, to be ſworn upon inqueſts, to preſent common nuſances, &c. and the rather, becauſe ſuit real, which is to be ſworn to the King for his allegiance, ought to be done but once in a man's life; and therefore ſuit twice a year cannot be intended to be that. And here this avowry is advantageous to the tenant, becauſe it acquits him of the ſervice to the court-baron to be held from three weeks to three weeks. He agreed the rule, that upon a declaration grounded upon a fact at common law one cannot maintain it by replication of a cuſtom or ſtatute; as in covenant upon an indenture of apprenticeſhip, the defendant pleads infancy, &c. the plaintiff cannot maintain his declaration, by ſaying, that there is a cuſtom, that infants may bind themſelves, &c. But he ſeemed to deny the caſe in *Keilw.* 76. ſuppoſing that it had appeared by the book, that the defendant there had exerciſed the office of bailiff, &c. and then it would not have been material, by what means he had become bailiff, but he might have been charged generally. But the next day, finding that it did not appear by the book that he acted as bailiff; he declared in court, that for that reaſon the ſaid caſe was good law, for then they ought to ſhew, by what means the defendant became bailiff.

Court held before the ſteward good by cuſtom.

Declaration at common law cannot be made good by replication of a cuſtom.

Account againſt a bailiff, if he acts, there is no need to ſhew how bailiff.

2. It was argued by the council for the plaintiff in error, that admitting, that the court would intend the ſervice in the conuſance, and that in the verdict, to be the ſame; yet it appeared by the verdict, that the manor is deſtroyed; and if there is no manor, there is no court; if no court, no ſuit can be due to it. And for this they urged, that the manor was deſtroyed, becauſe there was

but one ſuitor, and the court cannot be held, but before two ſuitors at leaſt. *Bro. compriſe* 31. *Bro. manor* 1. 2 *Roll. Abr.* 122, 124. *lit. R. pl.* 26. *Co. Lit.* 58. *Yelv.* 191. And the manor cannot ſubſiſt without a court-baron, becauſe if the freeholds eſcheat to the lord all but one, or if he purchaſe all but one, the manor is extinct. That ſuit ſervice cannot multiply, 2 *Inſt.* 119. and if the lord purchaſe the intire ſuit of court, it is extinct. 46 *Edw.* 3. 40. 2 *Inſt.* 120. That it is found poſitively, that there has been but one free ſuitor for twenty years laſt paſt; that the verdict being ſpecial ſhall not be aided by intendment; and therefore that it ſhall not be intended, that any of the other freeholds are only ſuſpended, and that ſo the tenure remains, and the manor continues.

Two ſuitors to continue a manor.

Two ſuitors, one makes a leaſe for life.

But *per Holt* chief juſtice there muſt be two ſuitors at leaſt to continue the manor, for without two no court can be held. But in this caſe the jury have expreſsly found, that this was a manor. The queſtion then will be, whether it appears to be deſtroyed. And (by him) it does not. For ſuppoſe, that there were two ſuitors, one of them makes a leaſe for life; the leſſee for life does not hold of the lord, but of the reverſioner, and he holds of the lord; and then for that time there is but one free ſuitor. The manor ſeems to be ſuſpended *pro tempore*, but the ſuit-ſervice remains notwithſtanding the ſuſpenſion. As where lands held by homage are granted to a corporation aggregate, the tenure remains, though the corporation cannot do homage; and if the corporation grant it over, the homage will revive. Farther the iſſue is, whether *Hugh Tonkin* held by rent, ſuit of court, *&c.* which is not confined to any time; and the jury have found expreſsly a time, when he held ſo, *viz.* before the twenty years laſt paſt. And therefore he ſeemed to be of opinion, that this objection would not avail here.

A jury cannot find againſt what the defendant admits in his bar.

But againſt this it was alſo objected by the defendant's council, that the plaintiff had admitted this to be a manor in his bar to the conuſance; and therefore that the jury could not find matter contrary to what the parties have admitted upon record, 2 *Co.* 4. *Goddard'* caſe, and the books there cited. 2 *Leon.* 80. 2 *Mod.* 2, 4. *Wilcox*'s caſe. But to this it was anſwered by the plaintiff's council, 1. That the admiſſion was only in the inducement to the traverſe, which is no material part of the plea, and therefore will not conclude. 2. It is admitted but by an *ut de manerio*, *&c.* which is not a poſitive averment. 3. That the jury are not concluded from finding the truth of the fact, where it is directly within their iſſue, and when they cannot find the iſſue without conſideration of it; but that the other rule is to be underſtood, where they find matter admitted by the parties upon the record, which is not within their iſſue, ſuch finding is void, not becauſe it is contrary to what the parties have admitted, but becauſe it is not compriſed in the iſſue. And upon ſearch, the books cited in 2 *Co.* 4. will receive this anſwer. But that the jury may find the truth in ſuch caſe, though contrary to the admiſſion of the parties, Mr. *Raymond* cited 2 *Brownl.* 149. *Higgins v. Biddlecome*, ſtrong in point; for there the parties admitted that Sir *William L.* was ſeiſed, yet the jury found expreſly contrary, and held good. And *Holt* chief juſtice upon the firſt argument of this caſe ſeemed to incline to this opinion, but gave no opinion in it, becauſe the whole court held, that the jury had found the iſſue for the defendants *in totidem verbis, viz.* that the ſaid *Hugh Tonkin* and his anceſtors were freehold tenants of the ſaid manor, and held the ſaid meſſuage, *&c.* of the ſaid *William Mohun, &c.* by fealty and rent of 4 *s. &c. necnon per ſervitium faciendi ſectam ad curiam manerii praedicti bis per annum apud manerium illud tenendam prout in advocatione infraſcripta interius mentionatur*; and then what was found afterwards was ſurpluſage and idle. And therefore all the judges were clear in opinion that the judgment ought to be affirmed. And it was ſo. See for this laſt point *Cro. Car.* 75. 131, *&c.*

The jury find the iſſue, all that is found afterwards to the contrary is void.

Regina *verſ.* Parry, Snelling & al'.

A Motion was made, for quaſhing an indictment againſt the defendants, for having pretended to be officers in the land bank, and for having cheated *J. S.* of 14 *l.* and for having pretended to aſſiſt him in procuring an office of meſſenger, whereas there was not any ſuch office, *&c.* But it was denied, becauſe it is a cheat; and the defendant, if he imagines that the law is with him, may demur.

Indictment for being a cheat.

Elwes executrix Elwes *verſ.* Mocata.

S. C. Salk. 314.
Farr. 48.
7 Mod.
8 Mod. 108.
Vent. 109.
1 Salk. 207.
6 Mod. 93.

THE plaintiff brought *indebitatus aſſumpſit* for monies received after the death of the teſtator by the defendant, to the uſe of the plaintiff as executrix, *&c.* Upon *non aſſumpſit* pleaded, the plaintiff was nonſuit. And now ſhe brought a new action. And the defendant moved to have coſts, before the plaintiff ſhould be permitted to proceed. And 1 *Ventr.* 109. *Cro. Car.* 219. *Atkey v. Heard*, were cited; where an adminiſtratrix nonſuit in *trover* brought by her upon a converſion in her own time paid coſts. And here ſhe might have ſued, without naming herſelf executrix. But denied *per curiam.* For in *trover* ſhe might have ſued, with-

out

Coſts by adminiſtrator on a nonſuit.

Contra adjudged Hil. 10 Will 3. C. B. Nicolas v. Killigrew. Ante, 436. and Mich 4 Ann. B. R. Wallis v. Lewis. Poſt.

out naming herſelf executrix, if the goods were once in her poſſeſſion; but otherwiſe in this caſe, for theſe debts are not *aſſets* till recovered. Note, Mr. *Raymond* cited for the plaintiff *Cro Jac.* 361. *Barrett v. Winchcomb, Yelv.* 168. *Cro. Jac.* 229. *Hayworth v. David.* 1 *Ventr.* 92. 2 *Lev.* 165. *T. Jones* 47. *Bull v. Palmer. Cro. Car.* 29. *Beacock's caſe.* 3 *Lev.* 60. *Maſon v. Jackſon.* See *Hill.* 10 *Will.* 3. *C. B. Nicolas v. Killigrew. Ante*, 436. But note, that in another action between theſe parties the plaintiff paid coſts for not going on to trial according to notice.

Yorke *verſ.* Grenaugh.

Intr. *Trin.* 1 *Ann.* B. R. Rot. 527.

S. C. 1 Salk. 388. 1 Bulſt. 170. 1 Roll. Abr. 3 (D) pl. 3. Noy 126. Cro. Jac. 188.

REplevin of a gelding taken by the defendant the firſt of *April* 13 *Will.* 3. *apud parochiam ſancti Jacobi infra libertatem de Weſtminſter in quodam hoſpitio ibidem vocato The maidenhead and caſtle.* The defendant avows, for that that the ſaid inn, *&c. modo exiſtit necnon praedicto tempore, &c. et abinde hucuſque fuit commune hoſpitium pro hoſpitatione quarumcunque perſonarum et earum equorum, &c. hoſpitationem pro ſeipſis, equis, &c. ſuis in hoſpitio illo requirentium*; and the defendant further ſaith, that he for one whole year *ante praedictum tempus quo, &c. necnon eodem tempore quo, &c. fuit et adhunc exiſtit communis hoſpitator, viz. apud parochiam praedictam ac de communi hoſpitio praedicto in quo, &c. poſſeſſionatus ut de hoſpitio ipſius* the defendant *proprio*, and entertained there for all the ſaid time divers gueſts, *&c.* and that he being a common inn-keeper *ut praefertur*, before the ſaid time in which, *&c. viz.* the twenty-fifth of *March* 13 *Will.* 3. aforeſaid, *quidam viator eidem defendenti ignotus acceſſit* to the ſaid inn of the defendant *ducens ſecum ſpadonem praedictum in hoſpitium illud, quem quidem ſpadonem idem viator praedicto* the defendant *adtunc et ibidem deliberavit per* the ſaid defendant *in eodem hoſpitio fore pabulandum, ac praedictus* the defendant *adtunc et ibidem ad requiſitionem praedicti viatoris ſpadonem praedictum* in the ſaid common inn of the defendant *in quo, &c. ad cuſtodiendum et cum neceſſariis providendum recepit*; and the ſaid defendant ſtable, corn, hay, *&c.* for the ſaid gelding *juxta requiſitionem praedictam* from the ſaid twenty-fifth of *March* until the time in which, *&c. necnon uſque viceſimum diem Maii extunc proxime ſequentem, invenit ibidem, &c. quodque* 2*l.* 6*s.* 8*d. adtunc et ibidem, viz.* the twentieth of *May*, was a reaſonable price for the ſtabling, corn, hay, *&c.* of the gelding aforeſaid, and to the defendant was juſtly due, *&c.* and that he was not paid, neither by the traveller, nor by the plaintiff, nor by any other; and therefore he juſtifies the taking and detaining

ing, &c. The plaintiff pleads in bar of this avowry, that he the ſaid firſt of *April* demanded this gelding of the defendant, and that the defendant *adtunc nec ad aliquod tempus poſtea* demanded of the plaintiff any ſum for maintaining this gelding, &c. Upon which the defendant demurred, and the plaintiff joined in demurrer. And it was held by all, that the plea in bar was ill; for the inn-keeper may detain for the meat, &c. of the horſe, without making a demand. Beſides, that perhaps the defendant demanded the money due for the meat before the firſt of *April*; for the plea is, that he did not demand upon the firſt of *April*; but the horſe was there the twenty-fifth of *March*, and the money due for it before the firſt of *April*, might be demanded before the firſt of *April*, which is a good juſtification of the diſtreſs. But divers exceptions were taken by *Darnall* Queen's ſerjeant to the avowry. 1. That ſince the horſe was brought to the inn by a ſtranger, the inn-keeper cannot detain it for its meat againſt the right owner. For it may be, that this traveller was a wrong doer, or a robber. *Sed non allocatur.* For *per curiam*, ſuppoſing that this traveller was a robber, and had ſtolen this horſe; yet if he comes to an inn, and is a gueſt there, and delivers the horſe to the inn-keeper, (who does not know it) the inn-keeper is obliged to accept the horſe; and then it is very reaſonable, that he ſhall have a remedy for payment, which is by retainer. And he is not obliged to conſider, who is owner of the horſe, but whether he who brings him is his gueſt or not. And *Holt* chief juſtice cited the caſe of the *Exeter* carrier; where *A.* ſtole goods, and delivered them to the *Exeter* carrier, to be carried to *Exeter*, the right owner finding the goods in poſſeſſion of the carrier, demanded them of him, upon which the carrier refuſed to deliver, without being paid for the carriage. The owner brought *trover*, and it was held, that he might juſtify detaining againſt the right owner for the carriage; for when *A.* brought them to him, he was obliged to receive them and carry them; and therefore ſince the law compelled him to carry them, it will give him remedy for the premium due for the carriage. The ſame reaſon holds in this caſe. [But *Powell* juſtice ſaid, that a carrier could not detain for his carriage; but note the contrary has always been held by *Holt* chief juſtice at *Guildhall.*] 2. A ſecond exception was, that the avowant ought to have ſaid, *quod tenuit* the inn; now he has ſaid, that he was poſſeſſed of it, which may be true, and yet perhaps he did not keep it. That it is neceſſary to ſay, *quod tenuit*, 11 *Hen.* 4. 45. *Dier* 266. *Raſt. Entr.* 404, 5. *Co. Entr.* 377. *Sed non allocatur.* For it appears ſufficiently, that he kept it; for it is ſaid, *ut de hoſpitio ſuo proprio.* 3. There is an appearance, that the horſe ſtood at livery; for it is ſaid, that he was received at the requeſt of the traveller, which implies a ſpecial contract;

An inn-keeper may detain a horſe for his meat without a demand.

An inn-keeper may detain a horſe for meat, brought to him by a wrong doer, againſt the right owner.

3 Bulſtr. 269, 289.
1 Roll. Rep. 449.

A carrier may retain.

Ante 752.

Yelv. 67.

An inn keeper cannot juſtify the detaining a horſe for his meat, but of ſuch a gueſt as he is compelled to receive.

Yelv. 67.

A gueſt, what?

and then the defendant cannot detain. *Sed non allocatur.* For it implies no more than what happens, when any one comes into an inn, he commands ſome ſervant to take his horſe. 4. The fourth and grand exception was, that it is not ſufficiently ſhewn in the avowry, that this traveller was a gueſt. For if he was not ſuch a gueſt, as the inn-keeper was obliged to receive, though he received him, he cannot retain the horſe for the meat. Now the word *viator* does not ſufficiently deſcribe a traveller, but it ought to be *ibidem tranſiens.* 'For *viator* imports only a traveller who has been beyond the ſea, or an *apparitor.* To which Mr. *Eyre* for the defendant urged, that it ſignified a traveller. It was farther urged for the plaintiff, that perhaps this *viator* in paſſing by left the horſe, and did not enter into the inn himſelf, and that will not make him a gueſt. But Mr. ſerjeant *Darnall e contra* ſaid, that ſuch a one would be a gueſt; and that if in ſuch caſe the inn-keeper received the horſe, and he is loſt, he will be chargeable, and he may detain in ſuch caſe for the meat of the horſe. And for authorities, he relied upon the caſes, *Cro. Jac.* 188. *Noy* 46. *Moor* 877. *Latch* 126. *Poph.* 178. But as to this exception *Holt* chief juſtice held it good, and that for this fault the avowry was ill. For it may be in this caſe, the traveller ſtole the horſe, and brought him to the inn, and the defendant received him and gave him meat, but the traveller never lodged in the inn. Now that is rather the buſineſs of a man that keeps livery ſtables than of an inn-keeper. And though in ſuch caſe if the horſe be loſt, the livery man ſhall be anſwerable; yet he cannot retain for the meat, but has a remedy upon the contract; for he is not compellable to receive ſuch a horſe. And as to the difference taken in the caſe of *Robinſon v. Waller*, and the point reſolved there, he did not regard it, becauſe it was pleaded ſpecially in *trover*, whereas nothing can be pleaded ſpecially in *trover* but a releaſe. And (by him) it is the lodging of the man at the inn that makes him a gueſt; and nothing of that appears in this avowry, and therefore he held it ill. But all the other judges *contra*, that the avowry was good, relying upon the caſes of *Robinſon v. Waller*, and *Sturt v. Dumgold* cited before, which were adjudged upon the matter in law after ſeveral debates; no notice being taken of the fault in the plea, *viz.* that it amounted to the general iſſue. And (by them) if a man ſet his horſe at an inn, though he lodges in another place, that makes him a gueſt, and the inn-keeper is obliged to receive him; for the inn-keeper gains by the horſe, and therefore that makes the owner a gueſt, though he was abſent. *Contra* of goods left there by a man, becauſe the inn-keeper has no advantage by them. And they held, that ſince the matter ſhewn makes it appear that he was a gueſt; it is enough, though it is not expreſly averred, that he was a gueſt. But *Holt* chief juſtice *contra*, that this matter is but evidence of it, that he was a gueſt, and is not traverſable; but gueſt or not is the more material part of the avowry, and traverſable; and therefore there ought to have been a poſitive averment, that he was a gueſt. *Powell* juſtice ſaid, that there was no ſpecial demurrer in the caſe of *Robinſon v. Waller*, and therefore no advantage could be taken of it, that the plea amounted to the general iſſue, ſince it was but form. But *Holt* chief juſtice held it to be ill upon a general demurrer, becauſe the plea does not anſwer the converſion, which is the point of the action. But judgment was given by *Powell* and *Gould* juſtices, *abſente Powys* juſtice (though he was when it was argued before of the ſame opinion) for the avowant, *diſſentiente Holt* chief juſtice.

Plea amounting to the general iſſue aided by a general demurrer.

The next day a motion was made, that no judgment ſhould be entred, upon ſuggeſtion that the plaintiff had been dead three terms. The court agreed, that they might make ſuch a rule; but becauſe the plaintiff had appeared of this term by his attorney, they refuſed to make a rule in it, but left the executors to bring error. It would have been otherwiſe, if the plaintiff had not appeared by his attorney.

Judgment after the death of the plaintiff.

Ogle *verſ.* Norcliffe.

Intr. *Paſch.* 1 *Ann.* B. R. Rot. 380.

AN action upon a bill of exchange. The defendant pleaded in abatement, that he was clerk to one of the prothonotaries of the Common Pleas, and ought not to be ſued (except for treaſon or felony) in any other court than in the Common Pleas (and lays a cuſtom in the negative) without his conſent. The plaintiff replies, that the defendant conſented to be ſued in the King's Bench. The defendant demurs. And the bill was abated, becauſe the conſent intended in the plea is a waiver of the privilege by ſome act in a court of record. And as to the exception taken, that the cuſtom was laid in the negative, *Holt* chief juſtice ſaid, that it was a privilege due to the clerks of the Common Pleas of common right, of which the King's Bench will take notice. Otherwiſe perhaps it might be of the clerks of the Exchequer.

S. C. Farr 97.
Salk. 4.
7 Mod.
Privilege of *C. B.* muſt be waived by act in court of record.

The King's Bench will take notice of the privilege of the Common Pleas.

Rous *verſ.* Etherington.

Intr. *Hil.* 13 *Will.* 3. B. R. Rot. 593.

S. C. 1 Salk. 312. *Capias* againſt two executors, one is taken and a *cepi* returned, as to the other the ſheriff returns *non eſt inventus*, judgment againſt both. 1 Keb. 452, 743, 892.

AN action was brought againſt two defendants as executors, and a *capias* iſſued againſt both. As to one of them, it was returned *non eſt inventus*. The other appeared, and judgment was given againſt him by *nil dicit*, but it was entred againſt both. He who appeared brought a writ error, and concluded it *ad damnum ipſius*. Upon which, after ſeveral exceptions had been over-ruled as to being errors, Mr. *Broderick* moved, that the writ of error was ill, becauſe both the executors ought to have joined in it. And *per Holt* chief juſtice, by the ſtatute of 9 *Edw.* 3. *cap.* 3. if debt be ſued againſt ſeveral executors, and one appears, and the other makes default upon the great diſtreſs, the court may proceed againſt him that appeared, and if the plaintiff has judgment, it ſhall be againſt all the executors for the goods of the teſtator. And the 25 *Edw.* 3. *cap.* 17. which gives a *capias* in debt, has been always conſtrued, to be within the equity of the 9 *Edw.* 3. ſo that if there are ſeveral executors defendants, and a *cepi* is returned as to one, and *non ſunt inventi* to the others; the plaintiff may proceed againſt him that appears, and if he recover, he ſhall have judgment againſt all; for the default upon the *capias* is the ſame as upon the great diſtreſs; ſo judgment being againſt all, all ought to join in the writ of error; for the judgment is *ad grave damnum* of all; and the coſts, which are adjudged only againſt him that appeared, are but acceſſory to the principal judgment, which cannot be reverſed *quoad* them only. The writ of error was abated.

Both ought to join in error.

Rogers *verſ.* Rereſby.

S.C. 3 Salk. 8. Demiſe in ejectment after the action brought.

IN ejectment by original the declaration was general of *Michaelmas* term; the demiſe was laid to be the twentieth of *October*. After verdict for the plaintiff, Mr. *Southouſe* moved in arreſt of judgment, that the action was brought before any cauſe of action accrued, the twentieth of *October* being the eſſoin day of the term, and the firſt day of it in law. To which it was anſwered, that the ejectment and the action may be upon the ſame day. But yet (*per curiam*) this action being by original, it is very conſiſtent, becauſe the ejectment was in full term; yet it being a long term, a man may ſue an original *teſte* in full term, and returnable before the end of it. Then ſince it is poſſible that it may be well, the court will intend it after verdict. Farther, if it be a ſlip, advantage ſhould have been taken of it upon *oyer* of the original. And judgment was given for the plaintiff.

Jacky *verſ.* Butler.

TWO joint partners are in trade. Judgment was entred againſt one of them. And upon a *fieri facias* all the goods, being undivided, were ſeiſed in execution. And upon application to the King's Bench by him againſt whom the judgment was not, the court held, that the ſheriff could not ſell more than a moiety, for the property of the other moiety was not affected by the judgment, nor by the execution.

Judgment againſt one joint partner does not affect the other.
Show. 173.
1 Salk. 392.
2 Chan. Rep. 226.
Cumb. 217.
12 Mod. 446.

Regina *verſ.* Savill.

AN order made at the general quarter-ſeſſions at *Hertford*, that the defendant ſhould be proſecuted as a common barretor, and that the proſecution ſhould be at the charge of the county, being removed into the King's Bench by *certiorari*, was quaſhed, becauſe the juſtices have not power to charge the county with the coſts of ſuch a proſecution. And as to the objection made by Mr. *Comyns* in maintenance of the order, that by 43 *Eliz. cap.* 2. *par.* 15. the juſtices may diſpoſe of the ſurpluſage of the money levied for the poor for charitable purpoſes, and that this was ſuch; it was anſwered, that this was an original order to charge the county, and not an order of payment out of the ſurpluſage of ſtock raiſed.

S. C. 2 Salk. 605.
The juſtices at the quarter-ſeſſions cannot order a proſecution at the charge of the county.

Lucas *verſ.* Haynes.

TRover for a bill of exchange. Upon not guilty pleaded, at the trial at *Guildhall* before *Holt* chief juſtice, upon evidence the caſe appeared to be thus. *J. S.* drew a bill of exchange upon the defendant, payable to the plaintiff or order. The plaintiff indorſed his name upon it, and delivered it to *J. N.* who carried the bill to the defendant, and left it with him for acceptance. Afterwards the bill of exchange being loſt, the plaintiff brought *trover* for it, and produced *J. N.* as a witneſs, to prove the delivery of the bill to the defendant. And it was objected, that he ought not to be admitted as a witneſs, becauſe by the indorſement the property of the bill was veſted in him. But it was held by the King's Bench,

S. C. 1 Salk. 126, 128, 130.
Witneſs.
12 Mod. 192.

Bare indorſement of a bill of exchange with the name does not alter the property.

it being moved there, that the bare indorſement of a man's name upon a bill of exchange, without writing ſome words purporting an aſſignment, does not alter the property of the bill; for it may be filled up with a receipt of the money, or an aſſignment, at the election of the party that has the bill; and conſequently that *J. N.* was a good witneſs. Note, that the plaintiff had paid the money to *J. N.*

Clements *verſ.* Langharne.

Intr. *Mich.* 10 *Will.* 3. B. R. Rot. 414.

S. C. 3 Salk. 168.

Death before the return of the writ of covenant.

See 1 Barnes 141, 144, 145. and Supplement to Barnes fol. 32.

THE plaintiff brought a writ of error, to reverſe a fine levied in the grand ſeſſions in *Wales* in the county of *Pembroke*, as heir to the wife of the conuſor, the land being the land of the wife. And the error aſſigned was, that ſhe died before the return of the writ of covenant. Upon a *ſcire facias* againſt the terretenants, *&c.* the defendant was returned terretenant (who was alſo conuſee) and warned. And upon mentioning the error by Mr. *Raymond* to the court, the fine was reverſed without difficulty.

Curlewis *verſ.* Dudley.

S. C. 1 Salk. 179.

Debt *qui tam* in Middleſex lies *in B. R.*

Continuances are not entred *in B. R.* until the plea comes in.

IN debt upon 5 *Eliz. cap.* 4. for exerciſing a trade, without having ſerved five years as apprentice, upon demurrer to the declaration Mr. *Broderick* for the defendant took exception, 1. That the action was diſcontinued, becauſe the declaration was of *Michaelmas* term, and the plea roll of *Eaſter* term, and there is no continuance from *Michaelmas* term to *Hilary* term, and from thence to *Eaſter* term. *Sed non allocatur:* Becauſe by the courſe of the King's Bench they never enter continuances until the plea comes in, though the declaration was delivered four terms before. 2. A ſecond exception was, that debt does not lie in ſuch caſe in the King's Bench by 21 *Jac.* 1. *cap.* 4. *Sed non allocatur.* For the difference is, where the action is brought in *Middleſex*, and where in a foreign county. In the latter caſe debt does not lie in the King's Bench, but the remedy is before the juſtices of *oyer* and *terminer* by 21 *Jac.* 1. *cap.* 4. But otherwiſe it is, where the action is brought in the county where the King's Bench is; becauſe the King's Bench is a court of *oyer* and *terminer*. And the reſolution in the caſe of the King *v. Gall* was cited, which ſee before, 370. *Hil.* 10 *Will.* 3. *B. R.* Judgment was given in this caſe for the plaintiff.

Price *verſ.* comitem Torrington.

IN *indebitatus aſſumpſit* for beer ſold and delivered to the defendant, upon *non aſſumpſit* pleaded, at the trial at *Guildhall* before *Holt* chief juſtice, the evidence againſt the defendant was, that the uſual way of the plaintiff's trading was, that the drayman came every night to the plaintiff's clerk, and gave account to him of all the beer that he had delivered that day; and an entry was made of it in a book, which the drayman and clerk ſubſcribed; and that there was ſuch an entry of barrels of beer delivered to the defendant, *&c.* and that the drayman was dead, and the ſubſcription was proved to be of his writing. And *Holt* chief juſtice held this good evidence to charge the defendant. And a verdict was given againſt him, *&c.*

S. C. 1 Salk. 283, 285.
Evidence.
2 Salk. 690.
6 Mod. 264.

Broughton *verſ.* Langley.

Intr. *Trin.* 12 *Will.* 3. B. R. Rot. 414.

THE plaintiff *Humphry Broughton* brough tan ejectmeat againſt the defendant *Abraham Langley* upon a demiſe of three meſuages, twenty acres of land, *&c.* lying at *Hipperholme* cum *Briggbouſe* in the pariſh of *Halifax* in the county of *York*, made to the plaintiff for five years, to be computed from the firſt of *March* 12 *Will.* 3. *&c.* by *John Ramſden junior.* Upon not guilty pleaded, and a trial had before *Turton* juſtice, at the *Summer* aſſiſes held at *York* 12 *Will.* 3. a ſpecial verdict was found, *viz.* that before the time of the treſpaſs and ejectment *Robert Ramſden* grandfather of the ſaid *John Ramſden* leſſor of the plaintiff was ſeiſed of the, *&c.* in fee; and being ſo ſeiſed, the ſixth of *April* 1689 he made his teſtament, and thereby deviſed the meſuages, *&c.* in queſtion with their appurtenances, *in his verbis, viz.* I do hereby give, deviſe and bequeath unto *John Stancliffe*, and *Robert Ramſden* my ſecond ſon, and their heirs and aſſigns, all thoſe my meſuages or tenements with the appurtenances at *Norwood green*, and all the houſes, buildings, cloſes, lands and grounds to the ſame belonging, now in the tenure of *Jeremy Robinſon* and *Robert Wilſon*, or their aſſigns; and I do hereby expreſs, publiſh and declare, that the ſaid *John Stancliffe* and *Robert Ramſden* my ſon and their heirs ſhall by force of this my laſt will and teſtament ſtand and be ſeiſed of the ſaid meſuages, *&c.* to all the uſes, intents and purpoſes herein after mentioned; that is to ſay, Firſt of intent and purpoſe, that they ſhall permit and ſuffer *George Ramſden* my ſon to have, receive and take

the

S. C. Lutw. 814. to 825.
2 Salk. 679.
Abr. Caſ. Eq. 383. p. 3. 220.
Deviſe to *A.* and *B.* and their heirs, to the intent they ſhould permit and ſuffer *J. S.* to receive the profits, this is an uſe executed in *J. S.*
Gibb. 10.
Allen 15.
1 Vent. 130.
11 Mod. 211.
Le. 254.
1 Sid. 26.
Gilb. Law of Uſes 281.
2 Vent. 312.

the rents, iſſues and profits of the ſaid meſuages, *&c.* for and during the term of his natural life, and after his deceaſe ſhall ſtand ſeiſed thereof to the uſe of the heirs of the body of the ſaid *George* my ſon lawfully begotten and to be begotten, and for default of ſuch iſſue to the uſe of the ſaid *John Ramſden* and *Robert Ramſden* my ſons, and of their heirs and aſſigns for ever, equally to be divided amongſt them; Provided always and upon condition that if it ſhall fortune the ſaid *George* my ſon to marry a woman that ſhall have *bona fide* one or more hundred pounds, that then the ſaid *John Stancliffe* and *Robert Ramſden* my ſon and the ſaid *George* ſhall have power by virtue of this my will to make a jointure to and for ſuch wife of 10*l.* *per annum* out of the ſame lands, *&c.* for every hundred pounds ſuch wife ſhall have for her portion for the life of ſuch wife, and after to the heirs of the body of the ſaid *George* upon ſuch wife, *&c.* then the jury find farther, that the ſaid *Robert Ramſden* the grandfather by his ſaid teſtament deviſed other tenements at *Norwood green* in *Hipperholme* aforeſaid to his ſaid ſon *Robert Ramſden* in fee, in the occupation of *Richard Riddleſton,* upon condition that the ſaid *Robert Ramſden* ſhould permit and ſuffer *George Ramſden* and his heirs peaceably to enjoy and occupy a cloſe of land called *Paradiſe,* and to take the rents, iſſues and profits thereof to his own uſe; and in default thereof, that the ſaid *George* and his heirs after any diſturbance made by the ſaid *Robert Ramſden* or his heirs in the enjoyment thereof ſhould enter into one meſuage, *&c.* part of the tenements lately mentioned and take the rents, *&c.* thereof until the ſaid *Robert Ramſden* ſhould deſiſt from ſuch moleſtation, and give ſecurity not to diſturb for the time to come: then the jury find, that the deviſor had iſſue three ſons, *John*, *Robert*, and *George*; that the deviſor died in 1689. that *George* upon the death of his father entered into the tenements in queſtion aforeſaid, and took the rents and profits to his own uſe during his life; that *George* in 1690 ſuffered a common recovery to the uſe of himſelf and his heirs; that by indentures of leaſe and releaſe dated the firſt and ſecond of *November* 9 *Will.* 3. *George* conveyed the premiſſes, in conſideration of 150 *l.* paid by the defendant, to the defendant in fee; that he entred, *&c.* and was ſeiſed *prout lex poſtulat*; that *George Ramſden* died the firſt of *December* 1697. then they find *John Ramſden junior* the leſſor of the plaintiff heir of the body of the ſaid *George Ramſden*; and they find leaſe, entry and *ouſter*, and make the common concluſion, *&c.* The general queſtion made upon this ſpecial verdict was, whether *George Ramſden* took an eſtate executed for his life by this will, or whether the eſtate remained in the truſtees for his life, and he had only a truſt not executed by the ſtatute 27 *Hen.* 8. *cap.* 10. of uſes. For it was admitted, that if *George Ramſden* took an eſtate for his life executed, he would by virtue of the ſubſequent clauſe (which limits

Co. Li. 22. b. 1 Ventr. 377, 378.

An uſe will be executed upon a deviſe.

1 Leon. 53.

mits the uſe to the heirs of his body) be tenant in tail executed; and then the common recovery ſuffered by him would bar the intail; and conſequently the plaintiff would have no title, and the defendant's title would be good. But if he was but *ceſtuy que truſt* for his life, and the eſtate remained in the truſtees for the ſaid time, it would be otherwiſe. It was alſo admitted by the plaintiff's council, that a deviſe of lands may be by expreſs words to the uſe of another than the deviſee, and that ſuch uſe will be executed by the ſtatute of 27 *Hen.* 8. [For that ſee 30 *Hen.* 6. *Fitzh. deviſe* 22. that a deviſe by cuſtom may be to a uſe, and then ſuch uſe will be afterwards executed by the ſaid ſtatute. See alſo the words of 27 *Hen.* 8. *cap.* 10. *Moor* 107. 1 *Sid.* 26. and 2 *Ventr.* 312. *Burchett v. Durdant.*] And this caſe was argued at the bar by Mr. *Cheatham* and Mr. *Broderick* for the plaintiff, and by Mr. *Raymond* and Mr. *Cheſhyre* for the defendant. And the council argued for the plaintiff, that *George Ramſden* had but a truſt in theſe lands, and that the eſtate in law remained in the truſtees. For they ſaid, that though a deviſe may be by expreſs words to the uſe of another than the deviſee, yet without expreſs words it cannot be averred to the uſe of another than the deviſee, becauſe it implies conſideration in it ſelf. 4 *Co.* 4. *Leake and Randal's* caſe. Then here by the firſt clauſe of the will, I give and bequeath to *John Stancliffe* and *Robert Ramſden* and their heirs, the eſtate and uſe paſſed to them in fee, if there are not ſubſequent words expreſſed, to convey the uſe to *George Ramſden.* And (by them) the ſubſequent words will not carry the uſe to *George Ramſden.* For they are, that *John Stancliffe* and *Robert Ramſden* ſhall ſtand ſeiſed, to the intent that they ſhall permit and ſuffer *George Ramſden* to receive the rents, iſſues and profits for his life; which words paſs no eſtate to *George Ramſden*, but apparently ſhew the intent of the deviſor to be, that the truſtees ſhall have the eſtate in law, but that *George Ramſden* by their permiſſion ſhall receive the benefit of it. For if he had intended, that *George Ramſden* ſhould have the eſtate in law, he would not have ſaid, that the truſtees ſhould permit and ſuffer *George Ramſden* to take the profits, *&c.* which he might do in ſpight of them. Beſides, his intent appears more plainly by the ſubſequent clauſe, for when he deviſes the eſtate to the heirs of the body, he varies the phraſe, and leaves out the words permit and ſuffer, but ſays, that the truſtees ſhall ſtand ſeiſed to the uſe, *&c.* ſo that there he deviſes the very eſtate. Farther his intent appears more plainly, by the clauſe which gives power to *George Ramſden* and the truſtees, to make a jointure; for if he did not intend, that the truſtees ſhould have the eſtate, it would be vain and ridiculous, to appoint them to join in the conveyance. Then ſeveral caſes were cited, that the words permit and ſuffer would not paſs an intereſt in the land, but ſounded only in covenant. 1 *Roll. Abr.* 848. *lit. X. pl.* 2. *Keilw.* 41. 3 *Bulſtr.* 252. *Cro. Jac.* 172. 2 *Mod.* 81. *Cro. Eliz.* 223. *Cro. Jac.* 598. But for authority in point they relied upon the caſe of *Burchett and Durdant,* 2 *Ventr.* 311. where *H. Wicks* deviſed lands to *John Higden* and his heirs, upon truſt that he ſhould permit and ſuffer *Robert Durdant* during his life to take the rents, iſſues and profits, *Robert* committing no waſte, and after his death to the heirs of the body of *Robert Durdant* then living. And it was there held in the Exchequer chamber, that the eſtate in law remained in *Higden,* and that *Robert Durdant* had but a truſt; which is the ſame with the principal caſe. And therefore for theſe reaſons they prayed judgment for the plaintiff.

E contra it was argued for the defendant, that this was an eſtate executed in *George Ramſden* by the ſtatute of the 27 *Hen.* 8. To prove which they ſaid, that before the ſtatute of 27 *Hen.* 8. an uſe, confidence or truſt, were the ſame; but now ſince the ſtatute common parlance has made a diſtinction between a uſe, and a truſt; as if the firſt ſhould be executed in poſſeſſion by the ſaid ſtatute, the other not; though in truth a truſt ſhall be executed, as well as an uſe. As if *A.* makes a feoffment to *B.* in truſt for *C.* this ſhall be executed by the ſtatute. But they urged, that before the ſtatute ſuch a limitation as that would have been an uſe; and therefore conſequently being the firſt uſe, it ſhall now be executed by the ſtatute. An uſe in 1 *Co.* 121. *b. Co. Lit.* 272. is defined to be a truſt or confidence, which doth not iſſue out of the land, but is *quaſi* a thing collateral, annexed in privity to the eſtate and to the perſon, touching the land, *viz.* that *ceſtuy que uſe* ſhall take the profits, and that the terretenant ſhall convey eſtates according to the direction of *ceſtuy que uſe:* ſo that *ceſtuy que uſe* had neither *jus in re* nor *ad rem*; but in equity he had both, where his remedy was by *ſubpoena.* *Ceſtuy que uſe* may be ſworn upon an inqueſt. *Litt. ſect.* 464. There may be *poſſeſſio fratris* of an uſe. 5 *Edw.* 3. 27. But *ceſtuy que uſe* could not diſtrain cattle *damage feaſant* upon the land. *Dier* 9. *Plowd.* 352, 349. *Keilw.* 41, 46. He could not releaſe the rent to the tenant of the land, nor give licence to enter upon the land, 9 *Hen.* 7. 26. He could not take the trees, 15 *Hen.* 7. 13. And all actions ought to be brought in the name of the feoffees, 7 *Edw.* 4. 29. *b.* Now this definition of an uſe agrees with this deviſe to *George Ramſden,* conſidering it as before the 27 *Hen.* 8. *cap.* 10. For here there is a confidence repoſed in the perſons of *John Stancliffe* and *Robert Ramſden,* and their heirs; it is annexed in privity to their eſtate, but collateral to the land; it is, that *George Ramſden* ſhall take the profits, and of conſequence that they ſhall convey-eſtates according to his direction, and according to the intereſt that he had in the uſe. It is the ſame thing as if

Doct. & Stud. 11.
14 Hen. 8. 7.
14 H. 4. 24. b.
Dier 96.
8 Ed. 4, 4. b.
7 Ed. 4, 5. b.
Plowd 352.
Moor 506.
W. Jones 116, 127.

The law takes notice of *ceſtuy que uſe.*

if the deviſor had ſaid, I deviſe the land to truſtees to the uſe of *George Ramſden*, or to the intent that *George Ramſden* ſhould take all the land to his uſe; for a grant of the rents, iſſues and profits, is a grant of the land itſelf. *Co. Lit.* 4. *b.* 14 *Hen.* 8. 6. If it be ſo in a grant, much more ſhall it be ſo in a deviſe. *Moor* 753. *Griffith v. Smith.* 3 *Leon.* 78. *pl.* 118. 2 *Leon.* 221. *Hob.* 285. *Balder v. Blackburne. Hutt.* 36. *Moor* 774. *Yelvert.* 73. *Carpenter v. Collins.* So *Paſch.* 8 *Will.* 3. *B. R.* between *South* and *Allen* in ejectment, upon a ſpecial verdict the caſe was, that *J. S.* ſeiſed of the lands in queſtion in fee 29 *Car.* 2. deviſed all the rents, iſſues and profits of them to *Sarah Burges* wife of *John Burges* for life, to be paid by his executors, ſo as the huſband of *Sarah Burges* ſhould not intermeddle with them; the queſtion was, whether *Sarah Burges* by this deviſe had the lands themſelves, or whether the executors were truſtees for her? *Rokeby* and *Samuel Eyre* juſtices held, that the executors were truſtees; but *Holt* chief juſtice held, that this was an expreſs deviſe to the wife herſelf, and that the ſubſequent words could not reſtrain it. Wherefore the council for the defendant concluded, that a deviſe of the profits is the ſame as a deviſe of the land; but that a deviſe of the land to truſtees, to the intent that *George Ramſden* ſhould have and take the land, would have been an uſe executed in *George Ramſden*; and therefore that this deviſe to the truſtees, to the intent that *George Ramſden* ſhould take the profits, will be an uſe executed in *George Ramſden.* They compared this caſe to the caſe *Paſch.* 27 *Hen.* 8. 6. *pl.* 15. where in a deed the covenantor declared, that his recoverees (having ſuffered a common recovery before) ſhould ſuffer *Giles* to take the profits of the lands, it was held an uſe in *Giles.* So 30 *Hen.* 6. *Fitzh. deviſe* 22. a deviſe that one of the three feoffees ſhould receive the profits, held a confidence, which is the ſame with an uſe. So in this caſe, before the ſtatute of 27 *Hen.* 8. this would have been an uſe in *George Ramſden*, and *John Stancliffe* and *Robert Ramſden* would have been ſeiſed of theſe lands to the uſe or in truſt for *George Ramſden*; and then it would be executed in poſſeſſion, by the expreſs words of the 27 *Hen.* 8. *cap.* 10. which are, that where any perſon ſhall be ſeiſed of any manors, lands, *&c.* to the uſe, confidence, or truſt, of another in fee tail, or for life, ſuch uſe ſhall be executed in poſſeſſion. Then they gave anſwers to the objections made of the other ſide. 1. And firſt to the intent of the deviſor, becauſe he intended, that this ſhould be only a truſt; they anſwered, that it is true, that it is ſaid in ſeveral books, that the intent will govern the raiſing of uſes. *Perk.* 102. *ſect.* 530, *&c.* But that which is intended by the ſaid books is, that the judges will not adjudge an uſe or intereſt to paſs, contrary to the intent of the party. But there is no authority in any book, that the intent of the party can hinder the operation of the law. And in this caſe of the

South v Allen, Salk 228. A deviſe of the rents, iſſues and profits to a feme coverte, ſo that her huſband ſhould not intermeddle.

the ſtatute in the execution of the uſe that is raiſed, if a man covenants to ſtand ſeiſed, to the uſe of himſelf for life without impeachment of waſte, and after his deceaſe to the uſe of the heirs male of his body; the man's intent is plain, to have but an eſtate for his life, yet the law ſupervenes his intention, and makes him tenant in tail. 1 *Vent.* 379. *Pybus v. Mytford*; where *Hale* chief juſtice ſays expreſly, that the intent of the party cannot control the operation of the law. 2. As to the objection made from the power, they ſaid that it would not be void; but that it was a prudent caution made by the deviſor, that the ſon ſhould not marry without the conſent of friends. For there the truſtees, though the eſtate was executed in *George Ramſden*, may execute the power, and join in making of the jointure; and when it ſhall be made, the jointureſs will be in by the will. As to the caſe of *Burchett v. Durdant*, cited on the other ſide out of 2 *Vent.* 311. they ſaid, that the principal point in the ſaid caſe was, whether the remainder, limited to the heirs of *Robert Durdant* now living, veſted in *George Durdant*, or was contingent, *viz.* whether that was a deſcription of the perſon? and it was held, that it was, and that the remainder veſted in *George Durdant:* and therefore the other queſtion, whether the eſtate for life was executed in *Robert Durdant* or not, was intirely immaterial; for be it ſo or not, *Robert Durdant* was but tenant for life, and therefore his recovery would not bar *George Durdant* nor his heirs, *&c.* [See the ſaid caſe, Sir *T. Jones* 99. 1 *Ventr.* 334. 3 *Keb.* 832. *Raym.* 333.] And for theſe reaſons the council for the defendant concluded, that this was an uſe executed in *George Ramſden*, *&c.* and therefore that judgment ought to be given for the defendant. And of that opinion was the whole court. And they agreed *in omnibus* with the defendant's council, and their anſwers to the objections made by the plaintiff's council. They ſaid, that a uſe and truſt (as to the words themſelves) were of the ſame purport as to the execution by the ſaid ſtatute. For if a man makes a feoffment in fee to *A.* in truſt to permit *B.* to take the rents, iſſues and profits; this will be an uſe executed as well as if *A.* had made uſe of the word uſe. They approved alſo of the anſwer given to the objection, that the intent appeared by the power; and ſaid, that this was a good precedent, to keep children dutiful to their relations, when they cannot ſettle jointures upon their marriage without their concurrence. And they ſaid, that if they conſtrued this limitation only a truſt, there will be ſtrange debates. For if *George* ſhall have children, then the truſtees will be ſeiſed in fee in truſt for *George* for life, and the iſſues will be tenants in tail; which will be ſtrange. Therefore it will be better to conſtrue it one intire uſe executed by the ſtatute. And judgment was given for the defendant.

Feoffment to *A.* in truſt to permit *B.* to take the rents, iſſues and profits, this will be an uſe executed.

Regina *verſ.* Taylor.

AN information was exhibited againſt the defendant by the attorney general, for that that he ſuch a year and place *proditorie* ſpoke theſe words upon the thirtieth day of *January*; King *Charles* the Firſt was rightly ſerved in having his head cut off, and it was pity his two ſons *Charles* and *James* were not ſerved ſo too at the ſame time. And the ſpeaking of theſe words was laid to have been in contempt of the deceaſed King *William* the Third and his laws, *et ad malum exemplum omnium aliorum in hujuſmodi caſu delinquentium et contra pacem dicti nuper regis.* Upon not guilty pleaded, the defendant was found guilty before the chief baron at the aſſiſes at *Kingſton* in *Surry.* And now Mr. *Weld* and Mr. *Mountague* moved in arreſt of judgment. 1. That the words, being ſpoken of dead perſons, were not puniſhable, unleſs they had ſome influence upon the living; and therefore it ought to have been averred, that they were ſpoken *ea intentione* to alienate the affections of the people from the preſent government. *Sed non allocatur.* For *per curiam*, if the words advance pernicious doctrine, and evil tenets, they have an influence upon the preſent government. Now theſe words juſtify regicides, and the murder of King *Charles* I. which is declared to be murder by act of parliament; and the regicides are attainted; and a faſt day is appointed to be obſerved, to pray God to avert his judgments, *&c.* And if ſuch doctrine be countenanced, it will endanger the Queen's perſon. 2. A ſecond exception was, that the word *proditorie* is uſed in all charges of treaſon, and therefore the inſerting of it makes the fact here charged treaſon, whereas the bare ſpeaking of words cannot be treaſon; and therefore the information was ill. And Mr. *Mountague* ſaid farther, that for this reaſon no information would lie at all, but the defendant ought to have been indicted for treaſon. *Sed non allocatur.* For *per curiam*, the word *proditorie* will not render the information worſe. If it appear upon an indictment, that the fact charged is high treaſon, there is a neceſſity of having the word *proditorie* in the indictment, as well as *felonice* in caſe of felony. But if the indictment be for a miſdemenour that hath a tendency to high treaſon, it is not neceſſary, to have the word *proditorie* in it; but the inſerting of it is not improper, becauſe it ſhews that the defendant had a treaſonable intent, though he was afraid to put it in execution. But farther if the word *proditorie* was inſenſible here, it would not vitiate, but ſhould be rejected as ſurpluſage. 3. A third exception was, that the *contra pacem dicti nuper regis*, when there were three Kings

Scandalous words ſpoken of dead Kings.

12 Car. 2. cap. 30.

Proditorie.

3 & 4 Will. & Mar. cap. 13. it is ſaid in the preamble, to prevent all traiterous correſpondence and commerce with *France.*

Cro Car. 117. Pine's caſe.

mentioned before, was uncertain to which of them it referred, and therefore it was ill. *Sed non allocatur*. For *per curiam*, the *contra pacem*, *&c.* are words of reference, and cannot relate but to King *William*, who was named in the ſame ſentence a little before. And judgment was given for the Queen, that the defendant ſhould ſtand twice in the pillory, and he was fined forty marks. Note, that the defendant was a tanner, and appeared to be in indifferent circumſtances.

Brown *verſ.* Babbington.

Intr. *Mich.* 12 or 13 *Will.* 3. B. R. Rot. 132.

Whether ſuing a *clauſum fregit* in the Common Pleas will ſave the ſtatute of limitations. *Ante* 383, 434, 533.

ERROR upon a judgment of the Common Pleas in *indebitatus aſſumpſit* for 14 *l.* brought by an executor, and the action was laid in *Leiceſterſhire*. The defendant pleaded *non aſſumpſit infra ſex annos*. The plaintiff replied, and ſhewed a *clauſum fregit* in *Derbyſhire* ſued within the ſix years; and that it was with intent to arreſt the defendant, and when he was brought in, to declare againſt him in *aſſumpſit*, according to the courſe of the Common Pleas. The defendant rejoined, that he did not aſſume within ſix years before the iſſuing of the *clauſum fregit*. And upon iſſue thereupon a verdict was given for the plaintiff. And judgment accordingly *in C. B.* And now upon the general errors aſſigned Mr. *Parker* for the defendant in error argued, that ſuppoſing that the *clauſum fregit* was ſued with intent to declare in another action, and was well continued until the time of the declaration in the ſaid action; that will be a ſufficient proſecution within the ſtatute of 21 *Jac.* 1. *cap.* 16. And that though in this caſe the *clauſum fregit* was not continued, yet that will be aided by the verdict; which will diſtinguiſh this caſe from that of *Mois v. Brereton*, and of *Kenſey v. Hayward*, which caſes were adjudged upon the point of the diſcontinuance. That ſuch a writ ſued will avoid the operation of the ſtatute of limitations; becauſe the words of the ſtatute are general, ſhall be commenced and ſued. If it had ſaid, that an original ſhall be ſued, the objection here would have been ſtrong; but now the ſole queſtion is, what ſhall be ſaid the commencement and ſuit of an action. Whatſoever is a proper method to bring the defendant into court to anſwer, will be the commencement and ſuit of an action; becauſe an action in *Co. Lit.* 185. is defined to be nothing but *jus proſequendi in judicio quod ſibi debetur*. That a *clauſum fregit* is proper for that purpoſe, appears, 1. Becauſe if a man lives in one county, and

Lutw. 256.

and commits a treſpaſs in another; if he be ſued by original in treſpaſs, there ought to be an original, and a *capias* upon it, in the proper county, and then a *teſtatum capias* in the county where he lives; all which dilatory proceeding is ſaved by the ſuing of a *clauſum fregit* at once, and by declaring againſt him in the proper county when he comes in. 2. If a man make a contract in the vacation, intending to run away immediately; if he be ſued by original, he muſt be let go at large, becauſe one cannot have an original but of the preceedent term, which will be before the cauſe of action. But now by the help of this *clauſum fregit* one may arreſt him preſently, and declare againſt him in a proper action the next term. The ſtatute of 13 *Car.* 2. *ſt.* 2. *cap.* 2. in the preamble takes notice of theſe *clauſum fregits*, that they were proceſſes uſed in the commencement of actions. And the ſaid courſe is confirmed in 2 *Jones* 217. *Atkins v. Jay*. Beſides, that there are other commencements of ſuits in the Common Pleas than by original, as by bills of privilege. The true commencement of every action in point of law is a proper original in ſuch action; and therefore ſtrictly ſpeaking a *clauſum fregit* cannot be an original, but in an action of treſpaſs: but yet if by the courſe of the Common Pleas a *clauſum fregit* iſſues, before the ſuing of a proper original in any action, and is uſed as a proceſs to bring the defendant in, and upon ſuch *clauſum fregit* he is arreſted, *&c.* the ſuing of ſuch *clauſum fregit* will be a ſuing and commencement of an action within the meaning of the ſtatute of limitations; for it is equally a demand of my right. And what ſhall be, and what ſhall not be, a commencement of an action, muſt be determined by the courſe of the court. And that is the reaſon, why a bill in the King's Bench is held as the original there, and the want of it aided by verdict by 18 *Eliz. cap.* 14. within the words want of any writ, original, *&c. Hob.* 264. This ſtatute has been expounded liberally, as to the ſaving the right of parties. Therefore it has been reſolved, that where an action has been commenced by plaint entred in an inferior court within the ſix years, and then the action has been removed by *habeas corpus*, and the ſtatute pleaded; though the proceedings here were *de novo*, yet the entry of the plaint in the inferior court was ſuch a proceeding, as would avoid the ſtatute of limitations, and that the proceedings upon the *habeas corpus* were in ſome ſort a continuance of the former ſuit. 1 *Sid.* 228. *Whitwick v. Hovenden*, and the caſe in 3 *Lev.* 245. is exactly a caſe in point. Then he ſaid, that the caſe of *latitats* in this court were of the ſame nature; for they are iſſued for a ſuppoſed treſpaſs, and when the defendant comes in, he ſhall anſwer in other actions. But the caſe of the *latitat* is a ſtronger caſe; for a *latitat* may bear *teſte* before the cauſe of ac-

1 Lev. 143.
1 Keb. 791,
&c.

tion, 1 *Vent.* 28. and the bill of *Middleſex* in this court is never filed, and the *latitat* is the firſt proceſs. *Dier* 118. *Cro. Car.* 264. So the *clauſum fregit* is the firſt proceſs in the Common Pleas, and always filed.

Objection. That there is no foundation for this averment, ſince there is no clauſe of *acetiam billae* in it, as there is in *latitats*.

Anſwer. The ſame objection held in all caſes of *latitats* before the 13 *Car.* 2. *ſt.* 2. *cap.* 2. in compliance with which ſtatute the ſaid clauſe was inſerted in *latitats*, as appears in 1 *Keb.* 598. and ſo it is at this day in all *latitats*, where ſpecial bail is not required.

As to the matter of the diſcontinuance he ſaid, that it was aided by the verdict by the 32 *Hen.* 8. *cap.* 30. And he cited ſeveral caſes of defects aided by verdict, as *Yelv.* 129. *Kenrick v. Pargiter.* 1 *Saund.* 226. *Stennel v. Hogden.* 1 *Lev.* 196. *Cro. Car.* 240. the caſe of *Gidley v. Williams.* See before, 634. *Allen* 32. *Cro. Jac.* 434. 2 *Keb.* 188, 230. the caſe in point upon a plea of a *latitat*.

E contra it was argued by Mr. *Cheſhyre* for the plaintiff in error, that both the caſes cited by Mr. *Parker*, of *Mois v. Brereton* and *Kenſey v. Hayward*, were adjudged upon this reaſon, *viz.* the originals were not proper in the ſaid actions; and that this was worſe than any of them, becauſe this action was brought by executors, and the *clauſum fregit* was for a treſpaſs done to them in their own right, *quare clauſum ipſorum fregit*; that the verdict would not help, becauſe the original was improper, and therefore the iſſue void and immaterial: but in the caſes cited of the other ſide the iſſues were proper.

Holt chief juſtice ſaid, that this caſe was not like the caſe of *latitats* in the King's Bench; becauſe a *latitat* is an ancient proceſs of this court, and was a proceſs of this court at the time of the making of the ſtatute of limitations; and the uſe, only to bring in a man in cuſtody, and then they declare againſt him *in cuſtodia mareſcalli mareſcalciae.* But when a man is brought in by a *clauſum fregit* in the Common Pleas, they do not declare againſt him *in cuſtodia guardiani de la Fleet*, but upon an original proper for the action. And this practice of *clauſum fregit* in the Common Pleas is new, and they have another way to ſue there, *viz.* by original. But in the King's Bench a *latitat* in ſome actions is the only way to commence the ſuit. *North* chief juſtice of the Common Pleas made a complaint of *latitats* in parliament, and the matter ſuffered great agitation in parliament; but at laſt the *latitats* were approved, as they are alſo by 27 *Eliz. cap.* 8. which gives a writ of error in the Exchequer chamber, but excepts errors to be aſſigned for want of juriſdiction in the King's Bench. Now this being the proceſs of the King's Bench at the time of the making of the ſtatute of limitations, it muſt be underſtood to be compriſed within the meaning of the act. And he ſaid, he imagined, that after the reverſal of the judgment of *Kenſey v. Hayward* was affirmed in parliament, this point would never have been moved again. But farther he ſaid, here was a fatal fault, *viz.* that the plaintiff does not ſhew, that the original was ever returned. Now if he ſues a writ, and does not return it, that will not avoid the ſtatute of limitations. And *Powys* and *Gould* juſtices agreed in all theſe matters with the chief juſtice *Holt*; and ſaid, that in the caſe of *Culliford v. Blandford* in the Exchequer chamber all the judges there held, that a *latitat* was a kind of original in the King's Bench. *Powell* juſtice agreed with them, that the judgment ought to be reverſed, for want of ſhewing a return of the writ. But as to the other point he ſeemed to retain the opinion that he had given in the Common Pleas in the caſe of *Kenſey v. Hayward*, when he was judge there, *viz.* that the ſuing of ſuch *clauſum fregit* will avoid the ſtatute of limitations, as well as a *latitat*; alleging that a *clauſum fregit* was the ancient proceſs of the Common Pleas, and very uſeful to the ſubject, in ſaving the fines due upon the original; which they never ſue, if there is a verdict in the cauſe; but after a demurrer they ſue it. The judgment was reverſed.

Original not pleaded returned.

Carth. 232.

Burdett *verſ.* Wheatley.

ERROR upon a judgment given in the Common Pleas in caſe upon ſeveral promiſes, in which, upon *non aſſumpſit* pleaded, as to two of the counts verdict and judgment were given for the plaintiff, and as to the reſt for the defendant. And the error aſſigned was, that the defendant was an infant at the time of the promiſes made, and alſo appeared by attorney. To which aſſignment the defendant in error demurred ſpecially, becauſe it contained matter of fact and of law alſo. And therefore the judgment was affirmed.

Error aſſigned both of fact and in law.
Ro. Abr. 761. (E. a.) pl. 1, 2.
Sty. 69.
Lev. 76.
Sid. 94.
F. N. B. 20. (E).
Sid. 147.
Lev. 105.

Andrews *verſ.* Linton.

Intr. *Hil.* 1 *Ann.* B. R. Rot. 483.

S. C. 1 Salk. 265.
It is not aſſignable as error, that he who returned the original was not ſheriff.

Diminution alleged.
12 Mod. 302.

ERROR upon a judgment given in the Common Pleas in treſpaſs, for a cloſe broken, upon default, writ of inquiry thereupon awarded and returned, and final judgment given there for the plaintiff. And now after the aſſignment of the general errors he ſaith farther, that the ſaid record is diminiſhed *in non certificando breve originale inter partes praedictas de praedicto placito et retornam ejuſdem brevis quod quidem breve originale vicecomiti Eſſex directum fuit et retornabile coram juſticiariis dicti nuper regis apud Weſtmonaſterium in octabis ſancti Hilarii anno regni ejuſdem nuper regis decimo tertio ac retorna in dorſo brevis illius ſive indorſamentum ſuperinde ſcriptum ut hujuſmodi retorna factum et ſcriptum fuit nomine cujuſdam Petri Whitcombe armigeri tanquam vicecomitis dicti comitatus Eſſex ubi revera dicto tempore retornae ejuſdem brevis originalis ſcilicet in eiſdem octabis ſancti Hilarii eodem anno decimo tertio quidam Edvardus Luther armiger fuit vicecomes comitatus Eſſex praedicti et non dictus Petrus Whitcombe, &c. et hoc paratus eſt verificare, &c.* Upon which a *certiorari* was awarded to the *cuſtos brevium* of the Common Pleas, who returned the original, to which the name of *Whitcombe* was ſubſcribed. And after two *ſcire facias's ad audiendum errores* returned *nihil*, the defendant in error pleaded, *in nullo eſt erratum.* And Mr. ſerjeant *Hall* for the plaintiff in the Common Pleas, and the defendant here in the error, objected, that this matter was not aſſignable for error. Againſt which it was argued by Mr. *Raymond* for the plaintiff in error, that it was aſſignable as error. And he ſaid, that there was a difference between acts judicial and miniſterial; for againſt the miniſterial acts done by a ſheriff or other officer, an averment may be. And of that opinion is *Popham, Cro. Jac.* 12. *Arundel v. Arundel.* And he cited *Yelv.* 34. as in point, where it is ſaid, that though in caſe of the ſheriff a man cannot aver contrary to what is returned; yet he may ſay, that he who has indorſed his name on the back of the writ, *&c.* was not ſheriff. Becauſe by the common law until the ſtatute of 12 *Edw.* 2. *cap.* 5. no ſheriff nor officer uſed to put their names to their returns; and ſo this averment, that he who made the return is not the true officer, is not taken away by the ſtatute, but remains as a thing at common law. To the ſame purpoſe *Mich.* 8 *Hen.* 4. 14. 20. *Mich.* 9 *Hen.* 4. 1. *Hil.* 10 *Hen.* 4. 7. *b. Hil.* 11 *Hen.* 4. 52. *Paſch.* 11 *Hen.* 4. 65. *b. Trin.* 11 *Hen.* 4. 92, 93. The ſame diverſity, 7 *Hen.* 7. 4. So *Cro. Car.* 421. 1 *Roll. Abr.* 758. Error upon a judgment of the

Common Pleas in formedon, the error aſſigned was, that the *venire facias* was returned by Sir *Richard Saltingſton* ſheriff of *Eſſex in craſtino Martini* 9 *Car.* 1. and that *A. Smith* was then ſheriff; the defendant pleaded, that Sir *Richard Saltingſton* was ſheriff before the return of the writ, created by letters patent of the King, *prout patet de recordo*; *nul tiel record* was pleaded to it; and the letters patent were produced; and it was moved *in B. R.* that this matter ought to be tried by the country, becauſe it might be, that Sir *Richard Saltingſton* was diſcharged before the day of the return of the writ; *ſed non allocatur*; becauſe that ſhall not be intended; and the judgment was affirmed. But there no exception was taken, that this matter was not aſſignable as error; but the ſaid caſe ſeems to admit, that it was aſſignable as error. So *Paſch.* 1649. *B. R. Baxtofte v. Richards.* 1 *Roll. Abr.* 760. *lit. A. pl.* 3. Error upon a judgment *in C. B.* the plaintiff aſſigned error, that where a *venire facias* was returned by *J. S.* ſheriff of the city of *Exeter*; this error is not well aſſigned, becauſe the *venire facias* is not certified, upon which the error is aſſigned; but it ſhould have been certified, and afterwards a certificate to aver that he was not ſheriff; which admits ſuch matter to be aſſignable for error. Farther it has been adjudged, that a man may aſſign error, that the judge before whom the judgment was given was not judge; as *T. Jones* 81. 2 *Lev.* 184. *Hippiſley v. Tucke.* Error upon a judgment in the court of *Newbury* before the mayor; the error was aſſigned, that the mayor had not taken the oaths. So *T. Jones* 137. *Deveney v. Norris.* 2 *Lev.* 242. reports the reſolution in the ſaid caſe contrary to *T. Jones*; but it is very probable, that Sir *Thomas Jones*, who was one of the judges then, has reported it more exactly than *Levinz*, who was then but counſel. So *Cro. Eliz.* 320. *Walſh v. Collinger. Sed non allocatur.* For *per Holt* chief juſtice, the caſe of *Deveney v. Norris* is not well reported in *Jones*, but exactly by *Levinz*; for there the judgment was affirmed. And he ſaid, that he was counſel in the ſaid caſe, and the court held there, that ſince the defendant had admitted the judge to be a judge, by a plea to the action, he was eſtopped to ſay that he was not a judge afterwards. And he denied the caſe of *Hippiſley v. Tucke* to be law; though there is a difference between the two caſes; for in that of *Deveney v. Norris* there was a replication by way of eſtoppel to the aſſignment of errors. And (by him) when a writ is returned, the defendant has all the ſame term to make complaint of any irregularity concerning it, or the execution of it; as the ſheriff has alſo all the ſame term, to diſavow the return. But if the defendant permits the term to paſs without application made to the court, and the return is filed, and made a record of the court, every one is eſtopped to ſay, that the perſon who returned it was not ſheriff. But farther it can never be aſſigned for error in caſe of an original writ,

Not judge, not aſſignable for error.

Remedy againſt an ill return.

writ, becauſe the defendant might have pleaded it. There would have been more colour, if it had been a return of a writ of inquiry, becauſe the defendant would have been out of court, and had not day to plead: but as afore is ſaid, it cannot be aſſigned for error. As to the caſe of the *venire facias*, if it be returned by a man who is not ſheriff, it is not aſſignable as error, becauſe the party might have challenged the array for that fault at *niſi prius*; and therefore it is not aſſignable, that the ſheriff was out of the realm, and had no deputy, as in the caſe in *Hen.* 4. becauſe it was a good challenge to the inqueſt. He ſaid alſo, that the caſe in *Croke* and *Rolle*, which concluded, *prout patet per recordum*, was not well pleaded. All the court agreed with *Holt*, and judgment was affirmed. Note, Mr. ſerjeant *Hall* cited *Cro. Jac.* 188. 13 *Co.* 8. *Trin.* 9 *Edw.* 4. 19. *Dier* 65. *Bro. error* 2. to prove, that the proceſs is void, if it hath not the name of the ſheriff. 21 *Hen.* 8. 3. *Cro. Car.* 224, 258. *Cro. Eliz.* 655. 1 *Sid.* 94.

Regina *verſ.* Rhodes and Cole.

Information for ſubornation of perjury, in a cauſe tried before the judge of *Niſi Prius*, who had no authority to try it.

AN information for ſubornation of perjury. The information ſet forth, *quod cum in curia domini regis coram ipſo rege apud Weſtmonaſterium in comitatu Middleſex Rhodes nuper de D. in comitatu Surrey oatmeal maker implacitaſſet Holford, pro eo quod cum indebitatus fuit* to the plaintiff *in parochia ſancti Clementis Dacorum in comitatu praedicto* in ſo much money for goods ſold, and promiſed to pay, &c. and whereas alſo upon an account ſtated between the plaintiff and defendant, the defendant was found in arrears ſo much, and promiſed to pay it, &c. and the defendant pleaded not guilty, and the cauſe came to trial, *et triatio exitus praedicti debite habita fuit per juratam patriae debite impanellatam, juratam, et oneratam*, before my lord chief juſtice *Holt* at the ſittings in *Middleſex*; and the defendants did *per ſiniſtros labores, media, et procurationes* perſuade and procure one *J. S.* to ſwear, that he was preſent when an account was ſtated between them, and ſo much agreed to be due; and the defendant paid part; and ſeveral other matters were laid to be ſworn; *ubi revera, et in facto*, there was never any account ſtated between them, nor any of theſe matters were true. And upon not guilty pleaded, the defendant was found guilty. And Mr. *Weld* moved in arreſt of judgment. And, 1. He took exception to ſeveral of the aſſignments of the perjuries, and he compared the caſe to the caſe of general damages, where one count is inſufficient, that will vitiate the whole. So here the defendant being to be fined upon the whole information, and that fine being intire, if any of the aſſignments of the perjury are wrong, the court will arreſt judgment.

But *Holt* and the whole court were of the contrary opinion, that if all the aſſignments of the perjuries were wrong, but one, yet that one would be ſufficient for the court to give judgment upon againſt the defendant.

All aſſignments of perjury ill but one.

The ſecond exception was, that the judge of *niſi prius* had no authority to try the cauſe; for that the cauſe of action was laid in *Surrey*, the *in comitatu praedicto* relating to *Surrey*, which is the next preceding county.

Mr. *Broderick* in anſwer ſaid, that *ad proximum antecedens fiat relatio, niſi impediatur ſententia*, but that if it did hinder the ſenſe, it ſhould be referred to the county in the margin; and for that he cited *Moore* 696, in caſe of an action, which was very like this, only not in caſe of an indictment; and 3 *Cro*. 465, where, as alſo in the caſe in *Moore*, the county next preceding was, as it is in this caſe, mentioned only by way of addition, and the judges referred *in comitatu praedicto* to the county in the margin; but that was in an action too: and the reaſon given was, becauſe, when there was no neceſſary relation, they would make ſuch conſtruction as ſhould preſerve the action. And he ſaid, the rule ought not to be, as Mr. *Weld* had laid it down, that it ought to appear, that the judge of *niſi prius* had an authority; but if it did not appear upon the record that the judge had no authority, it would be well, for *ſemper praeſumitur pro ſententia:* and the moſt that could be made of this would be, that it was uncertain in what county the action was laid, there being two counties mentioned before, to either of which the *praedicto* might relate; and therefore the court would preſume the action was laid in *Middleſex*, which would ſupport the information, and not that it was laid in *Surrey*, to deſtroy it.

Mr. *Mountague* ſaid farther, that as it ſtands indifferent, the averment that the trial was *debite habita*, now it is found by verdict, will help it; otherwiſe, if it appeared upon the record itſelf, that the judge of *niſi prius* had no power. That it was a common thing in *Latin* to put the words governed before the words governing, and therefore the court will ſo diſpoſe the words in the conſtruction of them, as to make them ſenſe; and ſo will make it, *quod cum Rhodes nuper de B. in comitatu Surrey oatmeal maker implacitaſſet Holford in curia domini regis coram ipſo rege, apud Weſtmonaſterium in comitatu Middleſex, pro eo quod cum indebitatus fuit* to the plaintiff *apud le pariſh de St. Clements Danes in comitatu praedicto*, and then that would refer to *Middleſex*, and ſo all well.

Difference between actions and indictments.

Holt chief juſtice. There is a difference between actions and indictments; if this had been an action, and the plaintiff had declared thus, and *Middleſex* had been in the margin, it muſt have referred to that county; and the reaſon is, becauſe *Middleſex* in the margin, ſtands there to denote the county in which the action is laid; and therefore though a county be mentioned in the declaration for a particular purpoſe, as for an addition of one of the parties for the purpoſe, before the *venue*, yet the *comitatu praedicto* in the *venue*, ſhall not relate to that, but to the county in the margin, which was put there for that purpoſe. But now here is no *Middleſex* in the margin, and the matter as to *Middleſex* upon this record is nothing but that *Holford* was ſued in the King's Bench in *Middleſex*, which might be, though the action were laid in *Surrey*; and *St. Clements Danes* where the contract is laid, might be in *Surrey*. Then what conſtruction ſhall be made? Why relation muſt always be to the next antecedent, unleſs the ſenſe hinders; which how does it in this caſe, to ſuppoſe the defendant *Holford* indebted there; and as I remember, the difference is between actions and indictments. 3 *Cro.* 101, 184.

But if the *praedicto* does not neceſſarily relate to *Surrey*, but ſtands indifferent; then it muſt not be taken to be *Middleſex*, upon the account of the averment that the trial *debite habita fuit*, which it could not be, if *St. Clements Danes* were in *Surrey* and not in *Middleſex*; for then the trial was void.

Powell. *Eodem* always refers to the next antecedent, but not *praedicto*. It is incertain what that relates to, and here is nothing for it to relate to, one thing more than another. It can't relate to *Surrey*, becauſe that is put in only as the addition of the defendant in the action, and *Middleſex* is only put in for the place where the court was held. And *Middleſex* in the margin, in the caſe of indictments, is only put for the county where the indictment is found. And that is the reaſon of the difference between indictments and actions, in the laſt of which it is put for the county where the action is laid; and therefore the *praedicto* in an action ſhall relate to the county in the margin. But it does not appear now here upon this information, that there was any *Middleſex* in the margin, and therefore this is uncertain. But nothing ties it up to *Surrey*, and for any thing that appears, the judge of *niſi prius* might have juriſdiction, and therefore when *non conſtat* whether he had or no, the averment that the trial *debite habita fuit* will cure it.

Mr. *Weld* took another exception; that the information was, that the defendants perſuaded *J. S.* but it was not ſaid, he did it upon their perſwaſion. For it might be, that he might repent of his firſt reſolution, and then another perſon might come and perſwade him, and upon that perſwaſion he might do it. And he compared it to *Vaux*'s caſe, where the indictment was held to be naught, for want of ſaying, *venenum praedictum*, after the *recepit et bibit*, though it ſays before, how he perſwaded him to drink the poiſon, and after that, *immediate poſt receptionem veneni praedicti obiit*.

To which it was anſwered by the court, that the information was, that they procured him, which neceſſarily implies an act done.

Perſuaſit et procuravit.

And *Holt* chief juſtice ſaid, that perſwaded implied an act done, for elſe the witneſs could not be ſaid to be perſwaded. For a man does not perſwade, till he has the effect of his perſwaſion. And he agreed *Vaux*'s caſe. And he ſaid, that Mr. *Weld*'s caſe was not to be intended, but if it could be intended; yet the firſt perſwaſion ſhould be intended to prevail in the caſe, and ſhould give the firſt perſwader a ſhare of the guilt. Then Mr. *Weld* took another exception; that it was too general to ſay, that *per ſiniſtros labores, media, et procurationes*, he procured him to forſwear himſelf; but the information ought to ſhew in particular, how it was brought about; and he compared it to the caſe of an indictment of murder, where the weapon, *&c.* is all ſet out in certainty.

Holt ſaid it would be good in an indictment for an acceſſory to a murder.

Powell. All the precedents are thus. Beſides the information ſays, he procured *J. S.* to do it, which ſhews, that the act was done; and then the *per ſiniſtros*, *&c.* will not hurt.

Mr. *Weld* took another exception; that the ſum the witneſs ſwore was due upon the account, was different from the ſum, for which the plaintiff had declared; and therefore was not evidence in the cauſe, becauſe upon the *inſimul computaſſet* the plaintiff can't vary from the ſum laid in his declaration. And *Broderick* anſwered, and *Holt* took the difference, that it is not neceſſary, that the evidence be ſufficient for the plaintiff to recover upon: it is enough if it be circumſtantial evidence. And in the nature of the thing an evidence may be very material, and yet it may not be full enough, to prove directly the point in queſtion. And it is always ſufficient in indictments of perjury, to ſay that the defendant ſwore ſo and ſo *de materia in exitu*, and it has been always held ſo in my time.

Powell agreed the ſame difference, and ſaid, though this evidence did not prove fully the *inſimul computaſſet*, yet it was very material evidence, that they accounted together.

Afterwards the judgment was arreſted on the point of the authority of the judge that tried the cauſe.

Regina *verſ.* Carter.

Intr. *Paſch.* 2 *Ann.* Rot. 8.

Indictment of treſpaſs.

AN indictment was found againſt the defendant, for having taken and carried away ſo many malt tickets. And motion was made that it ſhould be quaſhed, becauſe it does not ſay, from whom they were taken, nor to whom they belonged. And it was granted. And the indictment was quaſhed.

Joſe *verſ.* Mills.

Intr. *Trin.* 1 *Ann.* B. R. Rot. 470.

S. C. Salk. 640.
In a treſpaſs the goods not appearing to be alledged to be the plaintiff's, judgment was arreſted, after judgment for plaintiff on demurrer to the defendant's plea, and conditional damages found by the jury upon iſſue on another part.
6 Mod. 14.

TReſpaſs, *quare* the defendant the cloſe of the plaintiff *apud D. fregit*, and ſuch and ſuch goods *apud D. praedictum* in the ſaid cloſe of the plaintiff *exiſtentia et inventa, et centum congios tritici triturati*, *Anglice* ground, *de bonis propriis* of the plaintiff, *adtunc et ibidem ſimiliter inventi et exiſtentis cepit et aſportavit*. There were alſo other treſpaſſes laid in the declaration, and to them the defendant pleaded not guilty. But to the firſt treſpaſs he pleaded a taking for a diſtreſs for rent, upon which there was a demurrer. The iſſue being firſt tried a verdict was for the defendant, but the jury found conditional damages for the plaintiff, if judgment ſhould be for him on the demurrer. And the plea being ill pleaded, judgment on the demurrer was for the plaintiff. Whereupon Mr. *Branthwaite* moved in arreſt of judgment, that the declaration was ill, becauſe the firſt goods were not laid to be the plaintiff's goods; nor can it be helped by ſaying they were in the plaintiff's cloſe. 2 *Lev.* 156. in point. *Terry verſ. Strudwicke.* 3 *Bulſtr.* 303. *Cro. Jac.* 46. *Yelv.* 36. Treſpaſs, *quare equum cepit a perſona* of the plaintiff, and yet held naught. To which Mr. *Ward* and Mr. *Southouſe* for the plaintiff anſwered, that the *de bonis propriis* ſhould go to the whole, and cited 2 *Ro. Ab.* 250. *p.* 7. Treſpaſs, *quare clauſum fregit et mille carectatas ſoli ad valentiam* 10 *l. et centum pecias* *maheremii ipſius querentis ad valentiam* 200*l. adtunc et ibidem inventas cepit*, *&c.* There the ſame objection was took and enforced, becauſe *ipſius querentis* coming before *ad valentiam* tied it to the timber, and yet it was held to go to the whole. But Mr. *Branthwaite* in anſwer to that caſe cited *Raym.* 395. Treſpaſs for taking the mare *ipſius querentis*, *necnon bona et catalla ſequentia*, and held naught for not repeating *ipſius querentis:* and 2 *Saund.* 379. the reaſon of which caſes is, becauſe the ſentences are different, and ſo the *de bonis propriis* can't be carried to all, of which opinion was the court. And *Holt* and *Powell* ſaid, that the addition of the place cloſed up the ſentence, and that they could not leave out thoſe words, though if they had been out, the count would have been good. *Powys* juſtice held the caſe in *Raym.* to be the caſe in point, becauſe, by him, the words in the middle may as well be carried forward, as the words at the end backward. [Note, in 1 *Saund.* 60. *Gainsford verſ. Griffith*, 'tis held otherwiſe.] *Gould* juſtice agreed the caſe in 2 *Ro. Ab.* but ſaid, that would not warrant this caſe, becauſe the *et* coupled all together; but *quaere* of that. Then *Holt* chief juſtice ſaid, that the plaintiff ought to have judgment for the goods well laid, the treſpaſſes being ſeveral. 2 *Saund.* 379. *Pinkney verſ.* the inhabitants of Eaſt Hundred in *Rutland*. But to this Mr. *Branthwaite* anſwered, that the conditional damages were given intire, and therefore the whole judgment ought to be arreſted. *Holt* ſaid, if that were ſo the judgment ought to be entred ſpecial, *viz.* upon the verdict for the defendant; and as to the reſt, that judgment was arreſted, becauſe the damages were given intire. But in order that it might be ſeen how the damages were found, the *poſtea* not being in court, the cauſe was adjourned.

Green *verſ.* Waller.

Intr. *Hil.* 13 *Will.* 3. B. R. Rot. 20.

Lilly's Entr. 233.
Debt on a bond, condition to anſwer the determination of the law, *&c.*

DEBT on a bond. The defendant craved *oyer* of the condition, which was, that if the defendant ſhould anſwer the determination of the law touching ſuch a ſhip and goods, and in caſe the law ſhould adjudge the ſaid ſhip and goods to be prize, or otherwiſe forfeited, if then the defendant ſhould deliver the ſaid ſhip and goods to the plaintiff; that then, *&c.* The defendant pleaded, that the law did not adjudge the ſaid ſhip and goods to be prize, or otherwiſe forfeited. The plaintiff replied, that this ſhip and goods were condemned in the admiralty of *England* to be prize, and aſſigns a breach, that the defendant had not delivered the ſaid ſhip and goods, *et hoc paratus eſt verificare*; and at the end of his plea makes a *profert in curia* of the ſentence, under the great ſeal of the admiralty. The defendant craves *oyer* of the ſentence, and the exemplification of the ſentence was ſet out *in haec verba*: to which the defendant demurs. This action was brought in the Common Pleas in *Ireland*, and judgment was there given for the plaintiff. On error brought, that judgment was affirmed in the King's Bench in *Ireland*, on which judgment error was now brought here.

And the exceptions which were taken to the replication by Mr. *Ward* were, that by making a *profert* of the ſentence, the plaintiff had deprived the defendant of taking iſſue upon the ſentence; and yet when he comes upon *oyer* demanded to ſet out the ſentence, he pleads only an exemplification of it, which is not pleadable; but if it were, does not prove the plaintiff's replication, being varying in many particulars from the ſhip and goods mentioned in the condition of the bond, and ſo does not prove the law has made any determination as to them. And beſides it does not appear in the ſentence, that the capture was upon the high ſea, and conſequently the admiralty had no juriſdiction; and then alſo there is no legal determination, and that the breach was not well aſſigned.

2 Ro. 585. Pletcher v. Muffin.
5 Co. 53.
C. L. 225.

Holt chief juſtice. By pleading that the law has made no determination, the defendant has confeſſed, that he has not redelivered them, and therefore the plaintiff need not aſſign a breach; and it is not like the caſe of an award, which is a ſingle caſe, and ſtands by itſelf.

A *profert in curia* need not be of a ſentence in the admiralty.

Traverſe.

As to the *profert*, the defendant needed not have made it, becauſe it is no deed, but only a judicial determination in a court not of record, and though he did make a *profert*, he needed not have ſet it out: and notwithſtanding the *profert*, the defendant might have traverſed the ſentence; and then the *quaere* is, whether this impertinent matter will hurt, or leſſen the ſtrength of a good and ſubſtantial replication? for this is not the ſentence, tho' it be called ſo; but mere idle impertinent matter, which ſhall never hurt a good replication well averred.

Powell. You ſhould have traverſed the adjudication, which they gave you a fair opportunity to do; and then if the ſhip had not been the ſame, or the matter did not ariſe within their juriſdiction, *&c.* the ſentence had been void, and the iſſue had been for you; but when you have not thought fit to do that, but waved it; this matter of the ſentence, which is mere ſurpluſage impertinent and out of the caſe, ſhall never hurt a replication, which for all the reſt is good.

Holt

Exemplification of a ſentence in the admiralty concluſive evidence.

Holt chief juſtice ſaid, though the defendant might have denied, that there was any ſuch ſentence, yet the exemplication of the ſentence under the ſeal of the court would have been concluſive evidence. As according to *Henſloe*'s caſe it is neceſſary for an executor to maintain an action, to produce the probate of the will under the ſeal of the eccleſiaſtical court, and yet notwithſtanding the probate produced under the ſeal of the court, the defendant may plead that the will was never proved: but upon iſſue upon the probate, the probate under the ſeal of the court will be concluſive evidence: and ſo it was adjudged by my lord chief juſtice *Kelynge* upon ſuch a caſe in his time, which is reported in *Lev.* But the counſel not being ſatisfied with it moved the court, and they all agreed with my lord chief juſtice *Kelynge*. In the caſe of *Hughes verſus Cornelius*, in which I was of counſel with the plaintiff in my lord *Hale*'s time, an *Engliſh* ſhip was taken in the time of the *Dutch* war, and condemned as a *Dutch* ſhip in the admiralty of *France*, and ſold to the plaintiff; and in an action of *trover* brought by him for the ſhip upon a trial before my lord chief juſtice *Hale*, the ſentence of the admiralty of *France* was produced under the ſeal of the court, and all this matter was found ſpecially; and although the fact was found to be contrary and falſifying the ſentence in the admiralty of *France*, yet that ſentence was held to bind the property of the goods, and the plaintiff recovered.

Recuperaret **in a judgment.**

Judgment reverſed in part.

Then Mr. *Ward* took an exception, that the judgment in the King's Bench in *Ireland* was *ideo conſideratum eſt quod* the plaintiff *recuperaret* for *recuperet*, which was ill, being a wrong tenſe; and cited 1 *Ro. Abr.* 771. *n.* 23. in point, and the court agreed it to be error, but that it would only reverſe the judgment of the King's Bench in *Ireland quoad* the coſts given upon the affirmance; but the judgment of affirmance would ſtand, being a diſtinct judgment; and accordingly they reverſed the judgment of the King's Bench in *Ireland quoad* the coſts, and affirmed the judgment *quoad* the affirmance. And *Holt* chief juſtice ſeemed to ſay, that they might conſider here upon the writ of error the coſts in the King's Bench in *Ireland*. *Sed quaere.*

Then Mr. *Ward* took another exception, that there was a diſcontinuance in the King's Bench, the continuance being *apud the King's courts ubicunque*, which is as if a continuance ſhould be here *apud Weſtmonaſterium ubicunque*; whereas it ſhould be *coram domina regina ubicunque*, which is the ſtile of the court.

Miſcontinuance.

But *Holt* chief juſtice ſaid, that day being given to the parties, this was but a miſcontinuance, and could not be a diſcontinuance;

and that miſcontinuances are helped by an appearance. And he ſaid, that where the proceedings are by bill, the continuances are *coram domino rege apud Weſtmonaſterium*, where by original *coram domino rege ubicunque*.

Mr. *Ward* took another exception, that the writ of error was of a plea *inter Green et Jacobum Waller*, and the *placita* was *Capit. Jacobum Waller*, which was another perſon, for *Capit.* muſt be taken to be part of his name, otherwiſe, if *Capit.* had followed after *Jacobus Waller*.

Variance. *Holt* ſaid, that in the bond, and other proceedings, he was called captain, and yet when he comes to declare, he calls himſelf only *Jacobus Waller*, which ſhews that captain cannot be part of his name.

Powell agreed, that it could not be taken to be part of his name, and that he muſt be taken to be the ſame perſon.

The judgment of affirmance in the King's Bench in *Ireland* was affirmed *quoad* the affirmance, and reverſed *quoad* the coſts, *niſi*, &c. Mr. *Broderick* counſel with the defendant in error.

Trin. Term

2 Annae Reginae, B. R. 1703.

Herbert et alii *verſ.* Burſtow.

ERROR of a judgment in the Common Pleas in *aſſumpſit*, where the plaintiff declared, that the defendant, in conſideration that the plaintiff *ſolveret et deliberaret* to the defendant ſo many pieces of hammered money, promiſed to pay, *&c.* On *non aſſumpſit* pleaded, verdict and judgment for the plaintiff. Mr. *Salkeld* for the plaintiff in error firſt urged, that here was no conſideration, becauſe *ſolveret et deliberaret* implied no more than a bare giving a poſſeſſion of the pieces, *&c.* but not a transferring of the property. The court on the other hand, that it implied a transferring of the property. The ſecond error was, that after the entry of the *poſtea* comes immediately, *ideo conſideratum eſt*, *&c.* and does not ſay where, nor by whom, ſo that it muſt be took to be the judgment of the jury. The court on the other hand, that this was the conſtant form of entries in the Common Pleas, and the difference is between judgments of ſuperior and inferior courts: in the laſt it muſt be ſaid *per eandem curiam*, otherwiſe in the firſt. The judgment was affirmed.

S. C. 1 Salk. 25.
Conſideration of *aſſumpſit* to pay and deliver.
2 Salk. 446.

Ideo conſideratum eſt in C. B. and not ſaid by whom.

Sir John Parſons *verſ.* Gill.

THE defendant gave a warrant of attorney the 2 of *April* 1701, to enter up a judgment againſt him of *Hilary* term before, or any other ſubſequent term. A judgment was entered accordingly, and in entring it up, the *memorandum* was, that in *Hilary* term *coram domina regina apud Weſtmonaſterium venit* the plaintiff *et protulit*, *&c.* And the bill was an *indebitatus aſſumpſit* upon a *mutuatus*, and the *mutuatus* was laid the 2 of *April* 1701, the day the warrant of attorney bore date, which was after *Hilary* term 1700,

S C. Salk. 50. 88.
6 Mod. 165.
Amendment of time in a judgment.

1700, of which the judgment was entred, and a writ of error was brought upon this judgment *in camera ſcaccarii.* And now Mr. *Ward* moved the court to amend this record by the judgment paper, upon which the *mutuatus* appeared to be right of the 2d of *January* 1700; and it was alſo entred upon the bottom of the judgment paper, *J. S. pro querente, J. N. pro defendente.* And alſo upon the top of the roll the warrants of attorney were entred, *viz. Querens ponit loco ſuo J. S. &c.* and *defendens ponit loco ſuo J. N. &c.* And he inſiſted, that the court might amend a record by the inſtructions given to the clerk, as in 1 *Cro.* 147. *Hutton* 83. In debt upon a bond againſt an heir, the court added the word *haeredes*; becauſe it was *vitium clerici*, he having the bond before him: that amendments had been made in the Common Pleas by the book the prothonotaries keep of the entries of judgments. *Hob.* 127. 1 *Brownlow* 16. So amendments have been made by the paper book, 1 *Cro.* 144. And in *Hil.* 8 *Will.* 3. *B. R.* Sir *Roger Pulaſton verſ. Warburton.* The court ſeemed to agree, that in ejectment, if the declarations delivered in the country were right, they would be a ſufficient warrant to amend the declaration upon record by, and therefore as they would amend by theſe, ſo they would in this, and amend by the paper upon which the maſter ſigns the judgment, and make the *mutuatus* agree to that of the 2d of *January* 1700.

Amendments by inſtructions given to the clerk.

Salk. 48.

As to the ſecond thing to be amended, *viz.* to put in *per J. S. attornatum ſuum*, he argued, that the warrant of attorney entred upon the top of the plea-roll was ſufficient warrant to amend that by: that the warrants of attorney were never filed in this court, but that anciently the way was to enter ſuch a one *ponit loco ſuo* ſuch a one, *&c.* upon a diſtinct roll; but that in the time of lord chief juſtice *Wright*, that courſe was altered, and it was entred as it is now upon the top of the plea-roll; and it being entred now upon the roll, that the plaintiff has made ſuch an one his attorney, that ſhews plainly to the court, that he ſues by attorney; and is a ſufficient warrant for the court to make this amendment by: and that the court had amended warrants of attorney. *Dyer* 105, 225. *March* 133. that this was leſs than that; for the only *quaere* here was, whether the attorney ſhould be intended to continue, when the plaintiff has once made one, till he comes and appears expreſsly in proper perſon: that upon a claim of conuſançe or upon a writ of error the attorney continues. 21 *Edw.* 3. 61.

Attorney how long continues.

Holt denied that the attorney continued upon the writ of error. And *Ward* ſaid, that the amendment in this caſe ought rather to be favoured, becauſe it was a proceeding by conſent, like the caſe of fines and common recoveries. 5 *Co.* 45. And he ſaid, that the entry of *J. S. pro querente* at the bottom of the declaration, was a farther warrant to amend by.

Book in the office foundation to amend by.

Paper on which the maſter ſigns the judgment.

Holt chief juſtice. As to the firſt miſtake in the time of the *mutuatus*, that is a plain miſtake, the book in the office has often been allowed to be a foundation to amend by. So here the paper upon which the maſter ſigned the judgment is right, and that was the warrant by which the attorney was to make up the roll, and therefore he held clearly, that ought to be amended.

As to the other matter, that it did not appear, whether the plaintiff ſued in perſon or by attorney, and therefore, whether the court ſhould not add *per J. S. attornatum ſuum.* It is plain the ſuit was to be by attorney by the warrants, and therefore when it ſtands indifferently on record, whether he ſued by attorney or no, it appearing he had an attorney, we muſt intend he ſued by attorney. For to what end did he make an attorney, if he intended to ſue in perſon. Beſides it is the practice, if the plaintiff ſue in perſon, to enter at the bottom of the declaration, *querens in propria perſona*, or *defendens in propria perſona:* and if one ſues in perſon, the other by attorney: *querens in propria perſona: J. N. pro defendente*, and therefore the judgment paper being *J. S. pro querente*, demonſtrates that the plaintiff ſued by attorney, and is a ſufficient warrant to amend this as well as the other fault in the *mutuatus*.

Powys and *Gould* juſtices agreed with *Holt in omnibus*. *Powell* juſtice did alſo agree with him as to both amendments, taking the judgment paper for the reaſon. But he diſagreed to the ſecond amendment, taking the entry of the warrant of attorney on the plea-roll for the foundation only, and putting the judgment paper out of the caſe, becauſe though that proved the parties had attornies in court, yet notwithſtanding that, the plaintiff had election to ſue either in perſon or by attorney, and that entry did not prove he ſued by attorney, and therefore was no authority to amend by.

Both the amendments were granted upon the defendant in error's payment of coſts, and conſenting that the judgment ſhould be affirmed without coſts, becauſe there was a good error at the time of the error brought.

Mutual award.

DEBT on a bond. Condition to perform an award, which was, that the defendant ſhould pay to the plaintiff or his aſſigns 50 *l.* *et ſuperinde* the plaintiff ſhould ſeal a releaſe to him of all actions and controverſies *tangen' praemiſſa.* Mr. *Cheſhyre* for the defendant took exception, the award was not mutual; for the 50 *l.* being awarded to be paid generally, and the releaſe, which was all the defendant was to have, being only of all actions *tangen' praemiſſa*, that ſhould be took to relate only to the 50 *l.* and not to the controverſies ſubmitted. The court on the contrary: that it ſhould be underſtood of the controverſies. 2. It is not ſaid, the defendant did not pay to the plaintiff's aſſigns, which is naught. 2 *Sid.* 41. *Cro. Eliz.* 348. The court contrary: becauſe they held payment to the plaintiff's aſſigns had been payment to the plaintiff himſelf; otherwiſe in the caſe in 3 *Cro.* for not repairing, becauſe the thing demiſed there was demiſable over. Judgment for the plaintiff.

Breach that the defendant did not pay to the plaintiff; nor ſaid, nor his aſſigns.

Dillon *verſ.* Harpur.

Intr. *Paſch.* 2 *Ann.* B. R. Rot. 25.

S. C. Salk. 328, 545. Preſcription for privilege laid in two negatives.

CASE. The defendant being an attorney of the Common Pleas, pleaded his privilege, and he laid the preſcription, that time out of mind, *nullus hujuſmodi attornatus non debet implacitari, &c.* but in the Common Pleas, except for treaſons, *&c.* The plaintiff demurred ſpecially, and ſhewed ſeveral things for cauſe, none of which would hold as good exceptions. But the fault that Mr. *Raymond* inſiſted upon in the plea was, that in laying the preſcription, the two negatives amounted to an affirmative, *viz.* that ſome attornies of the Common Pleas were ſuable elſewhere than in the Common Pleas, and for any thing that appeared to the contrary this defendant might be one of them. To which the court agreed. But then *Holt* chief juſtice ſaid, it would be a *quaere*, whether, ſince the defendant has alledged himſelf to be an attorney of the Common Pleas, the law does not ſay he ought to be ſued there, without laying a cuſtom, and ſo this cuſtom as alleged here ſhould be rejected as ſurpluſage. And upon that it was adjourn'd. And at another day Mr. *Southouſe* for the defendant urg'd firſt, that two negatives in law did not make an affirmative. *Litt. ſect.* 220, 362. to which Mr. *Raymond* anſwered, that thoſe were caſes of grants, wherein the law regards the intent of the parties. But pleas (eſpecially thoſe to the juriſdiction, *&c.* as this is) are always took more ſtrictly, *quod fuit conceſſum per Powell,* *Powys* and *Gould* juſtices, *abſente Holt* chief juſtice. And *Powell* juſtice ſaid, that ſince pleadings muſt be in *Latin* by the act of *Edw.* 3. they muſt be conſtrued according to the rules for conſtruction of *Latin.* Then Mr. *Southouſe* urg'd, that the court would take notice, that the attornies of the Common Pleas had privilege of being ſued there, and reject the cuſtom as pleaded as ſurpluſage. But by the three juſtices, whatſoever they would have done had it ſtood indifferent, now they would not take notice of a privilege expreſly contrary to what the defendant has alleged in his plea. And therefore they gave judgment, that the defendant ſhould anſwer over.

Sheer *verſ.* Brown.

ERROR on a judgment given in the Common Pleas by *nil dicit* in an *aſſumpſit* for goods ſold and delivered, among other counts, and intire damages on the writ of inquiry. The error aſſign'd was, that in the declaration the plaintiff ſays, that the defendant being indebted to him in ſo much money for goods ſold and delivered, *in conſideratione inde ſuper ſe aſſumpſit*, and does not ſay, that the defendant aſſumed, and therefore that the declaration was ill. And to prove this, *Law verſ. Saunders, Cro. Eliz.* 913. *Noy* 50. and *Lopdell verſ. Hart, intr. Paſch.* 1 *Will.* 3. *B. R.* and 2 *Ventr.* 196. were cited. But *Holt* chief juſtice being preſent when this was firſt ſtirred, held it clearly well; and ſaid he had forgot the caſe of *Lopdell verſ. Hart*, but ſuppoſed if it were ſo adjudg'd, there were three perſons mentioned before in the count. Upon which it was adjourn'd. And being ſtirr'd at another day (*Holt* chief juſtice being abſent) *Powell* juſtice ſaid, that the caſe in *Cro. Eliz.* 913. was ſo adjudg'd, becauſe there were three perſons mentioned in the count, and then *non conſtat* which of the two beſides the plaintiff made the promiſe, and therefore it is uncertain; but in this caſe there is only the plaintiff and defendant mentioned. As to 2 *Ventr.* 196. that was adjudg'd on a motion without debate, and againſt *Ventris*'s opinion, and that in a caſe in the Common Pleas about two or three years ago this exception was took and conſidered, and 2 *Ventr.* conſidered, and the exception over-ruled; and the caſe in 2 *Ventr.* held not to be law by the whole court of Common Pleas. It muſt be took to be, that the defendant promis'd. If it is tranſlated, it is, that he promiſed, which muſt refer to the defendant, that went laſt before. *Gould* juſtice ſaid, that the difference was between a collateral promiſe, and one that ariſes by operation of law: and cited *Buckler verſ. Angell*, 1 *Lev.* 164. and *Moilſon verſ. Ruſſell.* Judgment was affirm'd by the three juſtices, *Holt* being abſent.

S. C. 3 Salk. 17.

Not ſaid who aſſum'd.

5 Mod. 306. Arg.

2 Keb. 715.
Lutw. 238.
1 Salk. 26.

Lopdell verſ. Hart.

Roe verſ. Gatehouſe, 1 Noy 51.

Poſt. 1156.

Regina *verſ.* Burnaby.

S. C. Salk. 181. Conviction for cutting trees, on 43 Eliz. cap. 7.

A Conviction upon the ſtatute of the 43 *Eliz. cap.* 7. againſt robbing of orchards, cutting of trees, *&c.* The conviction ſets forth, that whereas complaint hath been made to the juſtice of peace by Sir *Robert Barnard* of *Brampton* in the county of *Huntington*, that the defendant in the night-time cut down divers lime trees of the ſaid Sir *Robert Barnard* at *Brampton* aforeſaid, *&c.* the juſtice of peace awarded him to pay ſo much damages, and in the conviction *Burnaby* was ſtiled gentleman. This conviction was removed by *certiorari* into the King's Bench, and there the defendant upon the authority of the caſe in 3 *Cro.* 821. offered to put in a plea to the conviction, ſuggeſting a title in the defendant, as I think it was a right of common; but after ſeveral days debate before and after *Powell* juſtice came up to the King's Bench, the plea was refuſed by the opinion of the three judges, againſt *Holt* chief juſtice, who firſt ſtarted the point: Whether ſuch a plea might be received or not to the return of the *certiorari*.

No pleading to a conviction removed into the King's Bench by *certiorari*.

Powell juſtice ſaid, that there was never any ſuch proceeding, for ought appeared, in this court, and therefore he would not conſent to let in ſuch a way of pleading to judgments, which would be of ſuch mighty conſequence, without ſome precedent to warrant it. If indeed any record or precedent of *St. John*'s caſe could be found, he might have conſented to it, but being no ſuch could be found, he was againſt it. If they had juriſdiction, the act that veſts that juriſdiction in them excludes us and every body elſe to call in queſtion their judgment, or ſay any thing contrary to it; and if they had not juriſdiction, as I take it they have not where property is in queſtion, then an action lies againſt the maker, and him that executes the conviction; and that is the party's proper remedy, and the proper method to bring this matter into queſtion; and while he has that, there is no need for us to find out ſuch a new and extraordinary remedy as this for him. *Powys* and *Gould* agreed with *Powell*.

Holt chief juſtice ſaid, that there was all the reaſon in the world to believe, that that caſe in 3 *Cro.* 821. was ſo; for it appeared by my lord *Coke* in *St. John*'s caſe, 5 *Co.* 71. as well as by this report of the caſe in *Croke*, that ſuch a judgment was given upon the caſe of the dagge, and that queſtion could never have come before the court any way but this, and ſo we have a moral certainty, that there was ſuch a proceeding, though we have not a mathematical one. I agree, that if the matter of fact were within their juriſdiction, you ſhall never falſify the proceedings of the juſtices; but if the matter be out of their juriſdiction, then you all agree their proceedings may be falſified in an action; and why ſhould we not rather to prevent actions againſt the juſtices ſuffer the parties to put in pleas to theſe convictions here, but eſpecially ſeeing there can be no other remedy in this caſe. For now this conviction is come hither, no prohibition can go; whereas upon putting in ſuch a ſuggeſtion as this while the conviction remained below, the parties might have a prohibition after conviction to ſtay the juſtice from proceeding upon it; for without doubt, if the defendant had but a colour of title, the juſtices of peace had no juriſdiction in the cauſe, and now the conviction is removed here, if it be good, and ſo be confirmed, then proceſs iſſues out of this court upon the affirmance, and then no action will lie for the party againſt the officer who executes the proceſs of this court. And therefore ſeeing we by our affirmance are to give the conviction this new ſtrength, it ſeems reaſonable we ſhould have a power to examine into the matter of it by way of plea, that we may not ſet our ſtamp to that, that ought never to have been made at all.

Where the matter of fact is within the juriſdiction of the juſtices, it ſhall not be falſified.

No action againſt an officer, who executes proceſs on conviction confirmed by the King's Bench.

Then the court refuſing the plea, Mr. *Page* and Mr. *Broderick* took exceptions to the conviction, Firſt, that the conviction took notice of the defendant to be a gentleman, and that gentlemen are not within the ſtatute, but only mean and idle perſons, hedge-pullers, *&c.* And for that they cited the preamble of the ſtatute, and alſo the 15 *Car.* 2. made for enforcing this act; and alſo whipping, which is the puniſhment inflicted by the ſtatute, is ſo baſe as the law could never intend to inflict upon gentlemen. Secondly, that the conviction was uncertain, firſt in not mentioning the number of the trees, which ſhould have been done, as a meaſure for the juſtice to give damage by; ſecondly, in the place, at *Brampton* aforeſaid, and *Brampton* might lie in two counties, and ſo the fact might be done in *Brampton* aforeſaid, and yet not in the county of *Huntington*, and ſo out of the juriſdiction of the juſtice, and therefore the conviction ſhould have ſaid at *Brampton praedictam in comitatu praedicto.*

Holt chief juſtice. *Playter*'s caſe in 5 *Co.* 34. is expreſs, that in treſpaſſes the number and nature of things ought to be mentioned; if ſo in treſpaſſes, much more in a conviction, where all imaginable certainty is requiſite, the ſubject by this private juriſdiction executed by a ſingle juſtice in a ſummary way being deprived of the privilege and benefit of the common law, and of being tried in the face of the country by the judgment of his peers.

A conviction on 43 El. c. 7. for cutting trees ought to mention how many.

Beſides

Conviction pleaded in bar of a treſpaſs for the ſame thing. Poſt.

A gentleman is within 43 El. c. 7. if he cuts trees, &c.

Beſides the ſame reaſon that holds in treſpaſſes holds here, *viz.* the aſcertaining the damage, which by the ſtatute the juſtice is to aſſeſs, and this conviction may be pleaded in bar of an action of treſpaſs for the ſame treſpaſs. And therefore for this reaſon *per totam curiam* the conviction was quaſhed. As to the exception, that the defendant was ſaid to be a gentleman, the court over-ruled it, ſaying that if gentlemen will do baſe things, they muſt be liable to the puniſhment the law has appointed for ſuch offenſes, and their quality will be but an aggravation. As to the place, they held, that *Brampton praedict.* muſt be took to be *Brampton in comitatu praedicto.* The conviction was quaſhed. *Ex relatione m'ri Jacob.*

Note. I was informed that the court did not give any poſitive opinion as to the plea, but that they ſeemed inclined as above, and that by advice of the court the parties conſented to try in an action, whether the defendant had any right or no in the place where, &c. But Sir *Robert Barnard* dying ſoon after the term, the ſuit fell.

Helliot *againſt* Mr. ſerjeant J. Selby.

Traverſe that *J. S.* was *rite et legitime* ſeiſed in fee ſuch a day, ill. 2 Salk. 701. 3 Salk. 355.

Replevin. The defendant avowed the taking the cattle *damage feaſant* in his freehold. The plaintiff in bar of the avowry pleaded, that the duke of *Buckingham* was *rite et legitime* ſuch a day ſeiſed in fee of the manor of *W.* whereof the place is, and time out of mind has been parcel, and then he lays a cuſtom within the manor, for the copyholders to have common in the place where, and then ſets out a grant of a copyhold tenement, &c. to himſelf from the duke, &c. The defendant replied, that the cattle were *damage feaſant* in his freehold, *abſque hoc,* that the duke was at the day in the bar mentioned *rite et legitime* ſeiſed in fee of the manor, and granted the copyhold eſtate to the plaintiff, &c. The plaintiff demurred. Mr. *Raymond* for the plaintiff took exception to the traverſe. Firſt, that the defendant ought not to have traverſed the *rite et legitime*; nor ſecondly, the day of the ſeiſin, becauſe if the lord were a diſpoſer, the grant would be good, and the time of the ſeiſin is not material, if it were before the grant. Mr. *Weld* for the defendant cited *Dyer* 365. as a caſe that would govern this, where in replevin the defendant avowed as here; the plaintiff pleaded in bar, that he was ſeiſed in fee of *Blackacre* next adjoining to the place where, and the defendant, &c. was bound to repair the fenſes, &c. and for fault, &c. The defendant replied and traverſed, *abſque hoc,* that the plaintiff was ſeiſed in fee of *Blackacre,* &c. The defendant demurred. And reſolved, that though the being ſeiſed of a preciſe eſtate of fee was not material,

2 nor

nor conſequently traverſable; yet the plaintiff by pleading this preciſe eſtate had given the defendant the advantage of traverſing it, though any intereſt would have maintained the bar to the avowry as well as a fee. So here. But the court agreed clearly, that the traverſe was naught.

Then Mr. *Weld* took exception to the original, that it was nonſenſe, and that there was no ſuch word as *averiarum*, the entry being in the *memorandum*, that the defendants *ſummoniti fuerunt ad reſpondendum* the plaintiff *de placito captionis et injuſte detentionis averiarum, ea injuſte detiner. contra vad. et pleg. &c.* and that there was no ſuch word as *detiner.* But the court held it was not one jot material, the *memorandum* being no part of the declaration, and that if the original was naught, the way muſt be to take advantage of it by *oyer*; for this is but a recital, on which the King's Bench can't judge. And he cited a caſe in this court, where in error on judgment of the Common Pleas in debt, the recital was *attachiatus* inſtead of *ſummonitus*, and it was urged to be error; the court held it to be but a recital, and that the way to take advantage of it was to allege diminution, and take a *certiorari*, and if the original returned was ſo, it would be error, and they would reverſe it, but not as it is upon the bare recital. And when *Broderick* the laſt day of the term inſiſted upon it, that it was not took notice of in 1 *Saund.* 317. nor the other reporter of that caſe, *Holt* chief juſtice remembred the caſe well himſelf, and it was as he reported it, and that *Twiſden* juſtice ſaid it was but recital. Judgment was given for the plaintiff.

Memorandum no part of the declaration.

The counteſs of Banbury *verſ.* Knolls and Wood.

S. C. Salk. 5.
Variance from the regiſter.
Poſt. 987.
6 Mod. 84.

In a *homine replegiando*, the defendant prayed *oyer* of the writ, and had it, and it was the *pluries*, and then pleaded in abatement a variance between the writ in the regiſter and this, *viz.* that the words *ad ipſorum* (*viz. praefatae Mariae comitiſſae Banbury et Caroli Knolls, &c.*) *damnum non modicum et gravamen*, were left out, and to this the plaintiff demurr'd. And *per curiam*, the *pluries* complaining of the delay done to the plaintiff in not executing the firſt writ and the *alias*, thoſe words *ad ipſorum damnum, &c.* would be a material part of the writ, otherwiſe on the *alias*; and therefore being a variance from the regiſter in a point material, the writ muſt be abated. And ſo it was. *Holt* chief juſtice ſaid, that the *homine replegiando*, and the *alias*, are *viconticls* and not returnable, but the *pluries* is always returnable in the Common Pleas, or King's Bench, and is the very writ the court holds plea upon. And he bid the council of the plaintiff conſider, whether the counteſs of *Banbury* and *Charles Knolls* could be join'd in one writ: in the firſt

Hom. repleg. two join.

writ it would be well enough, it not being returnable. But it is a queſtion, whether it would be ſo in the *pluries*.

Willan *verſ.* The Hundred of Stancliffe.

Intr. *Paſch.* 2 *Ann.* B. R. Rot. 288.

The maſter and ſervant in company, and the robbers *ſpoliaverunt* the ſervant.

ERROR on a judgment given in the Common Pleas, in an action on the ſtatute of hue and cry. Mr. *Broderick* for the plaintiff took two exceptions to the count: firſt, that the maſter and ſervant were laid to be in company, and that the robbers *ſpoliaverunt* the ſervant, where it ſhould have been the maſter, the goods being all the while in the maſter's poſſeſſion, he being in company; and for this he cited *Style* 156, 319.

Holt chief juſtice agreed, that the goods were in point of law in the poſſeſſion of the maſter, and that in an indictment of robbery againſt the thieves it would be well to ſay, that they robbed the maſter; but he ſaid, that it would be well in a declaration to declare according to the truth of the fact, and leave the conſtruction of the law to the judges. The ſecond exception was, that it was ſaid in the declaration *quadraginta dies jam praeterierunt*, which refers to the time of the declaration; and ſo the original, for ought appears, might be ſued out within the forty days; and therefore he ought to have ſaid, *quadraginta dies praeterierunt* before the ſuit of the original. Mr. *Cheſhyre* for the defendants ſaid, all the precedents were as this is, and compared it to the caſe in 3 *Lev.* 246. of *adhuc*, which is there held to refer to the time of the original.

Holt chief juſtice ſaid, that they would take the robbery to have been committed the very day it is laid, and then it appears upon the count that the forty days were paſſed. That if they would take advantage of it upon the original, they ſhould have craved *oyer* of it. And judgment was affirmed.

Hales *verſ.* Owen.

S. C. 1 Salk. 625
S. C. Comyns 132.

An action for a double return of member to ſerve in parliament.

AN action upon the ſtatute of the 7 & 8 *Will.* 3. *c.* 7. for a double return. Upon not guilty pleaded, and a verdict for the plaintiff, it was now moved in arreſt of judgment by Mr. *Cowper.* And the ground upon which he founded his exceptions was, that if it did not appear to the court, that there was a ſufficient authority to make an election, and that that authority was well purſued, and a *fortiori* if it did appear that it was not well purſued, then was there no perſon elected, and conſequently no party grieved to bring an action, nor no action could lie upon this ſtatute. And firſt, after the recital of the act of parliament in the declaration comes the writ, which is ſet out thus, *quod quoddam breve domini regis e cancellaria ſua emanaſſet, vicecomitibus civitatis Coventriae directum, per quod quidem breve (recitando quod cum de adviſamento, &c.) vicecomitibus civitatis praedictae praecepit firmiter injungendo, &c.* And ſo it does not appear who it was commanded, there being no nominative to *praecepit*, and ſo for ought appears there was no authority to make the election. Secondly, the writ commands, that he ſhould make proclamation *de die et loco praedictis*, which refers to the day of the meeting of the parliament, which is the only time mentioned in the writ. And when the plaintiff in his declaration comes to ſhew how it was executed, he ſays only that proclamation was made of the time of election, but does not ſhew the proclamation of the time of meeting of the parliament. Thirdly, it did not appear the proclamation was made at the county court, much leſs at the next, the words being only *apud civitatem Coventriae*; and if that ſhould be taken to be the next county court, then the election could not be at the next county court; for he tells you, that proclamation was made at the city of *Coventry* the fourth of *December*, that the election would be upon the ninth; and it was made accordingly the ninth, which could not be the next county court, for that was the fourth; and the county court being but one day in law, it muſt fall then, except it had been adjourned over to the ninth, which does not appear; and eſpecially it being ſaid to be the ninth of *December* then next following, which muſt be the *December* twelve-month. Like the caſe of *Jones verſ. Morley*, adjudged in this court *Hil.* 9 *Will.* 3. *B. R.* where a man in *Hilary* term covenanted to levy a fine next *Hilary* term; that was adjudged, muſt be underſtood *Hilary* term twelve-month. The ſame objection goes to the election, it being only ſaid to be made *apud iſtam eandem civitatem.* Fourthly, it does not appear any body but himſelf was choſen, and he ought to have ſhewed two were choſen; for the writ commanding them to chuſe two, if only one was choſen, the writ was ill purſued in ſubſtance, and conſequently the election void, which is indeed the ground of all the other objections, the ſheriffs being bound in all things ſtrictly to purſue the directions of the writ; and if they vary from it, all their proceedings, as not being purſuant to their authority, are void, and conſequently the plaintiff not elected, which it is incumbent upon him to make himſelf out to be, to intitle himſelf to an action. To theſe objections it was anſwered by the council for the plaintiff, that as for the firſt, it muſt be underſtood the King commanded, and that it was the idiom of the *Latin* language not to repeat the nominative caſe, but the verb ſhould be applied to ſuch perſon named before, as beſt ſuited with the ſenſe: that it was

Conſtruction of a ſentence.

was a rule in the *ſyntaxis*, that *in verbis quorum ſignificatio ad homines tantum pertinet, tertiae perſonae nominativus ſaepe ſubauditur*: that the original writ in debt in the regiſter was juſt as this, *praecipe J. S. quod reddat J. N. triginta libras, quas ei debet et injuſte detinet, &c.* Where *J. S.* and *J. N.* are both dative caſes, and yet the *Latin* is well, without repeating *quas J. S. ei debet*, though *J. S.* was never named before in the nominative caſe; and though *J. N.* be the ſubſtantive next going before, yet it is determined by the ſenſe to *J. S.* To the reſt of the objections they gave an anſwer, that nothing was incumbent upon them, but only to ſhew that they were duly elected; and that accordingly they had averred, that they were *debito modo* elected, that whether the ſheriff proceeded regularly to the election in all the ſteps of it was not incumbent upon them to ſhew, as neither that another was elected; it was enough for them to ſhew themſelves elected, which they had done, and that was now found with them. And Mr. Sollicitor ſaid, that if the ſheriff had proceeded to an election irregularly, yet he ſhould not take advantage of his own wrong; for then he would have nothing to do, but to make ſome irregular ſtep in the election, and he would be ſecure from an action, let him act as he would. Mr. *Cooper* replied, that what was good *Ciceronian Latin*, would not be good in a declaration, for that required more certainty. For the caſe of the writ he ſaid, that was well enough; for the intention of a writ was to tell the matter ſhortly, and from thence it has the name of *breve*; but declarations muſt be more particular. He ſaid, that the averment of *debito modo electus* was not ſufficient, without ſhewing the manner of the election; and it was plain the plaintiff's council thought ſo, becauſe they had ſet it out: but that if what he had obſerved was true, that it appeared that the ſheriff had not purſued his authority, the averment, that the plaintiff was *debito modo electus*, could never make it good, becauſe it was an averment contrary to what appeared in their own declaration: and if the court would refer *praecepit* to the words going before, there were two of them, the King and the Chancery; and then it would be uncertain to which of them it ſhould be referred. And if the ſheriff proceeded irregularly, he might be puniſhed in parliament, &c. but he could not be liable to an action upon the caſe for a double return.

Holt chief juſtice. The pronoun *ille* in the nominative caſe is often underſtood, where there is a word going before, to which it may relate: the caſe of the *praecipe quod reddat* is in point; *ille* is there underſtood, and has relation to *J. S.* which went before. But then it is objected, that it is the nature of a writ to declare the matter ſhortly. But though it be the nature of a writ to tell the matter ſhortly, yet it muſt be *Latin*, and clear, and plain, and good ſenſe. The writ need not indeed be ſo particular as the declaration; as in treſpaſs, it is enough to ſay in the writ, *quare bona ſua cepit:* but when you come to declare, you muſt mention the particulars. But then it is objected, that indeed this is good *Latin* in *Cicero*, but it is not good in a declaration. But ſure what is good *Latin* in *Cicero* is good *Latin* in law. In the concluſion of a plea it is the conſtant way for us to ſay, *et hoc paratus eſt verificare*, without repeating the pronoun *ille*. So here, if you leave out the parentheſis, the words will run thus, *quoddam breve domini regis e cancellaria ſua emanaſſet vicecomitibus civitatis Coventriae directum per quod quidem breve vicecomitibus civitatis praedictae praecepit firmiter injungendo, &c.* that muſt be, *ille praecepit*. But it is objected, that it is uncertain whether it ſhould be *ille* or *illa*; that is, whether it ſhould relate to the King or the Chancery. But the Chancery cannot command by a writ, but only the King; and all writs are in the King's name. The Lord Chancellor indeed ſits in the court, and iſſues out the proceſs; but it is the King who commands in the proceſs, and it cannot be underſtood otherwiſe. And if this would be the ſenſe of the words leaving out the parentheſis, it will be the ſenſe of them with it in; for the parentheſis does not break the ſenſe at all, nor will make it worſe. But then it is objected ſecondly, that it does not appear here that there was a regular election. Nay, Mr. *Cowper* ſays, that it does not only not appear, that there was a regular election, but the contrary appears, *viz.* that it was irregular. But I think the contrary is true, for the election might be at the next county court, though it is not ſaid that it was, for nothing appears to the court, but that the county court might be adjourned; and ſince it might be ſo, why ſhall not we underſtand that it was ſo? But beſides all this, it would have been enough for the plaintiff to have ſaid in his declaration, that a writ was directed to the ſheriffs, and that thereupon the ſheriffs proceeded to an election, and that the plaintiff was *debito modo electus*, and he might have left out all this matter, about the manner of the election; and that which is in the declaration beſides, leaving out all that matter, brings the plaintiff within the benefit of the ſtatute, and he might have averred his concluſion, without ſhewing any premiſſes at all. And if he might have ſo done, then when nothing appears in theſe premiſſes to the contrary, why ſhall not we intend, that the election was well? But then Mr. *Cowper* objected, that it does not appear that two were choſen. Suppoſe the electors will chooſe but one, or they agree to chooſe one firſt, and then the other, and accordingly they chooſe the firſt well, and the ſecond is a void election; the election of the one will not be void, becauſe either another is not choſe, or not well choſe. Beſides, this is an authority to do two things; and if it be well executed as to one of them, the not executing of it as to the other

Enough to ſay a writ directed to the ſheriff.

Election of one good, though the other is not.

will not avoid the execution of it as to the firſt. Like the caſe of a power of revocation; a man may revoke part only, or part at one time, and part at another: ſo here, the electors may chooſe one firſt, or one only, and not another, and authorities in execution of juſtice are favoured; and therefore if a writ be directed to four bailiffs, two may execute it. C. L. 181. b. Beſides, it appears upon the writ, that the ſheriffs have returned two indentures, *viz.* one with Sir *Chriſtopher Hales* and *Hopkins*, and the other with *Hopkins* and *Neale*. But ſuppoſe there were an irregularity in the execution of the writ, ſhall the ſheriff take advantage of it? Since he has pretended to execute the writ, and make a return, he ſhall never take advantage of any error in the proceedings.

If it appears on the count to be a void election, the plaintiff cannot maintain his action.

Powell juſtice. Leaving out the parentheſis, the matter is plain, and it is the nature of a parentheſis to be left out. The Chancery cannot command by a writ, it muſt be the King muſt command. There is more doubt upon the matter of the adjournment. I think, that if it had appeared upon the record, that the election was a void election, the plaintiff could not have maintained this action; but it does not appear, that the ſheriff made proclamation of the time of the meeting of the parliament; but yet he might have done it, though it does not appear upon the writ, in which it is by no means neceſſary to ſet it out. It appears he made proclamation of the time of the election; but then it is ſaid, it does not appear he made the election at the next county court. But nothing appears to the contrary. It is ſaid, it does, becauſe the proclamation was made upon the fourth, that the election would be upon the ninth, and then it was had; and therefore the county court being but one day in law, the ninth could not be the next county court, for that was the fourth. But the court might be adjourned; and if the election had not been at the next county court, the plaintiff could not have had a verdict. The plaintiff has nothing to do to ſhew another was elected; he has ſhewed, he was duly elected himſelf, and ſo has made himſelf out to be the party grieved, and that is enough for him to ſhew. This matter might have been taken advantage of upon the trial.

Gould and *Powys* agreed, and judgment was given for the plaintiff.

Holt chief juſtice ſaid, this was not like the caſe of *Jones verſ. Morley*, for this muſt relate to the day of the month; that being ſpoken of the term, which is an intire thing, could not be conſtrued otherwiſe. And *Powell* agreed that it differed much.

Co

Coggs *verſ.* Bernard.

S. C. Comyns 133.
S. C. Salk. 26.
3 Salk. 11.
Caſe upon a promiſe to take up brandies, and carry them to *D.* and ſafely to lay them down, without ſhewing any conſideration.

IN an action upon the caſe the plaintiff declared, *quod cum Bernard* the defendant, the tenth of *November* 13 *Will.* 3. at, *&c.* *aſſumpſiſſet*, *ſalvo et ſecure elevare*, *Anglice* to take up, ſeveral hogſheads of brandy then in a certain cellar in *D. et ſalvo et ſecure deponere*, *Anglice* to lay them down again, in a certain other cellar in *Water-lane*, the ſaid defendant and his ſervants and agents, *tam negligenter et improvide* put them down again into the ſaid other cellar, *quod per defectum curae ipſius* the defendant, his ſervants and agents, one of the caſks was ſtaved, and a great quantity of brandy, *viz.* ſo many gallons of brandy, was ſpilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arreſt of judgment, for that it was not alledged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. And the caſe being thought to be a caſe of great conſequence, it was this day argued *ſeriatim* by the whole court.

Any man that undertakes to carry, though not a common carrier, is liable to an action for, *&c.*

Undertaking to build a houſe.

Gould juſtice. I think this is a good declaration. The objection that has been made is, becauſe there is not any conſideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are loſt, or come to any damage: and if a *praemium* be laid to be given, then it is without queſtion ſo. The reaſon of the action is, the particular truſt repoſed in the defendant, to which he has concurred by his aſſumption, and in the executing which he has miſcarried by his neglect. But if a man undertakes to build a houſe, without any thing to be had for his pains, an action will not lie for non-performance, becauſe it is *nudum pactum*. So is the 3 *Hen.* 6. 36. So if goods are depoſited with a friend, and are ſtolen from him, no action will lie. 29 *Aſſ.* 28. But there will be a difference in that caſe upon the evidence, how the matter appears; if they were ſtolen by reaſon of a groſs neglect in the bailee, the truſt will not ſave him from an action, otherwiſe if there be no groſs neglect. So is *Doct. & Stud.* 129. upon that difference. The ſame difference is where he comes to goods by finding. *Doct. & Stud. ubi ſupra. Ow.* 141. But if a man takes upon him expreſly to do ſuch a fact ſafely and ſecurely, if the thing comes to any damage by his miſcarriage, an action will lie againſt him. If it be only a general bailment, the bailee will not be chargeable, without a groſs neglect. So is *Keilw.* 160. 2 *Hen.* 7. 11. 22 *Aſſ.* 41. 1 *R.* 10. *Bro. action ſur le caſe* 78. *Southcote*'s caſe is a hard caſe indeed, to oblige all men, that take goods to keep, to a ſpecial acceptance, that they will keep them as ſafe as they would do their own, which is a thing no man living that is not a lawyer could think of: and indeed it appears by the report of that caſe in 3 *Cro.* 815. that it was adjudged by two judges only, *viz.* *Gawdy* and *Clench.* But in 1 *Ventr.* 121. there is a breach aſſigned upon a bond conditioned to give a true account, that the defendant had not accounted for 30 *l.* the defendant ſhewed that he locked the money up in his maſter's warehouſe, and it was ſtole from thence, and that was held to be a good account. But when a man undertakes ſpecially to do ſuch a thing, it is not hard to charge him for his neglect, becauſe he had the goods committed to his cuſtody upon thoſe terms.

Powys agreed upon the neglect.

Powell. The doubt is, becauſe it is not mentioned in the declaration, that the defendant had any thing for his pains, nor that he was a common porter, which of itſelf imports a hire, and that he is to be paid for his pains. So that the queſtion is, whether an action will lie againſt a man for doing the office of a friend, when there is not any particular neglect ſhewn? And I hold an action will lie, as this caſe is. And in order to make it out, I ſhall firſt ſhew, that there are great authorities for me, and none againſt me; and then ſecondly, I ſhall ſhew the reaſon and *git* of this action; and then thirdly, I ſhall conſider *Southcote*'s caſe.

1. Thoſe authorities in the *Regiſter* 110. *a.* *b.* of the pipe of wine, and the cure of the horſe, are in point, and there can be no anſwer given them, but that they are writs, which are framed ſhort. But a writ upon the caſe muſt mention every thing that is material in the caſe, and nothing is to be added to it in the count, but the time, and ſuch other circumſtances. But even that objection is anſwered by *Raſt. Entr.* 13. *c.* where there is a declaration ſo general. The year books are full in this point. 43 *Ed.* 3. 33. *a.* there is no particular act ſhewed. There indeed the weight is laid more upon the neglect, than the contract. But in 48 *Edw.* 3. 6. and 19 *Hen.* 6. 49. there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traverſable, and a writ is quaſhed for want of laying a place of the undertaking. 2 *Hen.* 7. 11. 7 *Hen.* 4. 14. theſe caſes are all in point, and the action adjudged to lie upon the undertaking.

Bro. action upon the caſe, 24.

2. Now to give the reaſon of theſe caſes, the *git* of theſe actions is the undertaking. The party's ſpecial *aſſumpſit* and undertaking obliges him ſo to do the thing, that the baylor come to no damage by his neglect. And the bailee in this caſe ſhall anſwer accidents, as if the goods are ſtolen; but not ſuch accidents and

caſualties as happen by the act of God, as fire, tempeſt, *&c.* So it is 1 *Jones* 179. *Palm.* 548. For the bailee is not bound, upon any undertaking againſt the act of God. Juſtice *Jones* in that caſe puts the caſe of the 22 *Aſſ.* where the ferryman overladed the boat. That is no authority I confeſs in that caſe, for the action there is founded upon the ferryman's act, *viz.* the overlading the boat. But it would not have lain, ſays he, without that act; becauſe the ferryman, notwithſtanding his undertaking, was not bound to anſwer for ſtorms. But that act would charge him without any undertaking, becauſe it was his own wrong to overlade the boat. But bailees are chargeable in caſe of other accidents, becauſe they have a remedy againſt the wrong doers: as in caſe the goods are ſtolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had againſt enemies, in caſe they are plundered by them; and therefore in that caſe he ſhall not be anſwerable. But it is objected, that here is no conſideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and anſwering for things which he has taken into his cuſtody upon ſuch an undertaking. An action indeed will not lie for not doing the thing, for want of a ſufficient conſideration; but yet if the bailee will take the goods into his cuſtody, he ſhall be anſwerable for them; for the taking the goods into his cuſtody is his own act. And this action is founded upon the warranty, upon which I have been contented to truſt you with the goods, which without ſuch a warranty I would not have done. And a man may warrant a thing without any conſideration. And therefore when I have repoſed a truſt in you, upon your undertaking, if I ſuffer, when I have ſo relied upon you, I ſhall have my action. Like the caſe of the counteſs of *Salop*. An action will not lie againſt a tenant at will generally, if the houſe be burnt down. But if the action had been founded upon a ſpecial undertaking, as that in conſideration the leſſor would let him live in the houſe, he promiſed to deliver up the houſe to him again in as good repair as it was then, the action would have lain upon that ſpecial undertaking. But there the action was laid generally.

Bailee not liable againſt the act of God, but againſt robbers.

Warranty without a conſideration.

3. *Southcote*'s caſe is a ſtrong authority, and the reaſon of it comes home to this, becauſe the general bailment is there taken to be an undertaking to deliver the goods at all events, and ſo the judgment is founded upon the undertaking. But I cannot think, that a general bailment is an undertaking to keep the goods ſafely at all events. That is hard. *Coke* reports the caſe upon that reaſon, but makes a difference, where a man undertakes ſpecially, to keep goods as he will keep his own. Let us conſider the reaſon of the caſe. For nothing is law, that is not reaſon. Upon conſideration

That notion in Southcote's caſe, 4 Co. 83. b that a general bailment and a bailment to be ſafely kept is all one, was denied to be law by the whole court, *ex relatione m'ri Bunbury.*

of the authorities there cited, I find no ſuch difference. In 9 *Edw.* 4. 40. *b.* there is ſuch an opinion by *Danby*. The caſe in 3 *Hen.* 7. 4. was of a ſpecial bailment, ſo that that caſe cannot go very far in the matter. 6 *Hen.* 7. 12. there is ſuch an opinion by the by. And this is all the foundation of *Southcote*'s caſe. But there are caſes there cited, which are ſtronger againſt it, as 10 *Hen.* 7. 26. 29 *Aſſ.* 28. the caſe of a pawn. My lord *Coke* would diſtinguiſh that caſe of a pawn from a bailment, becauſe the pawnee has a ſpecial property in the pawn; but that will make no difference, becauſe he has a ſpecial property in the thing bail'd to him to keep. 8 *Edw.* 2. *Fitzh. detinue* 59. the caſe of goods bail'd to a man, lock'd up in a cheſt, and ſtolen; and for the reaſon of that caſe, ſure it would be hard, that a man that takes goods into his cuſtody to keep for a friend purely out of kindneſs to his friend, ſhould be chargeable at all events. But then it is anſwered to that, that the bailee might take them ſpecially. There are many lawyers don't know that difference, or however it may be with them, half mankind never heard of it. So for theſe reaſons, I think a general bailment is not, nor cannot be taken to be, a ſpecial undertaking to keep the goods bail'd ſafely againſt all events. But if a man does undertake ſpecially to keep goods ſafely, that is a warranty, and will oblige the bailee to keep them ſafely againſt perils, where he has his remedy over, but not againſt ſuch where he has no remedy over.

Holt chief juſtice. The caſe is ſhortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down ſafely, and he managed them ſo negligently, that for want of care in him ſome of the goods were ſpoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cauſe being tried before me at *Guildhall*. There has been a motion in arreſt of judgment, that the declaration is inſufficient, becauſe the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is chargeable by his trade, and a private perſon cannot be charg'd in an action without a reward.

I have had a great conſideration of this caſe, and becauſe ſome of the books make the action lie upon the reward, and ſome upon the promiſe, at firſt I made a great queſtion, whether this declaration was good. But upon conſideration, as this declaration is, I think the action will well lie. In order to ſhew the grounds, upon which a man ſhall be charged with goods put into his cuſtody, I muſt ſhew the ſeveral ſorts of bailments. And there are ſix ſorts of bailments. The firſt ſort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the uſe of the

Six ſorts of bailments.

Depoſitum.

I bailor

Accommodatum.

Locatio.

Pawns.

Things to be carried, *&c.* for a reward.

To be carried without reward.

bailor; and this I call a *depoſitum*, and it is that ſort of bailment which is mentioned in *Southcote*'s caſe. The ſecond ſort is, when goods or chattels that are uſeful, are lent to a friend *gratis*, to be uſed by him: and this is called *commodatum* becauſe the thing is to be reſtored in *ſpecie*. The third ſort is, when goods are left with the bailee to be uſed by him for hire: this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth ſort is, when goods or chattels are delivered to another as a pawn, to be a ſecurity to him for money borrowed of him by the bailor: and this is called in *Latin vadium*, and in *Engliſh* a pawn or a pledge. The fifth ſort is, when goods or chattels are delivered to be carried, or ſomething is to be done about them for a reward to be paid by the perſon who delivers them to the bailee, who is to do the thing about them. The ſixth ſort is, when there is a delivery of goods or chattels to ſome body, who is to carry them, or do ſomething about them *gratis*, without any reward for ſuch his work or carriage, which is this preſent caſe. I mention theſe things, not ſo much that they are all of them ſo neceſſary in order to maintain the propoſition which is to be proved, as to clear the reaſon of the obligation, which is upon perſons in caſes of truſt.

Not anſwerable for a general bailment without a groſs neglect. 12 Mod. 487.

As to the firſt ſort, where a man takes goods in his cuſtody to keep for the uſe of the bailor, I ſhall conſider, for what things ſuch a bailee is anſwerable. He is not anſwerable, if they are ſtole without any fault in him, neither will a common neglect make him chargeable, but he muſt be guilty of ſome groſs neglect. There is I confeſs a great authority againſt me, where it is held, that a general delivery will charge the bailee to anſwer for the goods if they are ſtolen, unleſs the goods are ſpecially accepted, to keep them only as you will keep your own. But my lord *Coke* has improved the caſe in his report of it, for he will have it, that there is no difference between a ſpecial acceptance to keep ſafely, and an acceptance generally to keep. But there is no reaſon nor juſtice in ſuch a caſe of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the uſe of the bailor, to charge him without ſome default in him. For if he keeps the goods in ſuch a caſe with an ordinary care, he has performed the truſt repoſed in him. But according to this doctrine the bailee muſt anſwer for the wrongs of other people, which he is not, nor cannot be, ſufficiently armed againſt. If the law be ſo, there muſt be ſome juſt and honeſt reaſon for it, or elſe ſome univerſal ſettled rule of law, upon which it is grounded; and therefore it is incumbent upon them, that advance this doctrine, to ſhew an undiſturbed rule and practice of the law according to this poſition. But to ſhew that the tenor of the law was always otherwiſe, I ſhall give a hiſtory of the authorities in the books in this matter, and by them ſhew, that there never was any ſuch reſolution given before *Southcote*'s caſe. The 29 *Aſſ.* 28. is the firſt caſe in the books upon that learning, and there the opinion is, that the bailee is not chargeable, if the goods are ſtole. As for 8 *Edw.* 2. *Fitz. detinue*, 59. where goods were locked in a cheſt, and left with the bailee, and the owner took away the key, and the goods were ſtolen, and it was held that the bailee ſhould not anſwer for the goods. That caſe they ſay differs, becauſe the bailor did not truſt the bailee with them. But I cannot ſee the reaſon of that difference, nor why the bailee ſhould not be charged with goods in a cheſt, as well as with goods out of a cheſt. For the bailee has as little power over them, when they are out of a cheſt, as to any benefit he might have by them, as when they are in a cheſt; and he has as great power to defend them in one caſe as in the other. The caſe of 9 *Edw.* 4. 40. *b.* was but a debate at bar. For *Danby* was but a counſel then, though he had been chief juſtice in the beginning of *Edw.* 4. yet he was removed, and reſtored again upon the reſtitution of *Hen.* 6. as appears by *Dugdale's Chronica Series*. So that what he ſaid cannot be taken to be any authority, for he ſpoke only for his client; and *Genney* for his client ſaid the contrary. The caſe in 3 *Hen.* 7. 4. is but a ſudden opinion, and that but by half the court; and yet that is the only ground for this opinion of my lord *Coke*, which beſides he has improved. But the practice has been always at *Guildhall*, to diſallow that to be a ſufficient evidence, to charge the bailee. And it was practiſed ſo before my time, all chief juſtice *Pemberton*'s time and ever ſince, againſt the opinion of that caſe. When I read *Southcote*'s caſe heretofore, I was not ſo diſcerning as my brother *Powys* tells us he was, to diſallow that caſe at firſt, and came not to be of this opinion, till I had well conſidered and digeſted that matter. Though I muſt confeſs reaſon is ſtrong againſt the caſe, to charge a man for doing ſuch a friendly act for his friend, but ſo far is the law from being ſo unreaſonable, that ſuch a bailee is the leaſt chargeable for neglect of any. For if he keeps the goods bailed to him, but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own, is an argument of his honeſty. *A fortiori* he ſhall not be charged, where they are ſtolen without any neglect in him. Agreeable to this is *Bracton, lib.* 3. *c.* 2. 99. *b. J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, reſtituenda tenetur, et etiam ad id, ſi quid in re depoſita dolo commiſerit; culpae autem nomine non tenetur, ſcilicet deſidiae vel negligentiae, quia qui negligenti amico rem cuſtodiendam tradit, ſibi ipſi et propriae fatuitati hoc debet imputare.* As ſuppoſe the bailee is an idle, careleſs, drunken fellow, and comes home drunk, and leaves all his doors open, and by reaſon thereof the goods happen to be ſtole

Bailee comes home drunk, and leaves his doors open, &c.

ſtole with his own; yet he ſhall not be charged, becauſe it is the bailor's own folly to truſt ſuch an idle fellow. So that this ſort of bailee is the leaſt reſponſible for neglects, and under the leaſt obligation of any one, being bound to no other care of the bailed goods, than he takes of his own. This *Bracton* I have cited is, I confeſs, an old author, but in this his doctrine is agreeable to reaſon, and to what the law is in other countries. The civil law is ſo, as you have it in *Juſtinian's Inſt. lib.* 3. *tit.* 15. There the law goes farther, for there it is ſaid, *Ex eo ſolo tenetur, ſi quid dolo commiſerit: culpae autem nomine, id eſt, deſidiae ac negligentiae, non tenetur. Itaque ſecurus eſt qui parum diligenter cuſtoditam rem furto amiſerit, quia qui negligenti amico rem cuſtodiendam tradit, non ei, ſed ſuae facilitati id imputare debet.* So that a bailee is not chargeable without an apparent groſs neglect. And if there is ſuch a groſs neglect, it is looked upon as an evidence of fraud. Nay, ſuppoſe the bailee undertakes ſafely and ſecurely to keep the goods, in expreſs words, yet even that won't charge him with all ſort of neglects. For if ſuch a promiſe were put into writing, it would not charge ſo far, even then. *Hob.* 34. a covenant, that the covenantee ſhall have, occupy and enjoy certain lands, does not bind againſt the acts of wrong doers. 3 *Cro.* 214. *acc.* 2 *Cro.* 425. *acc.* upon a promiſe for quiet enjoyment. And if a promiſe will not charge a man againſt wrong doers, when put in writing, it is hard it ſhould do it more ſo, when ſpoken. *Doct.* & *Stud.* 130. is in point, that though a bailee do promiſe to re-deliver goods ſafely, yet if he have nothing for the keeping of them, he will not be anſwerable for the acts of a wrong doer. So that there is neither ſufficient reaſon nor authority to ſupport the opinion in *Southcote*'s caſe; if the bailee be guilty of groſs negligence, he will be chargeable, but not for any ordinary neglect. As to the ſecond ſort of bailment, *viz. commodatum* or lending *gratis*, the borrower is bound to the ſtricteſt care and diligence, to keep the goods, ſo as to reſtore them back again to the lender, becauſe the bailee has a benefit by the uſe of them, ſo as if the bailee be guilty of the leaſt neglect, he will be anſwerable; as if a man ſhould lend another a horſe, to go weſtward, or for a month; if the bailee go northward, or keep the horſe above a month, if any accident happen to the horſe in the northern journey, or after the expiration of the month, the bailee will be chargeable; becauſe he has made uſe of the horſe contrary to the truſt he was lent to him under, and it may be if the horſe had been uſed no otherwiſe than he was lent, that accident would not have befallen him. This is mentioned in *Bracton ubi ſupra:* his words are, *Is autem cui res aliqua utenda datur, re obligatur, quae commodata eſt, ſed magna differentia eſt inter mutuum et commo-*

A groſs neglect an evidence of fraud.

Promiſe to re-deliver ſafely not obliging againſt the acts of wrong doers.

Accidents happen by neglect on a loan.

Note, in the *Bracton* before me, it is *commodatam*, but that muſt be a miſtake, as you will find by *Juſtinian, ubi ſupra*, from whence *Bracton* has taken all his diſtinctions, and that almoſt word for word.

Bailee of a horſe by loan puts it in his ſtable, and it is ſtolen.

commodatum; *quia is qui rem mutuam accepit, ad ipſam reſtituendam tenetur, vel ejus pretium, ſi forte incendio, ruina, naufragio, aut latronum vel hoſtium incurſu, conſumpta fuerit, vel deperdita, ſubtracta vel ablata. Et qui rem utendam accepit, non ſufficit ad rei cuſtodiam, quod talem diligentiam adhibeat, qualem ſuis rebus propriis adhibere ſolet, ſi alius eam diligentius potuit cuſtodire; ad vim autem majorem, vel caſus fortuitos non tenetur quis, niſi culpa ſua intervenerit. Ut ſi rem ſibi commodatam domi, ſecum detulerit cum peregre profectus fuerit, et illam incurſu hoſtium vel praedonum, vel naufragio amiſerit, non eſt dubium quin ad rei reſtitutionem teneatur.* I cite this author, though I confeſs he is an old one, becauſe his opinion is reaſonable, and very much to my preſent purpoſe, and there is no authority in the law to the contrary. But if the bailee put this horſe in his ſtable, and he were ſtolen from thence, the bailee ſhall not be anſwerable for him. But if he or his ſervants leave the houſe or ſtable doors open, and the thieves take the opportunity of that, and ſteal the horſe, he will be chargeable; becauſe the neglect gave the thieves the occaſion to ſteal the horſe. *Bracton* ſays, the bailee muſt uſe the utmoſt care, but yet he ſhall not be chargeable, where there is ſuch a force as he cannot reſiſt.

A hirer bound to utmoſt care, but not liable for a robbery.

As to the third ſort of bailment, *ſcilicet locatio* or lending for hire, in this caſe the bailee is alſo bound to take the utmoſt care, and to return the goods, when the time of the hiring is expired. And here again I muſt recur to my old author, *fol.* 62. *b. Qui pro uſu veſtimentorum, auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiſerit, talis ab eo deſideratur cuſtodia, qualem diligentiſſimus paterfamilias ſuis rebus adhibet, quam ſi praeſtiterit, et rem aliquo caſu amiſerit, ad rem reſtituendam non tenebitur. Nec ſufficit aliquem talem diligentiam adhibere, qualem ſuis rebus propriis adhiberet, niſi talem adhibuerit, de qua ſuperius dictum eſt.* From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmoſt diligence, ſuch as the moſt diligent father of a family uſes; and if he uſes that, he ſhall be diſcharged. But every man, how diligent ſoever he be, being liable to the accident of robbers, though a diligent man is not ſo liable as a careleſs man, the bailee ſhall not be anſwerable in this caſe, if the goods are ſtolen.

Property in a pawn.

As to the fourth ſort of bailment, *viz. vadium* or a pawn, in this I ſhall conſider two things; firſt, what property the pawnee has in the pawn or pledge, and ſecondly for what neglects he ſhall make ſatisfaction. As to the firſt, he has a ſpecial property, for the pawn is a ſecuring for the pawnee, that he ſhall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be ſuch as it will be the worſe for uſing, the pawnee cannot uſe it, as cloaths, *&c.* but if it be ſuch, as will be never the worſe, as if jewels for the purpoſe were pawn'd to a lady, ſhe might uſe them. But then ſhe muſt do it at her peril, for whereas, if ſhe keeps them lock'd up in her cabinet, if her cabinet ſhould be broke open, and the jewels taken from thence, ſhe would be excuſed; if ſhe wears them abroad, and is there robb'd of them, ſhe will be anſwerable. And the reaſon is, becauſe the pawn is in the nature of a depoſit, and as ſuch is not liable to be uſed. And to this effect is *Ow.* 123. But if the pawn be of ſuch a nature, as the pawnee is at any charge about the thing pawn'd, to maintain it, as a horſe, cow, *&c.* then the pawnee may uſe the horſe in a reaſonable manner, or milk the cow, *&c.* in recompenſe for the meat. As to the ſecond point *Bracton* 99. *b.* gives you the anſwer. *Creditor, qui pignus accepit, re obligatur, et ad illam reſtituendam tenetur; et cum hujuſmodi res in pignus data ſit utriuſque gratia, ſcilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto ſit creditum, ſufficit ad ejus rei cuſtodiam diligentiam exactam adhibere, quam ſi praeſtiterit, et rem caſu amiſerit, ſecurus eſſe poſſit, nec impedietur creditum petere.* In effect, if a creditor takes a pawn, he is bound to reſtore it upon the payment of the debt; but yet it is ſufficient, if the pawnee uſe true diligence, and he will be indemnified in ſo doing, and notwithſtanding the loſs, yet he ſhall reſort to the pawnor for his debt. Agreeable to this is 29 *Aſſ.* 28. and *Southcote*'s caſe. But indeed the reaſon given in *Southcote*'s caſe is, becauſe the pawnee has a ſpecial property in the pawn. But that is not the reaſon of the caſe; and there is another reaſon given for it in the book of *Aſſiſe*, which is indeed the true reaſon of all theſe caſes, that the law requires nothing extraordinary of the pawnee, but only that he ſhall uſe an ordinary care for reſtoring the goods. But indeed, if the money for which the goods were pawn'd, be tender'd to the pawnee before they are loſt, then the pawnee ſhall be anſwerable for them; becauſe the pawnee, by detaining them after the tender of the money, is a wrong doer, and it is a wrongful detainer of the goods, and the ſpecial property of the pawnee is determined. And a man that keeps goods by wrong, muſt be anſwerable for them at all events, for the detaining of them by him, is the reaſon of the loſs. Upon the ſame difference as the law is in relation to pawns, it will be found to ſtand in relation to goods found.

For what neglect the pawnee ſhall make ſatiſfaction.

A man that keeps goods by wrong.

Bailment to carry for hire.

As to the fifth ſort of bailment, *viz.* a delivery to carry or otherwiſe manage, for a reward to be paid to the bailee, thoſe caſes are of two ſorts; either a delivery to one that exerciſes a publick employment, or a delivery to a private perſon. Firſt if it be to a perſon of the firſt ſort, and he is to have a reward, he is

bound

Common carriers, hoymen, maſters of ſhips.

Raym. 220.
Ante 792.

bound to anſwer for the goods at all events. And this is the caſe of the common carrier, common hoyman, maſter of a ſhip, *&c.* which caſe of a maſter of a ſhip was firſt adjudged 26 *Car.* 2. in the caſe of *Mors verſ. Slew.* The law charges this perſon thus intruſted to carry goods, againſt all events but acts of God, and of the enemies of the King. For though the force be never ſo great, as if an irreſiſtable multitude of people ſhould rob him, nevertheleſs he is chargeable. And this is a politick eſtabliſhment, contrived by the policy of the law, for the ſafety of all perſons, the neceſſity of whoſe affairs oblige them to truſt theſe ſorts of perſons, that they may be ſafe in their ways of dealing; for elſe theſe carriers might have an opportunity of undoing all perſons, that had any dealings with them, by combining with thieves, *&c.* and yet doing it in ſuch a clandeſtine manner, as would not be poſſible to be diſcovered. And this is the reaſon the law is founded upon in that point. The ſecond ſort are bailies, factors, and ſuch like. And though a baily is to have a reward for his management, yet he is only to do the beſt he can. And if he be robb'd, *&c.* it is a good account. And the reaſon of his being a ſervant is not the thing; for he is at a diſtance from his maſter, and acts at diſcretion, receiving rents and ſelling corn, *&c.* And yet if he receives his maſter's money, and keeps it lock'd up with a reaſonable care, he ſhall not be anſwerable for it, though it be ſtolen. But yet this ſervant is not a domeſtick ſervant, nor under his maſter's immediate care. But the true reaſon of the caſe is, it would be unreaſonable to charge him with a truſt, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other caſes, by reaſon of the neceſſity of the thing. The ſame law of a factor.

Bailies, factors.
1 Vent. 121.
3 Lev. 5.

Bailee to do a thing *gratis.*

See before, 911.

As to the ſixth ſort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are ſpoiled. Secondly, it is to be underſtood, that there was a neglect in the management. But thirdly, if it had appeared, that the miſchief happened by any perſon that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the ſtreets, and had pierced the caſk of brandy; in this caſe the defendant had not been anſwerable for it, becauſe he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and ſo by his neglect a damage has happened to the bailor, which is the caſe in queſtion, what will you call this? In *Bracton lib.* 3. 100. it is called *mandatum.* It is an obligation which ariſes *ex mandato.* It is what we call in *Engliſh* an acting by commiſſion. And if a man acts by commiſſion for another *gratis,* and in the executing his commiſſion behaves himſelf negligently

Caſe for negligently executing a commiſſion *gratis.*

I

gently, he is anſwerable. *Vinnius* in his commentaries upon *Juſtinian, lib.* 3. *tit.* 27. 684. defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. *Bracton ubi ſupra* ſays, *contrahitur etiam obligatio non ſolum ſcripto et verbis, ſed et conſenſu, ſicut in contractibus bonae fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, ſocietatibus, et mandatis.* I don't find this word in any other author of our law, beſides in this place in *Bracton*, which is a full authority, if it be not thought too old. But it is ſupported by good reaſon and authority.

The reaſons are, firſt, becauſe in ſuch a caſe, a neglect is a deceipt to the bailor. For when he intruſts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretenſe of care being the perſuaſion that induced the plaintiff to truſt him. And a breach of a truſt undertaken voluntarily will be a good ground for an action. 1 *Roll. Abr.* 10. 2 *Hen.* 7. 11. a ſtrong caſe to this matter. There the caſe was an action againſt a man, who had undertaken to keep a hundred ſheep, for letting them be drown'd by his default. And there the reaſon of the judgment is given, becauſe when the party has taken upon him to keep the ſheep, and after ſuffers them to periſh in his default; in as much as he has taken and executed his bargain, and has them in his cuſtody, if after he does not look to them, an action lies. For here is his own act, *viz.* his agreement and promiſe, and that after broke of his ſide, that ſhall give a ſufficient cauſe of action.

A breach of a truſt undertaken voluntarily is a good ground for an action.

But ſecondly it is objected, that there is no conſideration to ground this promiſe upon, and therefore the undertaking is but *nudum pactum*. But to this I anſwer, that the owner's truſting him with the goods is a ſufficient conſideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry theſe brandies from the one place to the other ſuch a day, the defendant had not been bound to carry them. But this is a different caſe, for *aſſumpſit* does not only ſignify a future agreement, but in ſuch a caſe as this, it ſignifies an actual entry upon the thing, and taking the truſt upon himſelf. And if a man will do that, and miſcarries in the performance of his truſt, an action will lie againſt him for that, though no body could have compelled him to do the thing. The 19 *Hen.* 6. 49. and the other caſes cited by my brothers, ſhew that this is the difference. But in the 11 *Hen.* 4. 33. this difference is clearly put, and that is the only caſe concerning this matter, which has not been cited by my brothers. There the action was brought againſt a carpenter, for that he had undertaken to build the plaintiff a houſe within ſuch a time, and had not done it, and it was adjudged the action would not lie. But there the queſtion is put to the court, what if he had built the houſe unſkilfully, and it is agreed in that caſe an action would have lain. There has been a queſtion made, If I deliver goods to *A.* and in conſideration thereof he promiſe to redeliver them, if an action will lie for not re-delivering them; and in *Yelv.* 4. judgment was given that the action would lie. But that judgment was afterwards revers'd, and according to that reverſal, there was judgment afterwards entred for the defendant in the like caſe. *Yelv.* 128. But thoſe caſes were grumbled at, and the reverſal of that judgment in *Yelv.* 4. was ſaid by the judges to be a bad reſolution, and the contrary to that reverſal was afterwards moſt ſolemnly adjudged in 2 *Cro.* 667. *Tr.* 21 *Jac.* 1. in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no conſideration in that caſe, but the having the money in his poſſeſſion, and being truſted with it, and yet that was held to be a good conſideration. And ſo a bare being truſted with another man's goods, muſt be taken to be a ſufficient conſideration, if the bailee once enter upon the truſt, and take the goods into his poſſeſſion. The declaration in the caſe of *Mors verſ. Slew* was drawn by the greateſt drawer in *England* in that time, and in that declaration, as it was always in all ſuch caſes, it was thought moſt prudent to put in, that a reward was to be paid for the carriage. And ſo it has been uſual to put it in the writ, where the ſuit is by original. I have ſaid thus much in this caſe, becauſe it is of great conſequence, that the law ſhould be ſettled in this point, but I don't know whether I may have ſettled it, or may not rather have unſettled it. But however that happen, I have ſtirred theſe points, which wiſer heads in time may ſettle. And judgment was given for the plaintiff.

In caſe of a delivery of money to pay over *ſine ulla mora.*

Regina *verſ.* Goddard and Carlton.

S. C. Salk. 342. Indictment for forging the aſſignment of a leaſe.

AN indictment for forging an aſſignment of a leaſe: the indictment was, *Juratores ſuper ſacramentum ſuum praeſentant, quod cum teſtatum exiſtit per quandam indenturam, quod J. S. dimiſiſſet et conceſſiſſet, et per eandem indenturam dimiſit et conceſſit, &c.* the defendant *falſe fabricavit quandam aſſignationem, ſive ſcriptum vel indorſamentum in ſcriptis, tenor cujus quidem aſſignationis ſequitur.* And then ſets out the aſſignment *in haec verba,* and at the end was the mark of ſuch a one, but no mark appear'd upon the *poſtea.*

Quod cum, in an indictment of forgery, good.

The firſt exception was, that the indictment was laid with a *Quod cum*, which was ill. But the court held that was well enough, being but inducement. And *Holt* chief juſtice ſaid, this differeth from a declaration in treſpaſs, becauſe in that caſe, there is nothing of recital in the declaration, as there is here, and when the indictment comes to charge the forgery, it does charge it poſitively.

Vide T. 10 *Georg. B. R. Rex verſ. Crowhurſt*, in an indictment for diſobeying an order of two juſtices the order was ſet out with a *Quod cum*, and adjudged ill. So Salk. 371.

Teſtatum exiſtit.

The ſecond exception was, that it was not ſaid that there was a demiſe, and if there was no demiſe, there could be no aſſignment, but only that by a certain indenture *teſtatum exiſtit* that *J. S.* demiſed. And as to this exception the court were divided. *Holt* chief juſtice and *Powys* held, that the *et per eandem indenturam conceſſit et dimiſit*, was a poſitive diſtinct averment of a leaſe, and had no relation to the *teſtatum exiſtit*. *Powell* and *Gould* on the contrary, that that, as well as the *dimiſiſſet*, muſt refer to the *teſtatum exiſtit*. And *Powell* ſaid, they could not take this to be a diſtinct averment, becauſe they muſt take it to be the recital of the leaſe, the conſtant form of deeds being to put both in, *viz.* hath demiſed and doth demiſe. *Holt* ſaid, it was well to declare in covenant with a *quod cum teſtatum exiſtit*, nay even when you come to ſet out the covenant, you may ſay, *teſtatum exiſtit quod convenit*. But *Powell* ſaid, that would not rule this caſe, for that, it may be, might be ruled upon precedents, which often rules caſes.

No mark on the *poſtea*.

The third exception was, that there was no mark upon the *poſtea*. And now ſince the ſtatute of frauds, a leaſe is not aſſignable without writing ſigned by the party. And this was agreed to be a good exception by the whole court. But *Holt* chief juſtice ſaid, if the indictment had been, that the defendant had forged a deed of aſſignment, and then they had ſet it out thus, without any mark, that had been well enough, becauſe ſigning is not neceſſary to a deed, and deeds antiently were not ſigned. But now ſince the ſtatute of frauds, an aſſignment by writing, if it be not a deed, muſt be ſigned, and therefore this not appearing to be any more, this ought to have been ſhewed to be ſigned, or elſe it is no aſſignment.

Deeds need not be ſigned.

3 Keble 356, 367, 387.

Powell juſtice ſaid, that in the caſe of the King *verſ. Newton* in *Charles* the Second's time, becauſe an indictment of forging ſaid only *ſcriptum*, and did not ſay *ſigillatum*, the judgment was reverſed upon a writ of error out of *Cheſter*.

This matter was ſtirred in *Eaſter* term, and now the firſt day of this term, Mr. ſerjeant *Darnall* ſhewed the court, that the indictment upon the file was right. And *Holt* ſaid, that he doubted then here had been no trial at all, this being a material variance. But there having been a new indictment found, pending this matter, the court would not determine theſe exceptions, but made him plead to that, where theſe things were amended; but they ſeemed *in omnibus* to retain their former opinions.

Then the council for the defendants moved, that before the court would make them plead to the new indictment, they would enter judgment for the defendants upon this. But the court ſaid, they would make no bargains with them.

Other indictment.

No pleading over but in treaſon or felony.

Holt chief juſtice ſaid, a man could not plead over in any caſe, but in treaſon or felony, and not in caſe of a miſdemeanor; and that a man, after he has been found guilty, can't plead that indictment depending in abatement, but muſt plead *auterfoits convict*. And the defendants pleaded to the new indictment.

Regina *verſ.* Scott.

Not ſaid, how obliged to repair.

THE defendant was indicted for not repairing the pavement before his houſe in *Old-ſtreet*, *ad commune nocumentum*, *&c.* And on Mr. *Ward*'s motion it was quaſhed, becauſe it was not ſaid, how he was obliged to repair it, and this was not within the late act of parliament for paving the ſtreets.

Staples *verſ.* Heydon.

Intr. *Mich.* 13. 370. B. R.

S. C. 6 Mod. 1. *&c.*
S. C. Salk. 173.
See before, 707.
1 Salk. 216.
2 Salk. 579.

IN treſpaſs for breaking his wharfe, and cutting down his fenſes, the plaintiff declares againſt two defendants, for two treſpaſſes done at two ſeveral times. One defendant pleads not guilty as to the whole. The other defendant as to the firſt, pleads this ſpecial juſtification, that one *Gray* was poſſeſſed of this wharfe and a timber-yard next adjoining for 90 years; and while he was ſo poſſeſſed, had and uſed a way from this timber-yard over this wharfe to the *Thames*, and being ſo poſſeſſed did demiſe the timber-yard to *Heydon* for a leſſer term; and that the plaintiff erected this fenſe, and ſtopped up his way, and the defendant cut it down. And in the leaſe there was a grant of all ways and paſſages, *&c.*

and avers, that he had no other way to the river *Thames*. And to this plea there was a demurrer. And to the other treſpaſs he pleaded the ſame juſtification; and the plaintiff replied, that he had another way; and iſſue was taken upon that. And at *niſi prius* the defendant made default, and the inqueſt was taken by default, and there was a verdict for the defendant, and 6*d*. conditional damages upon the demurrer, and the other defendant was found guilty of the firſt treſpaſs, and not guilty of the ſecond.

Immaterial iſſue.

And firſt it was moved, that there might be a repleader in this caſe, the iſſue being wholly immaterial; for it was not material, whether he had any other way to the *Thames* or not. Indeed if he had averred, he had no other way at all to his timber-yard, but over the wharfe, that might have been material, for then it might have paſſed of neceſſity.

No repleader for the defendant after he has made default at *niſi prius*.

But the court held, that they could not award a repleader in this caſe, becauſe the defendant by his default at the trial was out of court, and conſequently there could be no repleading.

But *Holt* chief juſtice ſaid, that if the defendant had made out a good title to the way in his plea, and then had made this impertinent averment, and the plaintiff had replied and taken iſſue upon it; there had needed no repleader, but it had been aided by the ſtatute of *jeofails* by the verdict. Which *Powell* denied, and ſaid that it would not have been aided, but there muſt have been a repleader in caſe there had been no default; and he held, that it was neceſſary to ſhew a title to the way in this caſe. And he took a difference between an action upon the caſe for ſtopping a way; there the action being againſt a wrong doer, it is enough to ſhew a poſſeſſion: otherwiſe where a man will juſtify a treſpaſs ~~by it.~~

Title muſt be ſhewn in a juſtification, not in an action againſt a wrong doer.

Term pleaded in a juſtification without ſhewing the commencement, ill.

And they all held, that both the juſtifications were naught: and *Holt* ſaid, that it was ill, to plead the term for years, without ſhewing the commencement of it; and that it was a kind of preſcription, which could not be in tenant for years. But he ſaid, if they had pleaded, that ſuch an one was ſeiſed in fee of both, that there was a way always uſed, *&c.* and that he demiſed to *Gray*, and *Gray* to the defendant, *prout*, *&c.* that had been a good title, for then it paſſed by the demiſe of *Gray* as appurtenant. So if he had ſaid, that ſuch a one was ſeiſed in fee of both, and demiſed to *Gray*, and *Gray* made the way, and then demiſed; for then it had paſſed alſo as appurtenant. And *Powell* ſaid, it might have been pleaded by way of grant from the termor. Then Mr. *Weld* ſaid, that the defendant having by his plea confeſſed the treſpaſs, and ſaid nothing to juſtify it, the plaintiff ought to have his judgment,

Judgment for the plaintiff on an immaterial iſſue.

however the iſſue was. And for that he cited 3 *Cro.* 214. an action for ſaying, he is as very a thief as any in ***Warwick*** gaol. The defendant pleaded, that he comforted a felon, and ſo he ſpoke the words, and iſſue upon that. And though the iſſue was agreed to be immaterial, inaſmuch as that matter would not make him a thief, but only a felon; yet in regard he had confeſſed the ſpeaking of the words, judgment was given againſt him upon his own confeſſion, without regard to the iſſue. And 1 *Leon.* 68. debt againſt the defendant, as executor of an executor: the defendant pleads *plene adminiſtravit* the goods of his teſtator, and iſſue upon that; and though that was held to be immatetial, yet the court gave judgment for the plaintiff by *nihil dicit*, becauſe he had not anſwered the charge, which was as executor of an executor.

But *Holt* chief juſtice took this difference: That where the defendant confeſſes a treſpaſs, and avoids it by ſuch a matter as can never be made good by any ſort of plea, there in ſuch a caſe judgment ſhall be given upon the confeſſion, without regard to ſuch an immaterial iſſue. And ſo is the caſe in 3 *Cro.* 214. for there the matter of the juſtification could never be made good by any ſort of plea. For his being an acceſſory to a felony would never juſtify the defendant in calling him thief. But where the matter of the juſtification is ſuch a matter, as if it were well pleaded, would be a good juſtification, there though it be ill pleaded, yet that ſhall not be taken to be a confeſſion of the plaintiff's action, as in this caſe here of the way. The caſe in *Leon.* is not law. For the ſaying he had fully adminiſtred the goods of his teſtator, does not confeſs *aſſets* of his teſtator's teſtator. (Note, when *Leon.* was cited, the judges ſeem'd to ſlight it.) And the books do all of them, if they be narrowly looked into, turn upon this difference; where the confeſſion is full, and the matter of the plea is ill in ſubſtance.

Powell. This is no confeſſion. The old books take a difference between an expreſs confeſſion, and a *nient dedire.* And though the way be ill pleaded, you cannot call that an expreſs confeſſion.

Repleader.

Holt. It is contrary to the tenor of all the books. And as to the matter of the repleader, *Holt* ſaid upon a former argument, that the defendant being out of court by his default, it was impoſſible to award a repleader. For upon a repleader both the parties muſt replead, which the defendant can never do, being out of court. And there is no way to bring the defendant into court again, neither can the plaintiff wave the default, as he may in a real action. In a real action, if the tenant makes default upon the day of

If the defendant makes default at *niſi prius* in a perſonal action, he is out of court.

Default waved.

the return of the original, a *grand cape* is awarded, and upon the return of it, if the demandant inſiſts upon the default, he ſhall have judgment final. But the demandant may wave the default, and take an appearance upon the *grand cape*. And that is regular, becauſe there the defendant comes in by proceſs. So if the tenant make default at *niſi prius*, the default is recorded, and a *petit cape* is awarded, and upon the return of that, the tenant may ſave his default. But when the defendant makes default in a perſonal action, the default can never be waved, for there is no proceſs to bring him into court again: and beſides, the day of *niſi prius* and the day in bank is all one day, and therefore a default at *niſi prius* cannot be waved at the day in bank.

At the ſtirring this caſe again *Holt* chief juſtice ſaid, that ſome old books held, that where the defendant made default after iſſue joined, judgment ſhould be given by default, and not the inqueſt taken by default. Some old books indeed are ſo, but I never underſtood the reaſon of them. A difference has been taken indeed, where a releaſe was pleaded, and where other matter; in the firſt caſe, becauſe that plea confeſſes the debt, if the defendant made default at the trial, judgment ſhall be given againſt him by default; but even in that caſe they agree, the plaintiff may go on to trial, if he will. As to all other caſes, it is a general rule, that there ſhall be no judgment by default after iſſue joined. By the ſtatutes of *Weſtm.* 2. and *Marlb.* the defendant can have but one default after iſſue joined, and that muſt be *ad proximum diem.* Now you always appear upon the return of the *venire facias.* But in thoſe days the defendant was called ſolemnly upon the return of the *venire facias*; and if he made default, then went out a *diſtringas*, in which was inſerted a clauſe to diſtrain the defendant to appear; but if he made default, then there was no other proceſs to bring him into court again, and ſo his default was peremptory. You have got a trick of making default, but let me warn you never to make defaults any more; for it will be hard to maintain, that any judgment can be given for the defendant, after he has made default. *Powell* juſtice ſaid, that a defendant, that has made default, is not ſo out of court, but that judgment may be given againſt him, but he can never have a day in court again. And the court ordered the council for the plaintiff to conſider, whether judgment might not be given againſt the defendant in this upon his default. And adjourned.

When the caſe was ſtirred again, and this matter of the confeſſion mentioned again, the court over-ruled it again upon the ſame diſtinctions. See 20 *Hen.* 6. 31, 32. 22 *Hen.* 6. 58, *Holt* chief juſtice took notice of the ſtatute of *Marlb. c.* 13. and *Weſtm.* 2. *c.* 27. and as I took it ſaid, that by thoſe ſtatutes the defendant could have but one eſſoin or one default after iſſued joined, and that upon the *venire facias*; ſo that if he made default upon the *diſtringas*, he was quite out of court, and the jury ſhould be taken by default: but that before iſſue joined, the firſt default was peremptory, and judgment ſhould be given againſt the defendant by default.

Powell ſaid, that there was a difference between real and perſonal actions; that in perſonal actions the inqueſt ſhould be taken by default, otherwiſe in real actions.

And the court were of opinion, that ſeeing the parties could not be let in again to replead, to abate the writ. But then Mr. *Weld* moved for judgment upon the demurrer, becauſe the plea was naught. And the court were in doubt how to give judgment as this caſe ſtood, there being ſome difference about the ſtating the caſe. But *Powell* juſtice was of opinion, that as this caſe is put, the writ might be abated for the laſt treſpaſs, and judgment given for the plaintiff for the firſt. But the caſe was adjourned.

Upon the ſtirring this caſe again, the caſe appeared to be contrary, and the defendant, that pleaded not guilty generally, was found guilty of the firſt, and not guilty of the ſecond; and ſo the difficulty was, how they ſhould give judgment? for they agreed that they could not give judgment for part only, but they muſt give judgment upon the whole record for the whole, as to both the defendants: and alſo, that upon the immaterial iſſue, the judgment muſt be, that the bill be abated, and that a bill might be abated as to part of the treſpaſs, and ſtand good for the reſt; but they never knew it abated as to one defendant, and ſtand good againſt the other. And it was adjourned.

Regina *verſ.* Crofts.

An inquiſition of forcible detainer ought to be took by a jury of the neighbourhood.

AN inquiſition of forcible detainer of a copyhold meſuage in *Streatham*, of which *Henry Hampſon* was ſeiſed in fee according to the cuſtom, *&c.* was found againſt the defendant the eleventh of *December* 1702. before Mr. *Lade* and Mr. *Hartley*, two juſtices of the peace in *Surrey*; and being removed into the King's Bench by *certiorari*, after ſeveral motions it was quaſhed, becauſe it did not appear that the jury before whom the inquiſition was taken were of the neighbourhood, nor of the county, it being only ſaid, *inquiſitio, &c. capta per ſacramentum Georgii Franklyn, &c. coram* the two juſtices, and did not ſay of what place the jury were, nor *proborum et legalium hominum comitatus praedicti.* See *Lamb. Juſt.* 163. *Keb.* 286. *Raymond* council againſt the defendant.

Regina *verſ.* Robert Mead an attorney.

THE defendant and eight others were incorporated under an act made in the 39 *Eliz.* by the name of the ſurveyors of the highways at *Aylesbury* in the county of *Bucks*, and were truſtees of a charity called *Bedford*'s gift. An information was preferred againſt the defendant, for executing this office, being an office of truſt, without having took the oaths, contrary to 25 *Car.* 2. *c.* 2. To which he pleaded not guilty. And now Mr. *Raymond* moved for a rule, that the proſecutor might have two books produced, which theſe ſurveyors kept, in which they entered their elections, and alſo their receipts and diſburſements; and that he might take copies of what he thought neceſſary, and that the books might be produced at the next aſſiſes at the trial. But *per curiam* denied, becauſe they are perfectly of a private nature, and it would be to make a man produce evidence againſt himſelf in a criminal proſecution.

Copy of private books not to be given. Reſolved in caſe of the King v. Dr. Purnell, vice-chancellor of Oxford, the crown ſhall not inſpect the archives of the univerſity. Hil. 22 Geo 2. in an information for a miſdemeanor.

Weſtbrooke et alii *verſ.* Andrews.

Intr. *Mich.* 1 *Ann.* B. R. Rot. 456.

ERROR on a judgment given againſt the defendant in the Common Pleas, in an action of treſpaſs for breaking the plaintiff's cloſe, &c. after ſeveral pleadings. And now the error aſſign'd was, that there was no *capiatur* entered. But *per curiam*, ſince the late ſtatute, which takes away the proceſs for the *capiatur pro fine*, there need be none entered. And judgment was affirmed.

No *capiatur* in treſpaſs. *Vide* 2 Saund. 47.

5 & 6 Will. & Mar. c. 12.

Daniel *verſ.* Morewood.

THE defendant being in the *Marſhalſea* priſon of this court, upon *meſne* proceſs at the plaintiff's ſuit for debt, eſcaped. Whereupon the plaintiff upon an *affidavit* of the eſcape procured an eſcape warrant from Mr. juſtice *Gould*; by virtue whereof the defendant was took up in St. *Clement*'s pariſh, and carried to *New-*

Eſcape. Day Rule.

gate. The defendant moved by his council, that he might be ſet at liberty, becauſe he inſiſted upon it, he was abroad by virtue of a day rule, when he was took by the eſcape warrant, it being term time; and upon examination, and *affidavit*, the fact appeared to be, that he was took up upon the eſcape warrant before the Queen's Bench ſat that morning; and that after the Queen's Bench ſat, he was in the petition among the other priſoners; and a day rule as uſual was made, in which he was. And though there are to be no fractions in a day, yet the court held, that they ought not to ſet him at liberty, it appearing to them, that when he was arreſted, he had not any day rule.

Ward *verſ.* Evans.

Intr. *Paſch.* 13 *Will.* 3. B. R. Rot. 206.

S. C. Comyns 138.
S. C. Salk. 442.
5 Mod. 398.

Indebitatus aſſumpſit for the money, after having took the goldſmith's note, which was not paid,
1 Salk. 132, 3.
1 Bulſ. 103.
6 Mod. 36.
11 Mod. 72, 87.
10 Mod. 109.
12 Mod. 521.
3 Salk. 118.
Chan. Prec. 200.

AN action upon the caſe upon an *indebitatus aſſumpſit* was brought, wherein the plaintiff counts on three promiſes, *viz.* for 60 *l.* received by the defendant to the plaintiff's uſe, for 60 *l.* lent by the plaintiff to the defendant, and on an *inſimul computaſſet* for 60 *l.* On *non aſſumpſit* pleaded, the cauſe was tried at the *niſi prius* at *London*, before the lord chief juſtice *Holt*. And on the evidence, the fact appeared to be; one *Fellows* a merchant, who kept his caſh with the defendant Sir *Stephen Evans*, a goldſmith in *Lombard-ſtreet*, was indebted to the plaintiff in 60 *l.* 10 *s.* the plaintiff ſent his ſervant to receive the money of *Fellows*, who ordered his ſervant to pay *Ward*'s man the money at Sir *Stephen Evans*'s. Accordingly both the ſervants went to Sir *Stephen Evans*'s ſhop, and there *Fellows*'s ſervant directed the defendant's ſervant to pay *Ward*'s ſervant the 60 *l.* 10 *s.* and to indorſe it on a note of 100 *l.* from the defendant to *Fellows*, in part of payment of the 100 *l.* The defendant's ſervant accordingly indorſes 60 *l.* 10 *s.* as paid on the ſaid note of 100 *l.* and then paid 10 *s.* to *Ward*'s ſervant, and gave him a note ſubſcribed by one *Wallis* a goldſmith for 60 *l.* payable to one *Freeman* or bearer, which the plaintiff's ſervant accepted. This tranſaction was about noon, and at that time *Wallis* was a ſolvent perſon, and continued paying his bills till night. Next morning the plaintiff's ſervant coming with the note to receive the 60 *l.* of *Wallis*, found that *Wallis* had ſtopped payment, and was become inſolvent. Whereupon the plaintiff brings this action againſt the defendant for the 60 *l.* Note, it did not appear upon the evidence, that the plaintiff was conuſant of, or privy to, this tranſaction of his ſervant, or had given him any authority to receive a note inſtead of money, or approved of it afterwards. This matter at the requeſt of the defendant's council was drawn up by way of caſe, and was put into the paper to be argued.

Three points were made in this caſe. Firſt, Whether this evidence was ſufficient to maintain the declaration on any of the three counts. Secondly, Whether the acceptance of the note upon *Wallis* by the plaintiff's ſervant without his direction or approbation ſhall bind the plaintiff. Thirdly, Whether the delivery of ſuch a note be in law a good and actual payment of the 60 *l.*

Mr. ſerjeant *Hall* was of counſel for the defendant, and gave his opinion for his client, but did not think it neceſſary to labour the points.

Mr. ſerjeant *Darnall* for the plaintiff argued, that the ſervants of merchants might in ſome caſes bind their maſters by their acts, but then it muſt be in the buſineſs of a merchant; but a ſervant can't accept a bill of exchange drawn upon his maſter, to bind his maſter, unleſs there be plain and ſtrong evidence, that the maſter gave him authority ſo to do. And he cited *Lex mercatoria*, 265. and a treatiſe concerning bills of exchange by *John Marius*, 47. A *fortiori* the ſervant in this caſe can't bind the plaintiff without his conſent, where there is not the ſame neceſſity, nor the ſame advantage to the publick by incouraging of trade. 2. This is no actual payment, for the law adjudges nothing actual payment, but money, or other thing given or taken in ſatisfaction by conſent of both parties. 5 *Co.* 117. *Pynnel*'s caſe. This note is but as a bare piece of paper, not valuable in itſelf, nor valuable to the plaintiff, for he can't bring any action to compel the payment of it, but in the name of *Freeman*, who may refuſe to give him leave to uſe his name. He agreed, that if *A.* ſells goods to *B.* for 50 *l.* and at the ſame time *B.* gives *A.* ſuch a note for 50 *l.* and *A.* accepts it; this is an actual payment, although the note be never receiv'd; becauſe it ſhall be taken as part of the contract, that *A.* was to accept ſuch note in ſatisfaction for his goods. But where there is a preceeding debt or duty, as in this caſe, ſuch note will not amount to payment, till it be paid, unleſs there be any negligence and delay in the party who takes the note, in going to receive it. For if the goldſmith continue ſolvent for a long time after the note delivered, and the party keep the note by him without demanding the money, and afterwards the goldſmith become inſolvent; he that took the note ſhall ſtand to the loſs of it, becauſe by keeping the note he prevented the other from receiving it. But in this caſe the fact is otherwiſe, for the plaintiff's ſervant went the next morning to receive the money.

Note, *Holt* chief juſtice ſaid *Marius*'s book was a very good book.

Holt

A ſervant's receiving money by a bill will not bind the maſter.

Holt chief juſtice. When a ſervant is ſent to receive money on a bill, he can't accept a note inſtead of money, without the particular directions of his maſter. Suppoſe the ſervant in this caſe had brought *Wallis*'s note home to the plaintiff, and the plaintiff had ſent him back with it, refuſing to accept it, and inſiſting to have money, then it would not have been a payment beyond all doubt. But indeed if the maſter does give his conſent ſubſequent to the taking of the note, that will amount to an authority precedent. But then I am of opinion, and always was (notwithſtanding the noiſe and cry, that it is the uſe of *Lombard-ſtreet*, as if the contrary opinion would blow up *Lombard-ſtreet*) that the acceptance of ſuch a note is not actual payment. I agree the difference taken by my brother *Darnall*, that taking a note for goods ſold is a payment, becauſe it was part of the original contract; but paper is no payment where there is a precedent debt. For when ſuch a note is given in payment, it is always intended to be taken under this condition, to be payment if the money be paid thereon in convenient time. This note was demanded within convenient time, but if the party who takes the note, keep it by him for ſeveral days, without demanding it, and the perſon who ought to pay it becomes inſolvent, he that received it muſt bear the loſs; becauſe he prevented the other perſon from receiving the money, by detaining the note in his cuſtody. As for the nature of the action, I am of opinion, that an *indebitatus aſſumpſit* for monies received to the plaintiff's uſe lies properly in this caſe, and that this evidence is ſufficient to maintain the plaintiff's declaration. For when the 60*l.* was indors'd on *Fellows*'s bill, as ſo much actually paid by Sir *Steph. Evans* to *Fellows*, *Fellows* directing that ſum to be paid to the plaintiff, and the defendant having the money in his hands, it amounts to a receipt of ſo much by the defendant to the plaintiff's uſe. No doubt the action were maintainable, if the plaintiff had brought the note back again to the defendant, and though he did not, ſince it does not amount to actual payment, the plaintiff muſt recover.

Acceptance of goldſmith's notes when payment.

Powell juſtice. This evidence will maintain the declaration, for *Fellows*'s caſh remaining in the defendant's hands, when by the indorſement the defendant is diſcharg'd from ſo much of *Fellows*'s note as againſt him, that money being to be paid by his direction to the plaintiff, it is a receipt by the defendant to the plaintiff's uſe. The delivery and acceptance of *Wallis*'s note is no payment, for when a maſter ſends his ſervant to receive money, he can't accept a note in lieu of it. Perhaps if the maſter had been there himſelf, he would have refuſ'd the note, as knowing the inſufficiency of *Wallis*; and ſhall the ſervant oblige him to take ſuch a note by his acceptance, without his maſter's directions? Indeed if the maſter conſents to it afterwards, that amounts to a previous command. Then the taking of ſuch a note is no payment; for it is always a conditional acceptance, and ſo underſtood, not to be a diſcharge till paid; and if it ſhould be otherwiſe, it would be to let in fraud, and give goldſmiths and others an opportunity of cheating traders. But ſtill the money ought to be demanded in convenient time, for if the party keep the note by him without demanding it, he muſt run the hazard of it, but here it was demanded in due time.

Let the plaintiff take his judgment, *per totam curiam.*

Tranter *verſ.* Watſon.

WATSON was maſter of a merchant ſhip, which was taken at ſea by a *French* privateer. *Watſon* agreed with the captain of the privateer for the ranſom of the ſhip and goods at 1200*l.* and as a pledge or ſecurity for the payment of the money, *Watſon* was detained and carried into *France*; but the ſhip and goods were releas'd, and were brought into *Briſtol*, where the ſhip was unladed, and the goods landed (after cuſtom paid) and delivered to one *Day*; but whether in truſt for the benefit of the maſter, or for the uſe of the owners, was not agreed. *Watſon* commences his ſuit in the court of Admiralty againſt the owners, to compel them to pay the 1200*l.* and redeem him; and thereupon a warrant was iſſued out of that court to arreſt the ſhip and goods *in quadam cauſa ſalvagii*, in order to compel the defendant to appear there, and the ſhip and goods were ſeis'd thereon. Mr. *Broderick* and Mr. *Dee* pray'd a prohibition as to the goods, ſuggeſting the ſeiſure on land *infra corpus comitatus*, and ſo not within their juriſdiction. He inſiſted, that the maſter has no power to make ſuch an agreement, nor to ſubject the goods to the payment of his ranſom, without the expreſs authority and conſent of the owners. The power of hypothecation in a voyage for neceſſaries, is incident to his office, and allow'd for the neceſſity of the thing, and the benefit of the owners; but this is not ſo, for this is a redemption, and a new buying of the ſhip; and if this be allow'd lawful, it will give a power to the maſter, to do an injury to the owners, by obliging them to the performance of an agreement of his making, upon any terms never ſo unreaſonable, and to compel them to pay more than the ſhip and goods are worth, as the agreement in this caſe is. Beſides the power of the maſter is only over the ſhip, and he has no power over the goods and lading, to make any diſpoſition thereof. Admitting the maſter has ſuch power, to ſubject the goods to the payment of this ranſom, yet he ought not to bring the ſuit in his own name, but the ſuit ought to be carried on in the name of the vendee or purchaſer of the goods. Admitting the ſuit proper, yet the ſeiſure is illegal, for the

S. C. Salk. 35. [illegible]
A maſter of a ſhip took by an enemy agrees to redeem it for 1200*l.* and is carried into *France*, and then libels againſt the ſhip and goods in the admiralty.
S. C. 6 Mod. 11. [illegible]
See Ricord
v. Bettenham
Burr. [illegible]
1734. [illegible]
[illegible] B. R.
Easter 21 Geo. 3.

the court of admiralty cannot award ſuch proceſs, as their firſt proceſs to compel the party to appear, in the nature of an execution againſt the goods. And they can no more begin with ſuch proceſs than an inferior court; and as a prohibition ſhall be awarded to an inferior court in ſuch caſes, ſo ought it in this, though the party have not yet appear'd, nor any libel be as yet exhibited. And ſo Salk. 31. was it done in the caſe of Captain *Sands* and Sir *Joſiah Child*, 5 *Will.* & *Mar.* a prohibition was there granted on the warrant, before any libel.

On the other ſide it was inſiſted by Mr. *Eyre* and Mr. *Mountague*, that no prohibition ought to go in this caſe; for that the maſter has power in this caſe, to ſubject the goods to the payment of his redemption; and it is founded on the ſame reaſon as his power of hypothecation, the neceſſity of the thing, and the benefit of the owners, by parting with ſome part of the goods to ſave the reſt, whereas otherwiſe the whole would have been loſt. So is *Molloy* 213, 214. *Hob.* 11, 12. [Note, *Holt* chief juſtice, upon his citing *Molloy*, ſaid, cite the authorities there mentioned if you will, but do not cite the book itſelf.] But this being a matter and a cauſe properly within the juriſdiction of the court of admiralty, ſhall be determined there. And in a maritime cauſe, whereof they have conuſance, the proceſs of the court may be executed upon land, *infra corpus comitatus*. Beſides the ſale or delivery of the goods, upon land, will not take away the juriſdiction of that court, ſince they have juriſdiction of the original matter. And ſo it is adjudg'd, 1 *Sid.* 320. *Thompſon v. Smith.* 3 *Cr.* 685. 2 *Saund.* 259. *Radley v. Egglesfield.* 1 *Lev.* 243. *Turner v. Neale.* As to the objection, that the ſuit *in curia admiralitatis* ought not to be in the maſter's name, they anſwer'd, that it is moſt proper in his name; for the captors, to whom the ranſom belongs, and who have the maſter in their cuſtody, cannot ſue in their own names, becauſe they are enemies; but if the ſuit be not carried on between proper parties, it is good cauſe for an appeal, and ſhall be determined by the rules of the marine law, but it is no ground for a prohibition. But admitting the merits of the cauſe to be againſt the maſter, yet the owners came too ſoon for a prohibition before they have appear'd, and before any libel exhibited, ſo that it cannot appear to this court, what the nature of the ſuit is.

The court deſired to hear a civilian, before they made any rule in this caſe, and accordingly Doctor *Lane* attended for the plaintiff Salvage of admiralty juriſdiction. *in curia admiralitatis.* He argued, that ſalvage, or *cauſa ſalvagii*, as it is mentioned in the warrant, is of admiral juriſdiction: that the maſter repreſents both the owners of the ſhip, and the traders, and has a truſt repoſed in him, which extends to the goods as well as the ſhip; the maſter may detain the goods of the merchant for the freight of the ſhip, or wages of mariners. The maſter in this caſe by the marine law has an hypothecation of the goods to him, to keep till payment be made of the money agreed, and not only a bare poſſeſſion, and therefore though he depart with the poſſeſſion of the goods before payment, that does not diveſt his intereſt. The goods were in the power and poſſeſſion of the enemy, who might have kept or deſtroyed them all, if they had not been redeemed by the maſter, which is for the benefit of the owners. Redemption is a redemption by the maſter, and gives ſecurity for the payment of the money agreed, by ſubjecting his perſon as a pawn or pledge, ſo that he has as it were paid for the goods. This power of redemption is not founded on the *Rhodian* laws, or the laws of *Oleron*, but ariſes from the cuſtom and law of nations, and the ſame cuſtom or law gives the maſter in this caſe an intereſt in the ſhip and goods.

Here *Holt* chief juſtice interrupted him and ſaid, we are not now upon the merits of the cauſe, for that is not before us upon this motion.

It was agreed by the whole court, that no prohibition ſhould be granted in this caſe.

Holt chief juſtice ſaid, you come too ſoon for a prohibition, before appearance, and a libel filed, for you are not yet in court. If this proceſs be an illegal proceſs, and not juſtifiable by the rules of their law, you may take your remedy by an action of treſpaſs or replevin. The caſe of *Sands* and Sir *Joſiah Child* was on an action upon the ſtatute of *Rich.* 2. and not on a prohibition as was ſuggeſted. We cannot try the legality of the proceſs upon a motion. If it come before us on an action of treſpaſs, we ſhall then judge both of the legality of the proceſs and the power of the maſter. If a replevin or an action of treſpaſs be brought, and there be a juriſdiction, we muſt determine, whether what was done was legally done or no, upon whatſoever law it is grounded, whether eccleſiaſtical, maritime, the law of nations, or whether [*H. J.*] It ſeems very juſt and reaſonable in this caſe, that the owners of the goods ought to pay the redemption. If a pirate ſhould take the ſhip and goods, and the maſter redeem them, the owners ſhall make ſatisfaction, and then much more in this caſe, when taken by an enemy. When the maſter makes a compoſition for the benefit of the owners, it is highly reaſonable that he ſhould be indemnified. The whole ſhip and goods would have been prize, if he had not made this compoſition; therefore where there is an inſtant danger of loſing ſhip and goods (as in this caſe, when they were under the capture and power of the enemy) and no hopes of ſaving them then ap-

If a pirate takes the ſhip and goods, and the maſter redeem them, the owners ſhall make ſatisfaction.

pears (though afterwards it may happen that the ſhip may be reſcued on freſh purſuit), cannot the maſter make ſuch an agreement as this, as well as he may throw part of the goods overboard in caſe of a tempeſt, to ſave the reſt? The maſter has the cuſtody and care of the ſhip and goods. Suppoſing then that the maſter has ſuch a power of compounding, the goods then remain to him as a ſecurity to him, and he may detain them till payment, as he may for freight. But then it is to be conſidered, whether, when he has once delivered them to the owner, or to his uſe, he has not departed with his ſecurity, and has no way to come at them again, as it is in caſe of freight? Theſe things are conſiderable, if we go into the merits of the cauſe, but that not being before us, I give no opinion therein.

Powell juſtice. This proceſs being only to compel the parties to appear, you come too ſoon for a prohibition before libel. We cannot determine the legality of the proceſs in this manner. If that court has a power in any caſe to proceed againſt the goods, and to ſeiſe them on proceſs, we ought not to grant a prohibition; for how does it appear to us, but that this proceſs is awarded in ſuch a caſe, wherein it lawfully may? As to the merits, it ſeems very reaſonable, that the maſter ſhould have power to make ſuch a redemption, as he may throw part overboard in a tempeſt, to ſave the reſt. And here the goods ſeem to remain in the nature of a pawn to the maſter, to ſecure the payment; and if the maſter by delivering out the goods has loſt his intereſt therein, and ſo the ſeiſure illegal, yet we cannot determine that on the return of the proceſs before libel: you may plead that matter there, but we cannot take notice, that the proceſs is illegal; if it be, you have your remedy.

Gould agreed. *Powys* abſent.

Ewer *verſ.* Jones.

S. C. 6 Mod. 25.
3 Salk. 227.
S. C. Comyns 137.
Statute of limitations pleaded in the admiralty to a ſuit for mariners wages againſt the owners of the ſhip.

MR. *Dee* moved for a prohibition to the court of admiralty. The caſe was, *Jones* and other ſeamen libelled there againſt the owners for their wages, who pleaded the ſtatute of limitations, but the judge over-ruled the plea, and gave ſentence for the mariners to recover, and thereupon the owners appealed, and pending the appeal they come for a prohibition. Mr. *Dee* urged, that the ſtatute extends to that court in this caſe, becauſe the ſuit here is againſt the perſon immediately for recovery of the debt, and the proceedings are not againſt the ſhip, which was loſt in the voyage, whereby the ſeamen have loſt their wages. It is without queſtion, that the contract is a matter properly conuſable by the common law, and of right only ſuable in the common law courts, where the plea would be a bar, and the ſuit in the admiralty court is only by indulgence. It might be otherwiſe, if there were no remedy to be had but only in that court. But when the parties have proper remedy in the courts of common law, they ought not to deprive us of the benefit of the ſtatute, by ſuing in the court of admiralty. And ſince it is only by the favour of this court, that the ſuit there is allowed, you will not grant a favour to them, which may turn to our prejudice.

Serjeant *Darnall* againſt the prohibition inſiſted, that the ſtatute does not extend to the court of admiralty, or other courts proceeding by the rules of the civil law. This is a matter of which they have conuſance, and the judge of the admiralty is the proper judge to determine this matter; and after he has given his ſentence, this court muſt give credit to it, and ought not to grant a prohibition in a cauſe within their juriſdiction, but leave them to proceed according to the rules of their own law. As in caſes of hypothecation and barretry. 1 *Rolle, Court* 530. *p.* 2. *Bernard verſ. Bridgman. Hob.* 11. 1 *Rolle, Court* 530, 531, 532. *P.* 5 *Jac. B. R. Squire*'s caſe. The ſtatute does not extend to ſuits in that court by the words of it, and it ſhall not be taken by equity. The ſtatute is not pleaded in a ſuit of Chancery, nor in the Eccleſiaſtical Court for a legacy, nor in a ſuit founded on a particular cuſtom, as a writ *de rationabili parte bonorum. March* 129, 152. *Force v. Brown.* The ſtatute extends not to an action of debt for arrears of rent by indenture. *Hutt.* 109. *Freeman verſ. Stacy.*

Holt chief juſtice. If the ſuit in the Admiralty Court were for a meer maritime cauſe, it would be out of the ſtatute; for the ſtatute means only duties ſuable at common law, and ſhall not be extended by equity beyond the letter of it: therefore the ſtatute does not extend to a writ *de rationabili parte bonorum*, nor to a ſuit in equity. Debt on an award is held not to be within the act, but in this caſe the ſuit is for a matter properly ſueable at common law, and therefore it ſeems the ſtatute extends to it. Suppoſe any of the plaintiffs in the Admiralty Court had brought his action at common law, would not the ſtatute have extended to it? And the ſuit in the Admiralty Court is not *de jure*, but by indulgence. As to the caſes cited by my brother *Darnall*, not one of them is applicable to the preſent caſe. The ſentence of a civil law court in a foreign realm ſhall be executed in a court of the ſame nature here, and proceeding after the ſame law; and no prohibition, becauſe the temporal courts proceed by a due law, and we muſt give credit to the ſentence; as it was adjudged in the time of *Charles* the ſecond, between *Hughs* and *Cornelius*. An *Engliſh* ſhip was taken at ſea

Statute of limitations does not extend to a ſuit in equity.

Sentence of civil law court in a foreign realm executed here.

by a *French* veſſel after the peace made between us and the *Dutch*, wherein *France* was left out, and the ſhip was carried into *France*, and condemned there as a *Dutch* ſhip, and afterwards the ſhip came into *England*; and in an action of *trover* brought by the owner of the ſhip againſt the vendee it was adjudged, that by the ſentence in the court of *France*, though it were an unjuſt ſentence, the property was altered; and the vendee had judgment.

Powell juſtice. I agree that the ſtatute ſhall not be extended by equity beyond the letter, and therefore they do not allow the plea in Chancery. I agree alſo that an action is maintainable at common law on this contract, and that the plea would be a bar. But it ſeems hard to allow the plea in this caſe. But upon reading the plea *Powell* juſtice took an exception to it, and ſaid you have pleaded it ill. For you ſay, reciting the libel, that it appears thereby, that no ſuit was proſecuted for this matter within ſix years after the time it is alledg'd to be due, being the time limited by the ſtatute. Now it is not material when the debt is laid in the libel to accrue, but you muſt plead, that the cauſe of action did not accrue within ſix years. Suppoſe you ſhould plead to an action at common law, that it appears by the declaration, that ſix years are elapſed ſince the action accrued, would that be good? Now you pray a prohibition, not becauſe they proceed in a matter wherein they have no juriſdiction, but becauſe the judge has over-ruled your plea which he ought to have allow'd; and if the ſtatute had been pleaded in this manner at common law, we ſhould have given the ſame judgment and over-ruled it too, and ſhall we then grant a prohibition as upon an ill ſentence? Plead it right; we will not award a prohibition, becauſe they over-rule an ill plea. And though it be inſiſted, that that the judge founded his ſentence upon the inſufficiency, and not the informality of the plea, we will not examine the reaſons of the ſentence.

Holt chief juſtice *acc.* Suppoſe it appears on the face of the libel, that the cauſe of action accrued above ſix years ſince, is that a cauſe for a prohibition? Surely not, for the plaintiff may have ſued out proceſs before. As at common law, you cannot take advantage of the ſtatute on the declaration, but muſt plead it, becauſe the plaintiff ought to have liberty to reply, that proceſs was ſued out before and continued, or that he was beyond ſea, or, the like. This is not only informally pleaded, but a fault in ſubſtance; for not having alleged directly that the cauſe of action aroſe above ſix years before, you have hindred the plaintiffs from replying a matter to help themſelves. And though the ſubſtance and mater of the plea be good, and ought to be allow'd, yet being ill pleaded the ſentence is good; and if they have given a good ſentence, though upon ill reaſons, that is no foundation for a prohibition; for we will not examine the reaſons of their judgment; that will be ſet right on an appeal. Though I am not ſatisfied, that no prohibition ought to go, when the proceeding only is erroneous. The ſentence is given on the plea as it is pleaded, and you make the over-ruling the plea the ground of your motion, but ſhall we grant a prohibition for over-ruling an ill plea? If the judge ought to have admitted the allegation when he has not, that is a proper *gravamen* for an appeal. Perhaps the plaintiffs were beyond ſea, and did not return within the ſix years, and then they are out of the ſtatute. *Powell* agreed. Diſcharge the rule for a prohibition, *per totam curiam.*

It was afterwards moved again, but a prohibition ſtill denied; but it ſeem'd chiefly becauſe the defendants had appeal'd, for a prohibition was granted in *Eaſter* term between *Hide* and *Partridge* in the ſame caſe.

Note, that was only in order to declare, *&c.* that the point might be more ſolemnly ſettled.

Deviſee may have an action at common law for a legacy out of land.

On the debate of this matter *Holt* chief juſtice ſaid, that a deviſee may maintain an action at common law againſt the terre-tenant for a legacy deviſ'd out of land. I make no queſtion of it, for where a ſtatute, as the 32 & 34 *Hen.* 8. of wills, gives a man a right, he ſhall have an action to recover it of conſequence; becauſe his right is created by act of parliament: and where an act of parliament creates a right, or forbids a thing to be done, an action lies *ex conſequenti* on the ſtatute for the party grieved. *H. J.*

Regina *verſ.* Potter et alios.

A *certiorari* lies to remove a conviction after verdict on an indictment, and before judgment.

AN indictment was preferred againſt the defendants before the juſtices of peace on the ſtatute 12 *Car.* 2. *c.* 24. for aſſaulting and beating a cuſtom-houſe officer. On a traverſe of the indictment the defendants were convicted, but before judgment given they obtain'd a *certiorari* to remove the record of conviction. Mr. Attorney general moved for a *procedendo*, for they cannot remove the record of conviction only, for by that means they prevent the juſtices from giving judgment; they ought to ſtay till judgment given, and then bring their writ of error. There is a *capias* out againſt the defendants to bring them in, for the juſtices cannot give judgment, and ſet a fine upon them, in their abſence, unleſs they appear, no more than this court can, as was held in the caſe of *Mead* the quaker on a conviction on the conventicle act.

A fine cannot be ſet in the defendant's abſence.

Mr. *Broderick* for the defendant. We ſhall take exceptions in arreſt of judgment, and matters of law are more fit to be determined here than before the juſtices. Such *certioraris* have been allowed to remove *recordum convictionis*, and a *certiorari* is the only method in this caſe, for a writ of error does not lie here, no more than on a conviction before the juſtices by virtue of any particular authority.

Holt chief juſtice. Without queſtion we may award a *certiorari* after conviction, and before judgment, though it be founded on an indictment; and it may be reaſonable to do it in ſome caſes, as was done on the indictment of murder between *Liſle* and *Armſtrong*; and in the time of *Scroggs* chief juſtice, on a conviction upon an indictment for words in *Glouceſter*, a *certiorari* was awarded, to the end the King's Bench might give the judgment for the greater example. We uſually grant a *certiorari*, where it appears to us to be ſuch a conviction, upon which no writ of error lies. And it was the old courſe of the crown-office, firſt to remove the whole record and proceedings on an indictment by *certiorari*, and then bring a writ of error *quod coram vobis reſidet*, even after judgment given on the indictment. But though we may grant a *certiorari*, yet we will conſider whether it be proper or not; and therefore ſince the defendants have ſtood a trial before the juſtices, it is reaſonable the juſtices ſhould give judgment alſo: therefore take a *procedendo*, and let the defendants bring their writ of error, if they think fit. *Powell* juſtice agreed.

Compleat Hist. of Europe vol. 9. p. 38. to 40. 93. to 98. 163. 179. to 205.

Aſhby *verſ.* White & alios.

X [illegible] the proceedings of the Lords & Comm. in consequence of this action, X

X see [illegible] 175. [illegible] Hist. [illegible] vol. 2. p. 74. to 145. & Chandl. Deb. of Lords vol. [illegible] Review of State Trials 798 to 795. [illegible] Report. 1105.

S. C. Salk. 19. S. C. 1. Bro. Parl. Cases. S. C. 6 Mod. 45.

Caſe for refuſing a voter his vote in the election of parliament men.

the [illegible] case of Queen v. Paty & others.

PLacita coram domino rege apud Weſtmonaſterium de termino ſancti Hilarii anno 13 *Will.* 3. *Regis*, *Rot.* 460. *Bucks*, *ſſ.* *Matthias Aſhby queritur de Willielmo White, Ricardo Talbois, Willielmo Bell, et Ricardo Heydon, in cuſtodia mareſcalli, &c. pro eo videlicet, quod cum* 26 *die Novembris* 12 *Will.* 3. *e curia cancellariae ipſius domini regis nunc apud Weſtmonaſterium in comitatu Middleſexiae emanavit quoddam breve ipſius domini regis nunc tunc vicecomiti Bucks praedicti directum, recitando quod dictus dominus rex de adviſamento et aſſenſu conſilii ſui pro quibuſdam arduis et urgentibus negotiis eundem dictum dominum regem, ſtatum, et defenſionem regni ſui Angliae, et eccleſiae Anglicanae concernentibus, quoddam parliamentum ſuum apud civitatem ſuam Weſtmonaſterium ſexto die Februarii tunc proxime futuri, teneri ordinaverit, et ibidem cum praelatis, magnatibus, et proceribus dicti regni ſui colloquium habere et tractatum, idem dominus rex nunc eidem tunc vicecomiti Bucks per dictum breve praecepit*

X 2. Burn. Hist. fol. ed. 366. to 369.

cepit firmiter injungendo, quod facta proclamatione in proximo dicto comitatu ſuo poſt receptionem ejuſdem brevis tenendo de die et loco praedictis, duos milites gladiis cinctos magis idoneos et diſcretos comitatus praedicti, et de qualibet civitate comitatus illius duos cives, et de quolibet burgo duos burgenſes de diſcretioribus et magis ſufficientibus, libere et indifferenter per illos, qui hujuſmodi proclamationi interforent juxta formam ſtatuti inde editi et proviſi, eligi, et nomina eorundem militum, civium, et burgenſium ſic eligendorum in quibuſdam indenturis inter ipſum tunc vicecomitem et illos, qui hujuſmodi electioni interforent inde conficiendis (licet hujuſmodi eligendi praeſentes forent vel abſentes) inſeri, eoſque ad dictos diem et locum venire faceret, ita quod iidem milites plenam et ſufficientem poteſtatem pro ſe et communitate comitatus, &c. civitatum et burgorum praedictorum diviſim ab ipſis haberent, ad faciendum et conſentiendum his, quae tunc ibidem de communi conſilio dicti regni ipſius domini regis nunc, favente Deo, contingerent ordinari ſuper negotiis antedictis, ita quod pro defectu poteſtatis hujuſmodi, ſeu propter improvidam electionem militum, civium, aut burgenſium praedictorum, dicta negotia infecta non remanerent quovis modo, et electionem illam in pleno comitatu ipſius tunc vicecomitis factam diſtincte et aperte ſub ſigillo ſuo et ſigillis eorum qui electioni illi interforent eidem domino regi nunc in cancellaria ſua ad dictos diem et locum certificaret indilate, remittens eidem domino regi alteram partem indenturae praedictae eidem brevi conſutam, una cum brevi illo; quod quidem breve poſtea et ante praedictum ſextum diem Februarii in brevi praedicto mentionatum, ſcilicet 29 Decembris anno 12 ſupradicto apud burgum de Ayleſbury praedictum in dicto comitatu Bucks, cuidem Roberto Weeden armigero tunc vicecomiti ejuſdem comitatus Bucks deliberatum fuit in forma juris exequendum; virtute cujus quidem brevis praedictus Robertus Weeden vicecomes comitatus Bucks praedicti ut praefertur tunc et ibidem exiſtens, poſtea et ante praedictum ſextum diem Februarii, ſcilicet 30 Decembris anno 12 ſupradicto apud burgum de Ayleſbury praedictum in dicto comitatu Bucks, fecit quoddam praeceptum ſuum in ſcriptis ſub ſigillo ipſius Roberti Weeden officii ſui vicecomitis comitatus Bucks praedicti, conſtabulariis burgi de Aylesbury praedicti directum, recitando diem et locum parliamenti praedicti tenendi, perinde eos requirens et eis in mandatis dans, quod facta proclamatione infra burgum praedictum de die et loco in eodem praecepto recitatis, cauſarent libere et indifferenter eligi duos burgenſes burgi illius de diſcretioribus et magis ſufficientibus per ipſos qui hujuſmodi proclamationi interforent, juxta formam ſtatutorum in talibus caſibus editorum et proviſorum, et nomina dictorum burgenſium ſic electorum (licet praeſentes forent vel abſentes) inſeri in quibuſdam indenturis inter dictum vicecomitem et illos qui haberent intereſſe in hujuſmodi electione, et quod eos venire facerent ad diem et locum in eodem praecepto recitatos, ita quod *dicti burgenſes haberent plenam et ſufficientem poteſtatem pro ſe et communitate burgi praedicti ad faciendum et conſentiendum iis, quae tunc ibidem de communi conſilio dicti regni, favente Deo, contingerent ordinari ſuper negotiis antedictis, ita quod pro defectu hujuſmodi poteſtatis, aut propter improvidam electionem burgenſium praedictorum, dicta negotia infecta non remanerent, et quod electionem indilate eidem tunc vicecomiti certificarent, mittentes eidem vicecomiti alteram partem indenturae praedictae dicto praecepto annexam, ut idem vicecomes eandem certificaret dicto domino regi in cancellaria ſua ad diem et locum praedictos: quod quidem praeceptum poſtea et ante praedictum ſextum diem Februarii, ſcilicet eodem 30 Decembris anno ſupradicto, apud burgum de Aylesbury praedictum in dicto comitatu Bucks, eiſdem W. W. R. T. W. B. et R. H. adtunc et uſque ad et poſt returnum ejuſdem brevis conſtabulariis burgi de Aylesbury praedicti exiſtentibus, in forma juris exequendum deliberatum fuit, quibus quidem W. W. &c. ratione officii ſui praedicti conſtabulariorum burgi praedicti executio praecepti illius de jure adtunc et ibidem pertinuit: virtute cujus quidem praecepti ac vigore brevis praedicti iidem burgenſes burgi praedicti exiſtentes in ea parte debite praemoniti poſtea et ante ſextum Februarii, ſcilicet 6 Januarii anno 12, &c. apud burgum de Aylesbury praedictum, coram eiſdem W. W. &c. conſtabulariis praedictis aſſemblati fuerunt ad duos burgenſes pro burgo illo eligendum, ſecundum exigentiam brevis et praecepti praedictorum, et durante aſſemblatione illa ad intentionem illam, et antequam hujuſmodi duo burgenſes virtute brevis et praecepti praedicti electi fuerunt, ſcilicet die et anno ultimo ſupradictis, apud burgum de Aylesbury praedictum in comitatu praedicto, idem Matthias Aſhby adtunc et ibidem exiſtens burgenſis et inhabitans burgi praedicti, et eleemoſynas ibidem aut alibi adtunc aut antea non recipiens, ſed debite qualificatus et intitulatus exiſtens ad ſuffragium ſuum ad eligendum duos burgenſes pro burgo praedicto ſecundum exigentiam brevis et praecepti praedicti dandum coram eiſdem W. W. &c. quatuor conſtabulariis burgi illius, quibus tunc et ibidem debite pertinuit ad ſuffragium ipſius Matthiae Aſhby de et in praemiſſis capiendum et allocandum, paratus fuit et obtulit ſuffragium ſuum dare pro eligendo Thomam Lee baronettum, et Simonem Mayne armigerum, duos burgenſes pro parliamento illo, virtute et ſecundum exigentiam brevis et praecepti praedictorum; ac ſuffragium ipſius Matthiae tunc et ibidem de jure debuit admitti, et praedicti W. W. &c. ſic conſtabularii burgi praedicti tunc et ibidem exiſtentes, tunc et ibidem requiſiti fuerunt per ipſum Matthiam Aſhby ad ſuffragium ipſius Matthiae Aſhby praedicti in praemiſſis recipiendum et allocandum: iidem tamen W. W. &c. adtunc et ibidem conſtabularii burgi praedicti exiſtentes, praemiſſorum non ignari, ſed machinantes et fraudulenetr et malitioſe intendentes eundem Matthiam Aſhby in hac parte damnificare, et de privilegio ſuo de et in praemiſſis praedictis impedire et*

totaliter fruſtrare, eundem M. A. ſuffragium ſuum in ea parte dare adtunc et ibidem obſtruxere et adtunc et ibidem penitus recuſavere ad eundem M. A. ſuffragium ſuum pro eligendo duos burgenſes pro burgo illo ad parliamentum praedictum dare permittendum, ac ſuffragium ipſius M. A. pro electione illo non receperunt neque allocaverunt: ac duo burgenſes de burgo illo pro parliamento praedicto (praedicto M. A. ſic, ut praefertur, excluſo) ſine aliquo ſuffragio ipſius M. A. adtunc et ibidem virtute brevis et praecepti praedicti electi fuerunt; in enervationem praedicti privilegii ipſius M. A. de et in praemiſſis praedictis: unde idem M. A. dicit, quod deterioratus eſt, et damnum habet ad valentiam 200 *librarum, et inde producit ſectam, &c.*

After a verdict for the plaintiff on not guilty pleaded, it was mov'd in arreſt of judgment by ſerjeant *Whitacre*, that this action was not maintainable. And for the difficulty it was order'd to ſtand in the paper, and was argued *Trin.* 1 *Q. Anne* by Mr. *Weld* and Mr. *Mountague* for the defendants, and this term judgment was given againſt the plaintiff, by the opinion of *Powell*, *Powys*, and *Gould*, juſtices, *Holt* chief juſtice being of opinion for the plaintiff.

Gonld juſtice. I am of opinion, that judgment ought to be given in this caſe for the defendants, and I cannot by any means be reconciled to give my judgment for the plaintiff, for there are no foot-ſteps to warrant ſuch an opinion, but only a ſingle caſe. I am of opinion, that this action is not maintainable for theſe four reaſons: firſt, becauſe the defendants are judges of the thing, and act herein as judges: ſecondly, becauſe it is a parliamentary matter, with which we have nothing to do: thirdly, the plaintiff's privilege of voting is not a matter of property or profit, ſo that the hindrance of it is merely *damnum ſine injuria:* fourthly, it relates to the publick, and is a popular offenſe.

As to the firſt, the King's writ conſtitutes the defendant a judge in this caſe, and gives him power to allow or diſallow the plaintiff's vote. For this reaſon it is, that no action lies againſt a ſheriff for taking inſufficient bail, becauſe he is the judge of their ſufficiency. So is the caſe of *Medcalf verſ. Hodgeſon*, *Hutt.* 120. and their ſufficiency is not traverſable, as 1 *Lev.* 86. *Bentley verſ. Hore*, Upon the ſame reaſon the reſolution of the court is founded in the caſe of *Hammond v. Howell*, 2 *Mod.* 218. that no action lies againſt a man for what he does as a judge. 9 *Hen.* 6. 60. *p.* 9.

2. This is a parliamentary matter, and the parliament is to judge whether the plaintiff had a right of electing or not; for

it may be a diſpute, whether the right of election be in a ſelect number, or in the populace; and this is proper for the parliament to determine, and not for us; and if we ſhould take upon us to determine, that he has a right to vote, and the parliament be of opinion that he has none, an inconvenience would follow from contrary judgments. So in 2 *Ventr.* 37. *Onſlow*'s caſe, it is adjudged, that no action lies for a double return of members to ſerve in parliament. The reſolution of the King's Bench in the caſe of *Barnardiſton v. Soame*, 2 *Lev.* 114. was given on this particular reaſon, that there had been a determination before in parliament in favour of the plaintiff. And *Hale* ſaid, we purſue the judgment of the parliament; but the plaintiff would have been too early, if he had come before; and yet that judgment was reverſed.

3. It is not any matter of profit, either *in praeſenti* or *in futuro*. To raiſe an action upon the caſe, both damage and injury muſt concur, as is the caſe of 19 *Hen.* 6. 44. cited *Hob.* 267. If a man forge a bond in another's name, no action upon the caſe lies, till the bond be put in ſuit againſt the party: ſo here, it may be this refuſal of the plaintiff's vote may be no injury to him, according as the parliament ſhall decide the matter; for they may adjudge, that he had no right to vote, whereby it will appear, the plaintiff was miſtaken in his opinion as to his right of election, and conſequently has ſuſtained no injury by the defendant's denying to take his vote.

4. It is a matter which relates to the public, and is a kind of popular offenſe, and therefore no action is given to the party; for by the ſame reaſon one man may bring an action, a hundred may, and ſo actions infinite for one default; which the law will not allow, as is agreed in *Williams*'s caſe, 5 *Co.* 73. *a.* and 104. *b.* *Boulton*'s caſe. Perhaps in this caſe after the parliament have adjudged the plaintiff has a right of voting, an information may lie againſt the ſheriff for his refuſal to receive it. So the caſe of *Ford v. Hoskins*, 2 *Cro.* 368. 2 *Brownl.* 194. Such an action as this was never brought before, and therefore ſhall be taken not to lie, though that be not a concluſive reaſon. As to the caſe of *Sterling v. Turner*, 2 *Lev.* 50. 2 *Ventr.* 50. where an action was brought by the plaintiff, who was candidate for the place of bridgemaſter of *London*, for refuſing him a poll, and adjudged maintainable, there is a loſs of a profitable place. So the caſe of *Herring v. Finch*, 2 *Lev.* 250. where the plaintiff brought an action on the caſe againſt the defendant, for that the plaintiff being a freeman, who had a voice in the election of a mayor, the defendant being the preſent mayor refuſed to admit his voice; in that caſe the defendant is guilty of a breach of his faith: and in both theſe caſes the plaintiff has no other re-

medy, either in parliament or any where elſe, as the plaintiff in our caſe has. So that I am of opinion, that judgment ought to be given for the defendant upon the merits. But upon this declaration the plaintiff cannot maintain any action, for the plaintiff does not allege in his count, that the two burgeſſes elected were returned, and if they were never returned, there is no damage to the plaintiff. See 2 *Bulſtr.* 265. But I do not rely upon this fault in the declaration.

Powys juſtice. I am of the ſame opinion, that no action lies againſt the defendant, 1. becauſe the defendant as bailiff is *quaſi* a judge, and has a diſtinguiſhing power either to receive or refuſe the votes of ſuch as come to vote, and does preſide in this affair at the time of election: though his determination be not concluſive, but ſubject to the judgment of the parliament, where the plaintiff muſt take his remedy.

2. If the defendant miſbehave himſelf in his office by making a falſe or double return, an action lies againſt him for it on the late ſtatute, and therein all this matter of refuſing the plaintiff's vote is compriſed, and all the ſpecial matter is ſcann'd in that action. And if you allow the plaintiff to maintain an action for this matter, then every elector may bring his action, and ſo the officer ſhall be loaded with a number of actions, that may ruin him; and he may follow one law-ſuit, though he may not be able to follow many. Theſe actions proceed from heat, I will not call it revenge; and it is not like ſpliting of actions, *ſcilicet*, of one cauſe of action into many, but the cauſes of action are ſeveral, and the court cannot unite them, but *A. B. C. D. E.* and a hundred more, may at this rate bring actions.

3. There is a vaſt intricacy in determining the right of electors, and there is a variety, and a different manner and right of election in every borough almoſt. As in ſome boroughs every potwaller has a right to vote, in ſome reſiants only vote, and in others the out-lying burgeſſes that live a hundred miles off; nay, I know *Ludlow* a borough, where all the burgeſſes daughters huſbands have a right to vote. But now all this matter is compriſed in an action againſt the officer for a falſe return. But it is objected, that by the law of *England* every one who ſuffers a wrong has a remedy; and here is a privilege loſt, and ſhall not the plaintiff have a remedy? To that I anſwer, firſt, it is not an injury, properly ſpeaking; it is not *damnum*, for the plaintiff does not loſe his privilege by this refuſal, for when the matter comes before the committee of elections, the plaintiff's vote will be allowed as a good vote: and ſo in an action upon the caſe by one of the candidates for a falſe return, this

tender of his vote by the plaintiff ſhall be allowed as much as if it had been given actually and received. And if this refuſal of the plaintiff's vote be an injury, it is of ſo ſmall and little conſideration in the law, that no action will lie for it; it is one of thoſe things within the maxim, *de minimis non curat lex*. In the caſe of *Ford v. Hoskins*, 2 *Cro.* 368. *Mo.* 843. 2 *Bulſtr.* 336. 1 *Roll. Rep.* 125. where an action is brought againſt the lord of a copyhold manor, for refuſing to accept one named as ſucceſſor for life by the preceeding tenant for life, according to the cuſtom, there the plaintiff ſuffers an injury, and yet it is adjudged, that no action lies. The late ſtatute 7 & 8 *Will.* 3. gives an action againſt the officer for a misfeaſance to the party grieved, *i. e.* to the candidate, who is to give his vote; ſo that by the judgment of the parliament he cannot have any action. Before the ſtatute of 23 *Hen.* 6. no action lay for the candidate, who was the party aggrieved, againſt the officer, for a falſe return, becauſe it related to parliamentary matters, as is adjudged 3 *Lev.* 29, 30. *Onſlow v. Rapley*, and yet he had an injury; and till the 7 & 8 *Will.* 3. no action lay for the candidate againſt the officer for a double return, as is adjudged in the ſame caſe, 3 *Lev.* 29. 2 *Ventr.* 37. and yet he ſuffered an injury thereby; *a fortiori* no action ſhall lie for the plaintiff in this caſe.

4. This action is not maintainable for another reaſon, which I think is a weighty one, *viz.* this action is *primae impreſſionis*; never the like action was brought before, aud therefore as *Littleton* uſes it to prove that no action lay on the ſtatute of *Merton*, *ſi parentes conquerantur*, *ſ.* 108. for if it had lain, it would have ſometimes been put in uſe: ſo here. So in the caſe of lord *Say and Seale v. Stephens*, *Cro.* 142. for the law is not apt to catch at actions. It is agreed by the conſent of all ages, that no action lay at common law againſt the officer for a double return; and yet in one year, *viz.* 1641. there were no leſs than ſeventy double returns, and yet they made no act to help it, though the parliament could not be miſconuſant of the matter.

5. Another reaſon againſt the action is, that the determination of this matter is particularly reſerved to the parliament, as a matter properly conuſable by them, and to them it belongs to determine the fundamental rights of their houſe, and of the conſtituent parts of it, the members; and the courts of *Weſtminſter* ſhall not tell them who ſhall ſit there. Beſides, we are not acquainted with the learning of elections, and there is a particular cunning in it not known to us, nor do we go by the ſame rules, and they often determine contrary to our opinion without doors, The late ſtatute, which enacts, that the laſt determination of the houſe as to the right of election ſhall be a rule to the judges in the trial of any cauſe,

is a declaration of their power, and the paths the judges are to walk in are chalked out to them, ſo that they are not left to uſe their own judgment; but the determination of the houſe is to be the rule of law to us, and we are not to examine beyond that. Suppoſe in this action we ſhould adjudge one way, and after in parliament it ſhould be determined another way; or ſuppoſe a judge of *niſi prius*, before whom the cauſe comes to be tried, ſhould ſay, I am not bound by the rule of the laſt determination in parliament in this action, for this is another ſort of action, not within the meaning of the ſtatute; theſe things would be of ill conſequence.

6. Another reaſon againſt this action is, that if we ſhould allow this action to lie for the plaintiff, *a fortiori* we muſt allow an action to be maintainable for the candidates againſt the defendant for the ſame refuſal; for the candidates have both *damnum et injuriam*, and are the parties aggrieved; and if we ſhould allow that, we ſhall multiply actions upon the officers at the ſuit of the candidates, and every particular elector too; ſo that men will be thereby deterred from venturing to act in ſuch offices, when the acting therein becomes ſo perilous to them and their families. I will not inſiſt upon the exceptions to the declaration, but give my opinion upon the merits. I think there is a ſufficient allegation in the count of the return of the election, eſpecially after a verdict. Nor ſhall I inſiſt, that it does not appear in the declaration, how near the party was to be choſen; nor that this action is brought merely for a poſſibility, for this is an action for a perſonal injury, and the plaintiff might give his vote for which he pleaſed, either the candidate that had fewer or more voices, or he might give his vote for one who had no other burgeſs's voice but the plaintiff's own; for the plaintiff in thoſe caſes is deprived as much of his privilege, as if the perſon for whom he voted was neareſt to be choſen. But it has been objected, that the defendant ſhould not have abſolutely refuſed to receive the plaintiff's vote, but ſhould have reſerved it for a ſcrutiny, and ſhould have admitted it *de bene eſſe*. To that I anſwer, he might indeed have done ſo, but he was not obliged to do it, for the officer ſuppoſed to know every man's right and pretenſe of election, and commonly the weaker party are for bringing in new votes, and deviſing new contrivances; but the officer ought to diſallow them at firſt, and not to give ſo much countenance to ſuch a practice, as to reſerve it for a ſcrutiny. As here in *Weſtminſter hall*, when a matter of law comes before us, if it be a clear caſe, we may give judgment in it on the firſt argument, and it will be a good judgment, although it be uſual to hear ſeveral arguments. The objection of weight is the reſolution between *Stirling* and *Turner*, 2 *Lev*. 50. *Hale* ſaid it was a good precedent: and the caſe of *Herring* and *Finch*, 2 *Lev*. 250. though as

to that caſe it was not adjudged upon the matter of law, but went off upon a point of evidence; yet I will admit the action to lie for the plaintiff in thoſe caſes, but they do not at all relate to the parliament, but are matters of cuſtom merely relating to the government of the city, and are properly determinable at common law. And although it may be ſaid, that this caſe alſo relates to the government of the town, ſo does a public nuſance in a high way; but if a particular perſon receive an injury, he may have his action; but that does not relate to the parliament as this matter does, and the whole caſe here turns upon that, *viz.* its being a parliamentary matter. If we ſhould admit this action to lie, we ſhall have work enough in *Weſtminſter hall* brought in by a ſide wind; nay, ſo much, that we ſhall even be glad to petition the parliament to take this power away from us. Beſides, the judgment here cannot be called properly a determination, it will only be a litigation; for our judgment cannot be cited as an authority in parliament, nor will the parliament mind it, or be bound up by it, for they themſelves are not bound even by their own determination, but may determine contrary to it, though that be a rule upon the courts of *Weſtminſter*. But it has been objected, that this is no determination of the election in this judgment, but only of a particular injury. To that I anſwer, it will be in conſequence a determination of the election; for if the plaintiff had a right to vote, then this action is maintainable; if he has no right, then he can have no action; and by conſequence twenty others may have a right to vote, and the election may turn upon this ſingle vote; and his right of voting is as much parliamentary as the whole election, and may as much intangle the caſe. It is ſaid in *Onſlow*'s caſe, 2 *Ventr.* 37. that the courts at *Weſtminſter* muſt not inlarge their juriſdiction in theſe matters, farther than the ſtatutes give them; and indeed it is a happineſs to us, that we are ſo far diſengaged from the heats, which attend elections. Our buſineſs is to determine of *meum* and *tuum*, where the heats do not run ſo high, as in things belonging to the legiſlature: therefore this being an unprecedented caſe, I ſhall conclude with a ſaying of my lord *Coke*, 2 *Bulſt.* 338. *Omnis innovatio plus novitate perturbat quam utilitate prodeſt.*

Powell juſtice. I am of the ſame opinion, that judgment ought to be arreſted. As to the novelty of this action, I think it no argument againſt the action; for there have been actions on the caſe brought, that had never been brought before, but had their beginning of late years, and we muſt judge upon the ſame reaſon as other caſes have been determined by. I do not agree with my brothers upon their firſt reaſon, that the defendant is a judge. I do not underſtand what my brother *Powys* means by ſaying, he is *quaſi* a judge; ſurely he muſt be a judge or no judge. The bailiff is not a judge, but only an officer, or miniſter to execute the precept. But I agree with them in their other reaſons to give judgment againſt the plaintiff, and chiefly becauſe in this action there does not appear ſuch an injury or damage as is neceſſary to maintain an action on the caſe. An injury muſt have relation to ſome privilege the party has. The caſe of *Turner* and *Sterling*, 2 *Lev.* 50. is adjudged upon a particular reaſon; for the defendant by refuſing him the poll, deprived him of the means of knowing whether he had a right or not. If *ceſtuy que uſe* deſires the feoffees to make a feoffment over to another, and they refuſe, no action upon the caſe lies againſt them for this refuſal. And in the caſe of *Ford* againſt *Hoskins*, 2 *Bulſtr.* 337. 2 *Cro.* 368. it is reſolved, that no action lies for the nominee againſt the lord, for refuſing to keep a court, and to admit him; yet that is a hard caſe, for the party is thereby depriv'd of the means of coming to his right. But that caſe differs from the caſe of *Sterling* againſt *Turner*; for the party hath a known remedy in Chancery, to compel the lord to hold a court, and admit him, but the other hath no remedy againſt the mayor but an action. Here is no injury to the plaintiff, for though he has alledg'd in his declaration, that he had a right to vote, and was hindered of it by the defendant, yet that does not give him a right, unleſs the finding thereof by the jury do confer ſuch right; but that cannot be ſo, for the jury cannot judge of this right in the firſt inſtance, becauſe it is a right properly determinable in parliament. The parliament have a peculiar right to examine the due election of their members, which is to determine whether they are elected by proper electors, ſuch as have a right to elect; for the right of voting is the great difficulty in the determination of the due election, and belongs to the parliament to decide. But it is objected, admitting the plaintiff had a right to vote, and was deprived of it, ſhall he have no remedy? To that I anſwer, he ſhall have a remedy in proper time, but the plaintiff here comes too ſoon, he ſhall have a remedy by action after the parliament have determined that he had a right, but not before. This is not ſuch a right, the deprivation whereof will make an injury, till it be determined in parliament. But the plaintiff has a proper remedy by petition to the parliament ſetting forth his caſe, and after the parliament have adjudg'd that he had a right of voting, he ſhall have an action at law to recover damages, when his right is ſo fixed and ſettled. The opinion of my lord *Hobart* in the caſe of Sir *William Elvis* and the archbiſhop of *York*, *Hob.* 317, 318. and the reaſon of that opinion comes very near to the preſent caſe. That if a church be litigious, and two clerks be preſented to the ordinary, and he award a *jure patronatus*, to inquire which patron has the right, and the inqueſt find for one, and yet the ordinary receive the clerk of the other, contrary to the finding of the jury, in that caſe if the other patron bring his *quaere impedit*

pedit againſt the uſurper and his incumbent, not naming the biſhop, and proves his title, he may afterwards have an action upon the caſe againſt the ordinary, for that wilful wrong delay and trouble, that he hath put him to; and he ſhall recover coſts and damages, not in reſpect of the value of the church (for there are no damages for that by the common law, but by *Weſt.* 2.) but for the other reſpects beforementioned. But if he name the ordinary in the *quare impedit*, he can have no other action of the caſe; neither ſhall he have ſuch action upon the caſe before he hath tried his title in a proper action, and againſt the proper parties. So that in that caſe, though the patron's right, being found by the jury on the *jure patronatus*, is in ſome meaſure determined, yet he ſhall not maintain an action upon the caſe againſt the ordinary, but he muſt firſt prove his title in a proper manner by a *quare impedit*, and thereby prove the ordinary a diſturber; and after that he may bring his action on the caſe againſt the ordinary for his damages. Where the party has no poſſibility of ſettling his right, as in the caſe of *Sterling* and *Turner*, there he ſhall maintain his action for the diſturbance before his right be ſettled; but where he has a proper method, as in our caſe, he ſhall not maintain an action till his right be determined; and the reaſon of this difference is very ſtrong, becauſe of the inconveniencies of contrary determinations upon the ſeveral actions, or of the different judgments by the houſe of commons, and the judges at common law: for the houſe may be of opinion that the plaintiff has a right to vote, and yet the judges may be of opinion upon the action that he has none, and give judgment againſt him, and then though he has a right he will have no remedy: *et e converſo*. But this difference of opinions will be prevented by ſuch a previous application to the houſe before any action brought. Beſides in this caſe, here is not a damage upon which this action is maintainable; for to maintain an action upon the caſe, there muſt be either a real damage, or a poſſibility of a real damage, and not meerly a damage in opinion or conſequence of law. For a poſſibility of a damage, as an action upon the caſe lies for the owner of an antient market, for erecting a new market near his; and yet perhaps the cattle that come to the old market might not be ſold, and ſo no toll due, and conſequently no real damage, but there is a poſſibility of a damage. But in our caſe there is no poſſibility of a damage. It is laid in the declaration, that the defendant obſtructed him from giving his vote; but that is too general, without ſhewing the manner how he obſtructed him, as that the defendant kept him out of the uſual place, where the votes are taken. The plaintiff ſhews no damage in his count, and the verdict will not ſupply it, for the plaintiff ought always to allege a damage; as in an action upon the caſe brought againſt the leſſee by him in the reverſion, for refuſing to permit him to enter to view waſte, it would

Caſe for poſſibility of damage.

would not be ſufficient to alledge thus generally, that the defendant obſtructed him, *&c.* It is laid here, that the defendants *ipſum* the plaintiff *ad ſuffragium ſuum dare obſtruxerunt, et penitus recuſaverunt*, I do not know what that means in this caſe. Indeed it is a ſufficient deſcription of a diſſeiſin of a rent ſeck, but if the plaintiff gives his vote for a candidate, that is as effectual as if the officer writ it down, for it is his vote by the giving of it, and the officer cannot hinder him of it, and on a poll it will be a good vote, and muſt be allow'd, and ſo there is no wrong done to the plaintiff; for his vote was a good vote notwithſtanding what the defendant did. Beſides the plaintiff can make no profit of his vote; and it is like the caſe of a *quare impedit*, in which the plaintiff at common law recovered no damages, becauſe he ought not to ſell the preſentation, and ſo could make no profit of it. So here, for it would be criminal for the plaintiff to ſell his vote. Perhaps the putting the plaintiff to trouble and charge, to maintain and vindicate his right of voting, might be ſufficient damage to maintain an action on the caſe; but as our caſe is, I cannot ſee that the plaintiff has received any damage. Great inconveniences do attend the allowance of this action, as my brothers have ſaid; as that it will occaſion multiplicity of actions, and for that reaſon it is, that the law gives no action to a private perſon for a publick nuſance, for there is a remedy by indictment to redreſs it. So here the plaintiff has a remedy in parliament. As to the caſe of *Weſtbury* againſt *Powell, Co. Li.* 50. *a.* where the inhabitants of *Southwarke* had a watering place for their cattle by cuſtom, which was ſtopped up; there any inhabitant might have an action, becauſe there was no other remedy by preſentment or the like: but if it had been a nuſance preſentable, no action would have lain. So in the caſe of *Sterling* and *Turner*, the party had no other remedy. So in the caſe of *Herring* and *Finch*, which is a ſtrong caſe; and I do not know whether an action will lie in that caſe, for refuſing to admit his voice to the election of a mayor; but there the plaintiff has no other remedy, nor other way to ſettle his right. If we ſhould adjudge, that this action lies, it will be dangerous to execute any office of this nature, and will deter men from undertaking public offices, which will be a thing of ill conſequence. I am of opinion upon the whole matter, that after a determination in the parliament for the plaintiff's right, the trouble and charge of vindicating it will maintain an action, but in this caſe no action lies, and therefore the judgment ought to be arreſted.

Holt chief juſtice. The ſingle queſtion in this caſe is, Whether, if a free burgeſs of a corporation, who has an undoubted right to give his vote in the election of a burgeſs to ſerve in parliament, be refuſed and hinder'd to give it by the officer, if an action on the caſe will lie againſt ſuch officer.

I am of opinion that judgment ought to be given in this caſe for the plaintiff. My brothers differ from me in opinion, and they all differ from one another in the reaſons of their opinion; but notwithſtanding their opinion, I think the plaintiff ought to recover, and that this action is well maintainable, and ought to lie. I will conſider their reaſons. My brother *Gould* thinks no action will lie againſt the defendant, becauſe, as he ſays, he is a judge; my brother *Powys* indeed ſays, he is no judge, but *quaſi* a judge; but my brother *Powell* is of opinion, that the defendant neither is a judge, nor any thing like a judge, and that is true: for the defendant is only an officer to execute the precept, *i. e.* only to give notice to the electors of the time and place of election, and to aſſemble them together in order to elect, and upon the concluſion to caſt up the poll, and declare which candidate has the majority.

But to proceed, I will do theſe two things: Firſt, I will maintain that the plaintiff has a right and privilege to give his vote: Secondly, in conſequence thereof, that if he be hinder'd in the enjoyment or exerciſe of that right, the law gives him an action againſt the diſturber, and that this is the proper action given by the law.

I did not at firſt think it would be any difficulty, to prove that the plaintiff has a right to vote, nor neceſſary to maintain it, but from what my brothers have ſaid in their arguments I find it will be neceſſary to prove it. It is not to be doubted, but that the Commons of *England* have a great and a conſiderable right in the government, and a ſhare in the legiſlative, without whom no law paſſes; but becauſe of their vaſt numbers this right is not exerciſeable by them in their proper perſons, and therefore by the conſtitution of *England* it has been directed, that it ſhould be exerciſed by repreſentatives, choſen by and out of themſelves, who have the whole right of all the Commons of *England* veſted in them: and this repreſentation is exercis'd in three different qualities, either as knights of ſhires, citizens of cities, or burgeſſes of boroughs; and theſe are the perſons qualified to repreſent all the Commons of *England*. The election of knights belongs to the freeholders of the counties, and it is an original right veſted in and inſeparable from the freehold, and can no more be ſever'd from their freehold, than their freehold itſelf can be taken away. Before the ſtatute of 8 *Hen.* 6. *c.* 7. any man that had a freehold, though never ſo ſmall, had a right of voting, but by that ſtatute the right of election is confin'd to ſuch perſons as have lands or tenements to the yearly value

Any freeholder intitled to vote at elections.

of forty ſhillings at leaſt, becauſe, as the ſtatute ſays, of the tumults and diſorders which happened at elections, by the exceſſive and outragious number of electors; but ſtill the right of election is as an original right, incident to, and inſeparable from the freehold. As for citizens and burgeſſes, they depend on the ſame right as the knights of ſhires, and differ only as to the tenure, but the right and manner of their election is on the ſame foundation. Now boroughs are of two ſorts; firſt, where the electors give their voices by reaſon of their burgerſhip; or, ſecondly, by reaſon of their being members of the corporation. *Littleton* in his chapter of tenure in burgage 162. *C. L.* 108. *b.* 109. ſays, Tenure in burgage is, where an ancient borough is, of the which the King is lord, of whom the tenants hold by certain rent, and it is but a tenure in ſocage: and *Sect.* 164. he ſays, and it is to wit, that the antient towns call'd boroughs be the moſt antient towns that be within *England*, and are call'd boroughs, becauſe of them come the burgeſſes to parliament. So that the tenure of burgage is from the antiquity, and their tenure in ſocage is the reaſon of their eſtate, and the right of election is annex'd to their eſtate. So that it is part of the conſtitution of *England*, that theſe boroughs ſhall elect members to ſerve in parliament, whether they be boroughs corporate or not corporate; and in that caſe the right of election is a privilege annex'd to the burgage land, and is, as I may properly call it, a real privilege. But the ſecond ſort is, where a corporation is created by charter, or by preſcription, and the members of the corporation as ſuch chuſe burgeſſes to ſerve in parliament. The firſt ſort have a right of chuſing burgeſſes as a real right, but here in this laſt caſe it is a perſonal right, and not a real one, and is exerciſed in ſuch manner as the charter or cuſtom preſcribes; and the inheritance of this right, or the right of election itſelf, is in the whole body politic, but the exerciſe and enjoyment of this right is in the particular members. And when this right of election is granted within time of memory, it is a franchiſe that can be given only to a corporation, as is reſolved by all the judges againſt my lord *Hobart* in the caſe of *Dungannon* in *Ireland*, 12 *Co.* 120, 121. That if the King grant to the inhabitants of *Iſlington*, to be a free borough, and that the burgeſſes of the ſame town may elect two burgeſſes to ſerve in parliament, that ſuch a grant of ſuch privilege to burgeſſes not incorporated is void, for the inhabitants have not capacity to take an inheritance. See *Hob.* 15. The principal caſe there was, the King conſtituted the town of *Dungannon* to be a free borough, and that the inhabitants thereof ſhall be a body politic and corporate, conſiſting of one provoſt, twelve free burgeſſes, and commonalty; and by the ſame name may ſue and be ſued; *et quod ipſi praefati praepoſiti et liberi burgenſes burgi praedicti et ſucceſſores ſui in perpetuum habeant plenam poteſtatem et authoritatem eli-*

Boroughs of two ſorts.

Grant to chuſe members to ſerve in parliament can be only to a corporation.

gendi, mittendi, et retornandi duos diſcretos et idoneos viros ad inſerviendum et attendendum in quolibet parliamento, in dicto regno noſtro Hiberniae in poſterum tenendo, and ſo proceeds to give them power to treat, and give voice in parliament, as other burgeſſes of any other ancient borough either in *Ireland* or *England* have uſed to do. And upon this grant it was adjudged by all the judges of *England*, that this power to elect burgeſſes is an inheritance of which the provoſt and burgeſſes were not capable, for that it ought to be veſted in the intire corporation, *viz.* provoſt, burgeſſes, and commonalty, and that therefore the law in this caſe did veſt that privilege in the whole corporation in point of intereſt, though the execution of it was committed to ſome perſons, members of the ſame corporation. 12 *Co.* 120, 121. *Hob.* 14, 15. As to the manner of election, every borough ſubſiſts on its own foundation, and where this privilege of election is uſed by particular perſons, it is a particular right veſted in every particular man; for if we conſider the matter, it will appear, that the particular members and electors, their perſons, their eſtates, and their liberties, are concern'd in the laws that are made, and they are repreſented as particular perſons, and not *quatenus* a body politic; therefore, when their particular rights and properties are to be bound (which are much more valuable perhaps than thoſe of the corporation) by the act of the repreſentative, he ought to repreſent the private perſons. And this is evident from all the writs, which were antiently iſſued for levying the wages of the knights and burgeſſes that ſerv'd in parliament. As 46 *Edw.* 3. *Rot. Parl. memb.* 4. *in dorſo.* For when wages were paid to the members, they were not aſſeſſed upon the corporation, but upon the commonalty as private perſons, as the writ ſhews, which indeed is directed to the ſheriff, or to the mayor, &c. yet the command is, *quod de communitate comitatus, civitatis, vel burgi, habere faciat militibus, civibus, aut burgenſibus,* 10*l.* *pro expenſis ſuis.* But now if the corporation were only to be repreſented, and not the particular members of it, then the corporation only ought to be at the charge; but it is plain that the particular members are at the charge. And this is no new thing, but agreeable to reaſon and the rules of law, that a franchiſe ſhould be veſted in the corporation aggregate, and yet the benefit of it to redound to the particular members, and to be enjoy'd by them in their private capacity. As is the caſe of *Waller* and *Hanger*, *Mo.* 832, 833. where the King granted to the mayor and citizens of *London*, *quod nulla priſagia ſint ſoluta de vinis civium et liberorum hominum de London*, &c. And there it was reſolved, that although the grant be to the corporation, yet it ſhould not enure to the body politic of the city, but to the particular perſons of the corporation, who ſhould have the fruit and execution of the grant for their private wines, and it ſhould not extend to the wines belonging to the body politic; and

Manner of levying wages for knights, &c.

ſo is the conſtant experience at this day. So in the caſe of *Mellor verſ. Spateman*, 1 *Saund.* 343. where the corporation of *Derby* claim common by preſcription, and though the inheritance of the common be in the body politick, yet the particular members enjoy the fruit and benefit of it, and put in their own cattle to feed the common, and not the cattle belonging to the corporation; but that is not indeed our caſe. But from hence it appears that every man, that is to give his vote on the election of members to ſerve in parliament, has a ſeveral and particular right in his private capacity, as a citizen or burgeſs. And ſurely it cannot be ſaid, that this is ſo inconſiderable a right, as to apply that maxim to it, *de minimis non curat lex.* A right that a man has to give his vote at the election of a perſon to repreſent him in parliament, there to concur to the making of laws, which are to bind his liberty and property, is a moſt tranſcendant thing, and of an high nature, and the law takes notice of it as ſuch in divers ſtatutes: as in the ſtatute of 34 & 35 *Hen.* 8. *c.* 13. intitled an act for making of knights and burgeſſes within the county and city of *Cheſter*; where in the preamble it is ſaid, that whereas the ſaid county palatine of *Cheſter* is and hath been always hitherto exempt, excluded, and ſeparated out, and from the King's court, by reaſon whereof the ſaid inhabitants have hitherto ſuſtained manifold diſheriſons, loſſes, and damages, as well in their lands, goods, and bodies, as in the good, civil, and politic governance, and maintenance of the commonwealth of their ſaid county, *&c.* So that the opinion of the parliament is, that the want of this privilege occaſions great loſs and damage. And the ſame farther appears from the 25 *Car.* 2. *c.* 9. an act to enable the county palatine of *Durham* to ſend knights and burgeſſes to ſerve in parliament, which recites, whereas the inhabitants of the county palatine of *Durham* have not hitherto had the liberty and privilege of electing and ſending any knights and burgeſſes to the high court of parliament, *&c.* The right of voting at the election of burgeſſes is a thing of the higheſt importance, and ſo great a privilege, that it is a great injury to deprive the plaintiff of it. Theſe reaſons have ſatisfied me as to the firſt point.

2. If the plaintiff has a right, he muſt of neceſſity have a means to vindicate and maintain it, and a remedy if he is injured in the exerciſe or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. As if a purchaſer of an advowſon in fee-ſimple, before any preſentment, ſuffer an uſurpation, and ſix months to paſs without bringing his *quare impedit*, he has loſt his right to the advowſon, becauſe he has loſt his *quare impedit*, which was his only remedy; for he could not maintain a writ of right

2 Inſt. 357. right of advowſon; and though he afterwards uſurp and die, and the advowſon deſcend to his heir, yet the heir cannot be remitted, 6 Co. 58. b. but the advowſon is loſt for ever without recovery. 6 *Co.* 50. Where a man has but one remedy to come at his right, if he loſes that he loſes his right. It would look very ſtrange, when the commons of *England* are ſo fond of their right of ſending repreſentives to parliament, that it ſhould be in the power of a ſheriff, or other officer, to deprive them of that right, and yet that they ſhould have no remedy; it is a thing to be admired at by all mankind. Suppoſing then that the plaintiff had a right of voting, and ſo it appears on the record, and the defendant has excluded him from it, no body can ſay, that the defendant has done well; then he muſt have done ill, for he has deprived the plaintiff of his right: ſo that the plaintiff having a right to vote, and the defendant having hindered him of it, it is an injury to the plaintiff. Where a new act of parliament is made for the benefit of the ſubject, if a man be hindred from the enjoyment of it, he ſhall have an action againſt ſuch a perſon who ſo obſtructed him. How elſe comes an action to be maintainably by the party on the ſtatute of 2 *Ric.* 2. *de ſcandalis magnatum*, 12 *Co.* 134. but in conſequence of law? For the ſtatute was made for the preſervation of the publick peace, and that is the reaſon that no writ of error lies in the Exchequer chamber by force of the ſtatute of 7 *Eliz.* in a judgment in the King's Bench on an action *de ſcandalis*, for it is not included within the words of the ſtatute; for though the ſtatute ſays, ſuch writ ſhall lie upon judgments in actions on the caſe, yet it does not extend to that action, although it be an action on the caſe, becauſe it is an action of a far higher degree, being founded ſpecially upon a ſtatute, 1 *Cro.* 142. If then when a ſtatute gives a right, the party ſhall have an action for the infringement of it, is it not as forcible when a man has his right by the common law? This right of voting is a right in the plaintiff by the common law, and conſequently he ſhall maintain an action for the obſtruction of it. But there wants not a ſtatute too in this caſe, for by *Weſt.* 1. *c.* 5. it is enacted, that foraſmuch as elections ought to be free, the King forbids upon grievous forfeiture, that any great man, or other, by power of arms, or by malice or menaces, ſhall diſturb to make free election. 2 *Inſt.* 168, 169. And this ſtatute, as my lord *Coke* obſerves, is only an inforcement of the common law; and if the parliament thought the freedom of elections to be a matter of that conſequence, as to give their ſanction to it, and to enact that they ſhould be free; it is a violation of that ſtatute, to diſturb the plaintiff in this caſe in giving his vote at an election, and conſequently actionable.

And I am of opinion, that this action on the caſe is a proper action. My brother *Powell* indeed thinks, that an action upon the caſe is not maintainable, becauſe here is no hurt or damage to the plaintiff; but ſurely every injury imports a damage, though it does not coſt the party one farthing, and it is impoſſible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for ſlanderous words, though a man does not loſe a penny by reaſon of the ſpeaking them, yet he ſhall have an action. So if a man gives another a cuff on the ear, though it coſt him nothing, no not ſo much as a little *diachylon*, yet he ſhall have his action, for it is a perſonal injury. So a man ſhall have an action againſt another for riding over his ground, though it do him no damage; for it is an invaſion of his property, and the other has no right to come there. And in theſe caſes the action is brought *vi et armis*. But for invaſion of another's franchiſe, treſpaſs *vi et armis* does not lie, but an action of treſpaſs on the caſe; as where a man has *retorna brevium*, he ſhall have an action againſt any one who enters and invades his franchiſe, though he loſe nothing by it. So here in the principal caſe, the plaintiff is obſtructed of his right, and ſhall therefore have his action. And it is no objection to ſay, that it will occaſion multiplicity of actions; for if men will multiply injuries, actions muſt be multiplied too; for every man that is injured ought to have his recompenſe. Suppoſe the defendant had beat forty or fifty men, the damage done to each one is peculiar to himſelf, and he ſhall have his action. So if many perſons receive a private injury by a publick nuſance, every one ſhall have his action, as is agreed in *Williams*'s caſe, 5 *Co.* 73. *a.* and *Weſtbury* and *Powell Co. Li.* 56. *a.* Indeed where many men are offended by one particular act, there they muſt proceed by way of indictment, and not of action; for in that caſe the law will not multiply actions. But it is otherwiſe, when one man only is offended by that act, he ſhall have his action; as if a man dig a pit in a common, every commoner ſhall have an action on the caſe, *per quod communiam ſuam in tam amplo modo habere non potuit*; for every commoner has a ſeveral right. But it would be otherwiſe if a man dig a pit in a highway, every paſſenger ſhall not bring his action, but the party ſhall be puniſhed by indictment; becauſe the injury is general and common to all that paſs. But when the injury is particular and peculiar to every man, each man ſhall have his action. In the caſe of *Turner* againſt *Sterling* the plaintiff was not elected, he could not give in evidence the loſs of his place as a damage, for he was never in it; but the *git* of the action is, that the plaintiff having a right to ſtand for the place, and it being difficult to determine who had the majority, he had therefore a right to demand a poll, and the defendant by denying it was liable to an action. If publick officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offenſes. So the caſe of *Hunt* and *Dowman*, 2 *Cro*. 478. where an action on the caſe is brought by him in reverſion againſt leſſee for years, for refuſing to let him enter into the houſe, to ſee whether any waſte was committed. In that caſe the action is not founded on the damage, for it did not appear that any waſte was done, but becauſe the plaintiff was hindred in the enjoyment of his right, and ſurely no other reaſon for the action can be ſuppoſed.

But in the principal caſe my brothers ſay, we cannot judge of this matter, becauſe it is a parliamentary thing. O! by all means be very tender of that. Beſides it is intricate, and there may be contrariety of opinions. But this matter can never come in queſtion in parliament; for it is agreed that the perſons for whom the plaintiff voted were elected; ſo that the action is brought for being deprived of his vote: and if it were carried for the other candidates againſt whom he voted, his damage would be leſs. To allow this action will make publick officers more careful to obſerve the conſtitution of cities and boroughs, and not to be ſo partial as they commonly are in all elections, which is indeed a great and growing miſchief, and tends to the prejudice of the peace of the nation. But they ſay, that this is a matter out of our juriſdiction, and we ought not to inlarge it. I agree we ought not to incroach or inlarge our juriſdiction; by ſo doing we uſurp both on the right of the Queen and the people: but ſure we may determine on a charter granted by the King, or on a matter of cuſtom or preſcription, when it comes before us, without incroaching on the parliament. And if it be a matter within our juriſdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever ſuch a petition heard of in parliament, as that a man was hindred of giving his vote, and praying them to give him remedy? The parliament undoubtedly would ſay, take your remedy at law. It is not like the caſe of determining the right of election between the candidates.

My brother *Powell* ſays, that the plaintiff's right of voting ought firſt to have been determined in parliament, and to that purpoſe cites the opinion of my lord *Hobart* 318. that the patron may bring his action upon the caſe againſt the ordinary after a judgment for him in a *quare impedit*, but not before. It is indeed a fine opinion, but I do not know whether it will bear debating, and how it will prove, when it comes to be handled. For at common law the patron had no remedy for damages againſt the diſturber, but the ſtatute gives him damages; but if he will not make the biſhop a party to the ſuit, he has loſt his remedy which the ſtatute gives him. But in our caſe the plaintiff has no opportunity to have a remedy elſewhere. My brother *Powys* has cited the opinion of *Littleton* on the ſtatute of *Merton*, that no action lay upon the words, *ſi parentes conquerantur*, becauſe none had ever been brought, yet he cannot depend upon it. Indeed that is an argument, when it is founded upon reaſon, but it is none, when it is againſt reaſon. But I will conſider the opinion. Some queſtion had aroſe on the penning of that ſtatute on thoſe words, *ſi parentes conquerantur, &c.* what was the meaning of them, whether they meant a complaint in a court in a judicial manner. But it is plain the word *conquerantur*, means only *ſi parentes lamententur*, that is only a complaint *in païs*, and not in a court; for the guardian in ſocage ſhall enter in that caſe, and ſhall have a ſpecial writ *de ejectione cuſtodiae terrae et haeredis*. But this ſaying has no great force, if it had it would have been deſtructive of many new actions, which are at this day held to be good law. The caſe of *Hunt* and *Dowman* before mentioned was the firſt action of that nature, but it was grounded on the common reaſon, and the antient juſtice of the law. So the caſe of *Turner* and *Sterling*. Let us conſider wherein the law conſiſts, and we ſhall find it to be, not in particular inſtances and precedents, but on the reaſon of the law, and *ubi eadem ratio, ibi idem jus*. This privilege of voting does not differ from any other franchiſe whatſoever. If the houſe of commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections, but we muſt not be frighted when a matter of property comes before us, by ſaying, it belongs to the parliament; we muſt exert the Queen's juriſdiction. My opinion is founded on the law of *England*. The caſe of *Mors* and *Slue*, 1 *Ventr.* was the firſt action of that nature, but the novelty of it was no objection to it. So the caſe of *Smith* and *Craſhaw*, 1 *Cro.* 15. 1 *Jones* 93. that an action of the caſe lay for falſly and maliciouſly indicting the plaintiff of treaſon, though the objections were ſtrong againſt it, yet it was adjudg'd, that if the proſecution were without probable cauſe, there was as much reaſon the action ſhould be maintained, as in other caſes. So 15 *Car.* 2. *C. B.* between *Bodily* and *Long*, it was adjudg'd by *Bridgman* chief juſtice, *&c.* that an action on the caſe lay for a riding, whenever the plaintiff and his wife fought, for it was a ſcandalous and reproachful thing. So in the caſe of *Herring* and *Finch*, 2 *Lev.* 250. no body ſcrupled, but that the action well lay, for the plaintiff was thereby depriv'd of his right. And if an action is maintainable againſt an officer for hindring the plaintiff from voting for a mayor of a corporation,

Co. Li. 81, a, b.

Caſe for a riding.

who cannot bind him in his liberty nor eſtate, to ſay, that yet this action will not lie in our caſe, for hindering the plaintiff to vote at an election of his repreſentative in parliament, is inconſiſtent. Therefore my opinion is, that the plaintiff ought to have judgment.

Friday the 14th of *January* 1703. this judgment was revers'd in the houſe of lords, and judgment given for the plaintiff by fifty lords againſt ſixteen. *Trevor* chief juſtice and baron *Price* were of opinion with the three judges of the King's Bench. *Ward C. B.* and *Bury* and *Smith* barons, were of opinion with the lord chief juſtice *Holt*, *Tracy dubitante*, *Nevill* and *Blencowe* abſent.

No mention is made in the printed journal the day of judgment of the lords ^ of their putting any question to the judges. But in a case printed by the lords it is mentioned that ten of the judges were heard: & in the journal of a former day it mentions their being ordered to attend.

(Note, I had it from good hands; that *Tracy* agreed clearly, that the action lay, but was doubtful upon the manner of laying the declaration.)

Upon the arguments of this caſe *Holt* chief juſtice ſaid, the plaintiff has a particular right veſted in him to vote. Is it not then a wrong and injury to that right, to refuſe to receive his vote? So if a borough has a right of common, and the freemen are hindred from enjoying it by incloſure, or the like, every freeman may maintain his action. This action is brought by the plaintiff for the infringement of his franchiſe. You would have nothing to be a damage, but what is pecuniary, and a damage to property. If a man has *retorna brevium*, although no fees were due to him at common law, yet if the ſheriff enters within his liberty, and executes proceſs there, it is an invaſion of his franchiſe, and he may bring his action; and there is the ſame reaſon in this caſe. Although this matter relates to the parliament, yet it is an injury precedaneous to the parliament, as my lord *Hale* ſaid in the caſe of *Bernardiſton verſ. Soame.* The parliament cannot judge of this injury, nor give damage to the plaintiff for it: they cannot make him a recompenſe. Let all people come in, and vote fairly; it is to ſupport one or the other party, to deny any man's vote. By my conſent if ſuch an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his *Engliſh* right, and if this action be not allow'd, a man may be for ever depriv'd of it. It is a great privilege to chuſe ſuch perſons, as are to bind a man's life and property by the laws they make.

MR. *Dee* prayed a *mandamus* to reſtore the clerk of the butchers company, which is a company by charter. *Holt* chief juſtice. Such *mandamus's* have been granted, but I think they have gone too far in theſe caſes. I am of opinion, that no *mandamus* ought to be granted where the officer may have an aſſiſe, therefore hear council of both ſides.

Mandamus to reſtore the clerk of the butchers company. 6 Mod. 18.

A *mandamus* was afterwards granted.

Baker *verſ.* Pierce.

S. C. Salk. 695. S. C. 6 Mod. 23. John Baker ſtole my box-wood, and I will prove it, actionable. Difference between timber and timber trees, *per Broderick.* H. J.

IN an action on the caſe for words, *John Baker* ſtole my box-wood, and I will prove it. After a verdict for the plaintiff, ſerjeant *Darnall* moved in arreſt of judgment, that theſe words are not actionable, for they ſhall be taken to mean wood growing or the like, whereof only a treſpaſs can be committed. So to ſay, you are a thief, and have ſtolen my timber, or my apples, or my hops, is not actionable. For where words may import either a felony, or a treſpaſs, they ſhall be taken in the mildeſt ſenſe, unleſs there be other words to determine them in the worſt ſenſe. As to ſay, he ſtole my timber out of my yard, or my hops in a bag. *Hob.* 331. *Clerk verſ. Gilbert. Hutton* 113. *Herbert verſ. Angell.* So *Hutton* 38. *Maſon v. Thompſon.* I charge thee with felony for taking forth from *J. D.*'s pocket, and I will prove it; the words were held not to be actionable, becauſe it ſhould not be intended to mean a felony, not being directly affirmed. [But *Holt* chief juſtice and the court denied that caſe to be law, for the taking out of a man's pocket muſt be intended a felonious taking.] In this caſe the words may be taken to mean box-wood growing; and although the defendant might mean them in the worſt ſenſe, yet the intent of the ſpeaker ſhall not make the words actionable, unleſs the words expreſs it ſufficiently. Suppoſe the defendant had ſaid, he ſtole my coppice-wood.

Holt. The words, I charge thee with felony, import that it was a felonious taking. *H. J.*

Mr. *Broderick* for the plaintiff. Theſe words are actionable, and the difference is founded on this rule, *Arbor dum creſcit, lignum cum creſcere neſcit,* and therefore box-wood in this caſe muſt be intended wood cut down, whereof a felony may be committed. *Yelv.* 152. *Higgs verſ. Auſtin.* Thou haſt ſtolen as much wood and timber as is worth twenty ſhillings, adjudged actionable. *Noy* 114. *Short*'s caſe. 1 *Roll. action* 70. *n.* 47, 48. *Liford* and *Stamp. March.* 211. 2 *Cro.* 166. *Loe* and *Saunders* 674. *Smith* and *Ward. Hob.* 77. *Coote* and *Gilbert. Sty.* 9. 3 *Cro.* 471. The words in this caſe according to common parlance import a thing of which felony may be committed, and therefore he prayed judgment for the plaintiff.

Holt chief juſtice. I have heard *Twiſden* juſtice ſay, he knew no rule to go by in actions for words.

Gould juſtice. So ſaid my lord *Hale*; for all words ſtand on a different bottom.

Holt chief juſtice. In moſt caſes where ſuch words as theſe have been held actionable, there are other words of an ill ſenſe to explain them. As I charge you with felony, or you are a thief. And ſtealers of coppice-wood are called in common parlance ſtealers of wood.

Powell juſtice. No action will lie for ſaying, you have ſtole my coppice-wood, for that muſt be intended growing; but to ſay generally, you have ſtole my wood, that muſt be intended wood cut down, and there are many caſes founded on the difference in that verſe cited by Mr. *Broderick*.

Holt chief juſtice agreed the difference.

Powell juſtice. To ſay, you are a thief, for you have ſtolen, or you are a thief and have ſtolen, muſt mean both the ſame. And though it was formerly held, that there was a difference between them, yet of late it has been taken otherwiſe; for *for* or *and* are explanatory, and mean both the ſame thing.

Holt chief juſtice. It has gone both ways.

Afterwards the court gave judgment for the plaintiff, that the words were actionable, notwithſtanding the opinion in 2 *Cro.* 166. to the contrary. And *Holt* ſaid, Sure the plaintiff muſt have judgment. It is not worth while to be very learned on this point, but where words tend to ſlander a man, and take away his reputation, he ſhall be for ſupporting actions for them, becauſe it tends to preſerve the peace. I remember a ſtory told by Mr. juſtice *Twiſden*, of a man that had brought an action for ſcandalous words ſpoken of him, and upon a motion in arreſt of judgment, the judgment was arreſted; and the plaintiff being in court at that time ſaid, that if he had thought he ſhould not have recovered in his action, he would have cut his throat. *Powell* juſtice. This caſe in 2 *Cro.* 166. cited by my brother *Darnall*, is ſo; but the later books are contrary, and I will ſtick to the latter authorities, being grounded

2 Keb. 261. Alſop v. Taylor.

grounded on ſo much reaſon. *Gould* juſtice ſaid, that in the 10 *Car.* 2. *Mich.* term, it was adjudged, that theſe words, Thou haſt ſtole my wood, were actionable.

Squire *and* Grevett.

S. C. Salk. 74. S. C. 6 Mod. 33. Debt on a bond to perform an award.

A Writ of error upon a judgment given in the King's Bench, in an action of debt upon a bond of arbitration, the defendant prays *oyer* of the condition, which was to perform the award, *&c.* and pleads, that the arbitrators made no award: the plaintiff replies an award made *de et ſuper praemiſſis*, whereby the arbitrators did award, *quod omnis proſecutio in aliqua ſecta dependente inter partes ceſſaret, et abinde determinata ſit, et quod dictus Johannes Grevett ſolveret dicto Johanni Squire ſummam* 17 *l.* 3 *s.* 11 *d. ſuper* 10 *diem Octobris tunc proxime ſequentem, in pleno omnium damnorum et demandorum, ac etiam quod ipſe idem Johannes Grevett ſuper dictum* 10 *diem Octobris ad proprias miſas et cuſtagia ſua ſigillaret et deliberaret dicto Johanni Squire unam generalem relaxationem omnium actionum, et cauſarum actionis, ſectarum, clameorum, et demandorum quorumcunque a principio mundi uſque dictum* 10 *diem Octobris, et quod dictus Johannes Squire ſuper receptionem ſuam dictae ſummae* 17 *l.* 3 *s.* 11 *d. faceret, ſigillaret, et deliberaret dicto Johanni Grevett unam generalem relaxationem omnium actionum, et cauſarum actionis, ſectarum, clameorum, et demandorum quorumcunque a principio mundi uſque dictum* 10 *diem Octobris*, and the plaintiff aſſigns his breach: the defendant rejoins *nul tiel agard*; and iſſue thereon, and a verdict for the plaintiff, and judgment in the Common Pleas. On a writ of error in this court, and the general errors aſſigned, Mr. *Parker* took three exceptions to the award: firſt, that it is not final, for it is not awarded that all actions ſhall ceaſe, but that the proſecution in any ſuit depending between the parties ſhall ceaſe, which goes only to the ſuſpenſion of the preſent proſecution, and not to the right of action; and though it ſhould be taken to extend to ſtay the proſecution during the lives of the parties themſelves, yet it might be revived again by their executors. Secondly, that the 17 *l.* 3 *s.* 11 *d.* awarded to be paid by *Grevett* to *Squire*, is awarded to be paid upon a day after the award, in full of all demands, *&c.* which muſt intend all demands, *&c.* to that day, and ſo the award too large, and includes more time than the ſubmiſſion. 3. He admitted, that the releaſe to be given by *Squire* to *Grevett* would be good as to the time of the ſubmiſſion, and void for all the time after; but in this caſe the money is awarded to be paid *ſuper* 10 *diem Octobris* in full of all demands to that day, and that *Squire ſuper receptionem inde, &c.* ſhould give a releaſe; ſo that the tender being to be made in full of all demands to a time after the ſubmiſſion, and not in any other manner, *Squire* is not bound to receive it ſo, and then no releaſe to be made by him, for the releaſe is not to be given but *ſuper receptionem*, and the receipt is a condition precedent to the giving the releaſe; and if the tender be made in ſatisfaction of all demands to the time of the ſubmiſſion, that would not have intitled *Grevett* to a releaſe, and ſo the award not final.

Award that all actions ſhall ceaſe.

Ball v. Heſcott.

Pengelly for the defendant in error. As to the firſt exception, he inſiſted that the award was good and final; for it ſhall be taken according to the uſual conſtruction in caſes of awards, not merely as a ſuſpenſion or delay of the proſecution, but in extinguiſhment of the right and duty, and then no proſecution can be carried on or revived by the executors. That ſince an award, that all actions ſhall ceaſe, is agreed to be final, much more ſhall this; for the word proſecution or ſuit is a more large and comprehenſive word than the word action; and it is *Littleton*'s text, *ſect.* 504. *C. L.* 291. that a releaſe of all ſuits, or proſecutions, which are ſynonymous, will diſcharge not only all actions, but all executions too. He that has no right of proſecution can have no right of action, for *actio eſt jus proſequendi*. He cited ſeveral caſes to this purpoſe, as the caſe of *Ball* and *Heſcott*, which was adjudged in this court *Paſch.* 11 *Will.* 3. where the award was, that one party ſhould pay to the other 20*l.* at a day ſubſequent, and that he ſhould give the other a bond for payment of the money accordingly within four days, and that all proſecutions and ſuits ſhould ceaſe till failure of performance; and this was held to be final, for if he paid the money, &c. the award was abſolute, and the ceſſation perpetual, and he ſhould not take advantage of his own non-performance. So the caſe of *Millward* and *Stokes*, 1 *Roll.* 261. *n.* 7. the award was made concerning an obligation, in which one was bound to the other, that the obligee ſhould not proſecute or cauſe to be proſecuted any ſuit againſt the obligor upon the ſaid obligation; it was adjudged a good award, and final, and that thereby the duty was extinguiſhed. And theſe caſes he ſaid were ſtronger than the preſent caſe. 2 *Mod.* 227, 228. *Strangford verſ. Green.* 1 *Lev.* 58. *Knipe*'s caſe. 1 *Roll.* 254. *n.* 10. As to the ſecond and third exceptions, he firſt premiſed, that the award was made, and ſo recited to be, purſuant to the ſubmiſſion; that it was averred to be made *de et ſuper praemiſſis*, that there was no averment of any matter or controverſies ariſen ſince the ſubmiſſion. Then he ſaid, the ſecond exception was not truly ſtated, for the words are general, *quod ſolveret, &c. ſuper* 10 *Octobris in pleno omnium damnorum et demandorum*, and not *in pleno omnium demandorum uſque ad dictum diem*: and it muſt be therefore conſtrued to mean all demands, &c. to the time of the ſubmiſſion, and not to the time after, the tenth of *October*; and therefore the arbitrators ſhall never be ſuppoſed to have made their award of more than was ſubmitted to them, or to a time beyond their power, *viz.* after the ſubmiſſion, unleſs it be ſo expreſly limited in the award; for they ſhall not be intended to have exceeded their authority, nor ſuppoſed to have done a vain and a void thing. However, if it were expreſſed to be paid in full of all demands, *&c.* to the tenth of *October*, yet it would be good to the time of the ſubmiſſion, and only void *pro tanto*, *viz.* the time after. And ſince Mr. *Parker* admitted, that the releaſe was good to the time of the ſubmiſſion, and void for the time after, it was very ſtrange and particular, that he ſhould deny this part of the award to have the ſame operation: for the power is equally extenſive, and muſt be exceeded as much as to one part of the award as to the other, and no more; and therefore a tender in full of all demands to the *Poſt.* time of the ſubmiſſion would be a good performance of the award, and the other party is bound to receive it as ſuch. Nor indeed can it be tendered in any other manner, *viz.* in full of all demands, *&c.* to the tenth of *October*, becauſe to all the time beyond the ſubmiſſion the award is void, and the plaintiff might refuſe to receive it, if it had been ſo tendered. But in the firſt caſe upon a tender he ought to receive, and thereupon he ought to give the releaſe, and the words *ſuper receptionem* do not amount to a condition preceedent, and make the releaſe depending upon the former part of the award, which is void, or impoſſible to be done, or not mutually obligatory. To prove this he cited theſe caſes, 1 *Roll. Abr.* 260. *p.* 5. *Lewin* and *Hills. Allen* 26. 1 *Sid.* 154. *Rows v. Nun.* 1 *Sid.* 252. *Manning* and *Warren.* 1 *Lev.* 132, 133. *Hopper verſ. Hackett.* 1 *Roll. Abr.* 260. *n.* 4. *Etnoke* and *Otwell.* 2 *Mod.* 169. *Adams* and *Adams.* 1 *Roll. Abr.* 260. *n.* 1. 254. *n.* 12. *Popely* and *Popely.* 260. *n.* 2. *Franklyn* and *Emlyn.* 244. *n.* 23. *Alabaſter* and *Clifford. Hutt.* 29. 2 *Mod.* 309. *Hill* and *Thorn.* 1 *Roll. Abr.* 256. *n.* 1. *Goffe* and *Browne, Hob.* 190. But admitting the award to be void as to the releaſe, yet he inſiſted, that upon the other parts, which were diſtinct and independent, the award was mutual and final. That the money being awarded in ſatisfaction, gave the plaintiff a right of action, and might be pleaded in bar by the defendant in any action brought by the plaintiff on the original contract. And to that purpoſe he cited the caſe of *Kinnaſton* and *Jones*, 1 *Roll. Abr.* 258, 259. *n.* 3, 6. *Allen* 85. *Sty.* 97. as this caſe in point. 1 *Roll.* 259. *n.* 4, 5. *Ingram* and *Webb*, and *Sayer* and *Sayer.* 2 *Cro.* 663. 2 *Roll. Rep.* 192. 1 *Roll. Abr.* 244. *n.* 21, 22. *Valore* and *Trib.* 1 *Roll. Rep.* 437. 2 *Cro.* 447, 448. *Lumley* and *Hutton.* 3 *Cro.* 861. *Goodman and Fountain.* And therefore however it happened as to the releaſe, the other parts of the award were ſufficient without it; and ſo he prayed that the judgment might be affirmed.

All proſecutions ſhall ceaſe.

Holt chief juſtice. The firſt part of the award, that all proſecutions, *&c.* ſhall ceaſe, goes to the cauſe of action, and is not to be reſtrain'd only to the proſecution then depending. Where a man has but one remedy to come at his right, a releaſe of that remedy is a diſcharge of his right. As if a man releaſe all actions, he releaſes all cauſes of action, and determines his right. So if a man releaſes all actions now depending, he releaſes the right of action. So if the plaintiff after the *darrein continuance* releaſe the action depending, he releaſes his right of action. And if a releaſe ſhall have that operation, why ſhall not an award? The words here are not only *quod proſecutio ceſſaret*, but alſo *et abinde determinata ſit*, which implies a perpetual ceſſation. Therefore theſe words in the award do not only diſcharge the preſent ſuit, but alſo the right of action, becauſe the plaintiff has no other remedy but by action, and then the award is mutual and final on that part only without more.

Releaſe of the action releaſes the right of action.

And as to the ſecond clauſe in the award, ſurely it is well, and it is final, for the money is awarded in ſatisfaction, and though it ſhould be taken to extend to a time after the ſubmiſſion (which ſhall not be intended) yet it will be good, for it ſhall not be underſtood that there were any other cauſes of action ariſen after the ſubmiſſion, and then no damage to the plaintiff, though he receive it in ſatisfaction to the 10 of *October*. If there had been any new controverſies, the defendant ſhould have ſet it forth in his plea, and even that he tendered the money in full of all matters to the time of the ſubmiſſion.

As to the laſt exception, the queſtion is, if the words *ſuper receptionem* do not imply a liberty in the plaintiff, to refuſe the money when tender'd? A tender and refuſal has been formerly held no performance without actual payment, as in the caſe of *Hunt* and *Craven*. But it has been adjudg'd otherwiſe ſince. But admitting the award void as to the releaſe, yet it is good for the reſt.

Tender and refuſal actual payment. *Poſt.* 1060.

Powell juſtice. The law is againſt Mr. *Parker* upon all three points, though if the award be good upon any one of the three points, it will be ſufficient, ſince they are diſtinct and independent clauſes. The firſt part of the award muſt be taken to refer to the cauſe of action, and not merely to mean a ſuſpenſion of the action, but to determine it for ever; and the word [depending] is only to deſcribe the nature of the action, and does not import that the cauſe ſhall ſtand ſtill for a time. The next part of the award as to the payment is mutual and final, for it is not to be paid in full of all demands to the 10 of *October*, but to the time of the ſubmiſſion, and ſhall be ſo intended. Beſides if it did extend to the 10 of *October*, it would yet be good for the time to the ſubmiſſion, and void for all the time after; for it is a thing ſeverable in its nature. Then as to the giving the releaſe *ſuper receptionem* of the money, that will not give the plaintiff a liberty to refuſe the money, for he muſt accept it, and when one party is awarded to pay, the other by implication is awarded to receive it, and I believe it has been ſo adjudged.

Award to pay to *B.* implies *B.* muſt receive.

Holt chief juſtice. I doubt that, whether an award that one ſhall pay, implies that the other is thereby obliged to receive.

Upon which *Pengelly* cited the caſe of *Linnen* v. *Williamſon* adjudged according to *Powell*'s opinion, which is reported 1 *Roll. Abr.* 254, 255. *n.* 16. and the ſame is agreed 2 *Cro.* 447. *Lumley* and *Hutton.*

1 Vent. 167.

Holt chief juſtice. The award to pay money in ſatisfaction is pleaded in bar, though the other party be not awarded to accept it; for the award of payment of money veſts a duty in the party, and is a bar in debt, or treſpaſs, or *aſſumpſit*. And the old books are, that upon a *parol* ſubmiſſion, if any collateral matter were awarded to be done, other than the payment of money, as the making a releaſe, or the like, no action lay for non-performance; yet it has been otherwiſe adjudged ſince. For when two perſons ſubmit, they actually promiſe to perform the award, and an action lies on the mutual promiſes. An award only to pay money in ſatisfaction is of itſelf final, therefore let the judgment be affirmed, *per totam curiam.*

Trin. 9 Will. 3. *B. R.* Freeman verſ. Bernard, ante 247.

Corporation of Grampound's Caſe.

IF a number of people aſſemble together in a lawful manner, and upon a lawful occaſion, as for electing a mayor (as it was in this caſe) or the like, and during the aſſembly a ſudden affray happen; this will not make it a riot *ab initio*, but it is only a common affray. But if a number of people aſſemble in a riotous manner to do an unlawful act, and a perſon, who was upon the place before upon a lawful occaſion, and not privy to their firſt deſign, comes and joins with them, he will be guilty of a riot equally with the reſt. *Holt* chief juſtice with *Powell* juſtice ſeemed to agree.

Riot.
11 Mod. 115.
29 E. 3. 74.
Regiſter 103.

Phettle

Phettle *verſ.* Wood.

2 Salk. 659. *Chetky v. Wood,* ſeems to be S. C. 6 Mod. 42. S. C. 2 Salk. 564. 11 Mod. 224.

Debt on a recogniſance as acknowledged in court, where it was firſt acknowledged before a judge, and then brought into court.

IN debt againſt the defendant upon a recogniſance of bail in the Common Pleas, the plaintiff counted, that the defendant *per ſcriptum ſuum obligatorium recognitum in curia dominae reginae de banco coram Thoma Trevor milite et ſociis ſuis, &c.* On *nul tiel record,* a recogniſance was certified, and it appeared to be taken before *Nevill* juſtice at his chamber; and for this variance it was adjudged *per totam curiam,* that the plaintiff had failed of his record.

Hob. 264, 273.

Holt chief juſtice. It is not the ſame recogniſance, for a recogniſance taken before a judge at his chamber, and a recogniſance taken in court are different, therefore you have varied in the deſcription of the recogniſance. Indeed if it had been entered as originally taken in court, though taken before a judge in his chamber, the declaration would have been well. And in this court the courſe is to enter them always as taken in court, and a recogniſance taken before a judge of this court upon bail is not obligatory till it be entered on a record, becauſe we do not take them in a ſum certain: but in the Common Pleas they take them in a ſum certain, and it is a record immediately upon the caption at the judge's chamber, and binds the lands, *&c.* before it be filed at *Weſtminſter*; and when it is filed, it is then a record in court. And a *ſcire facias,* or an action of debt, may be brought on ſuch recogniſance, either in *London,* where it was taken, or in *Middleſex,* where it is filed, according to the reſolution in the caſe of *Hall* and *Wingfield, Hob.* 195. But on a recogniſance of bail taken in this court, the action or *ſcire facias* muſt always be brought in *Middleſex.*

Vaugh. 103. Vent. 360.

Powell juſtice of the ſame opinion *in omnibus,* and ſaid, *Rolle* chief juſtice was of the ſame opinion with *Hobart.*

Mr. *Raymond* was of counſel for the defendant.

Mr. *Dee* for the plaintiff at another day urged, that the precedents in the Common Pleas are all as this count is.

Holt chief juſtice. If they proceed hand over head, that is nothing to us. They ſhall not ſet up a preſcription againſt law upon pretenſe of their uſage. *Powell* agreed.

See theſe entries. *Thomp.* 125. 2 *Brownl.* 176. *Brownl. Lat. Red.* 209, 210.

Clarkſon *verſ.* Buſſey.

IN an action of debt upon a bond, the defendant pleaded in bar a compoſition made with his creditors according to the ſtatute 8 *Will.* 3. to which the plaintiff demurred. And Mr. *Acherley* for the plaintiff took ſeveral exceptions to the plea.

Compoſition act.

1. Exception. The plea is, that he abſconded for debt ſuch a day before the making of the act, but does not ſay, that he abſconded at the time of the making of the act. And though he might be an inſolvent perſon before the making of the ſtatute, yet he may have recover'd, and become ſolvent, when the act was made.

That he abſconded for debt ſuch a day before the making the act.

Holt chief juſtice. This is a plea in bar, and is ſufficient, if it be good to a common intent; and in this caſe it ſhall be intended, that the defendant continued inſolvent to the time of the making the ſtatute; and if he became ſolvent after the time alleged, and before the ſtatute, that ought to come on the plaintiff's ſide, for as it is pleaded, it is within the words of the act, *viz.* ſuch as have abſconded. *Powell* juſtice agreed.

Doctrin. Placit. 55.

2. Exception. The defendant has pleaded the agreement as a deed under ſeal, but does not produce it in court by a *profert in curia*, as he ought.

No *profert in curia* of a compoſition.

Holt chief juſtice. The ſtatute ſays an agreement ſubſcrib'd and ſeal'd, *&c.* and that does not import it to be by deed, for it may be under ſeal, and yet no deed, and therefore a *profert* is not neceſſary.

See now ſtat. 4, 5. Ann for amendment of the law. *Ante* 762.

Powell juſtice. It is not requir'd by the act, nor pleaded, to be deliver'd, and it cannot be a deed without delivery; it muſt be ſubſcrib'd and ſeal'd by the act, but ſubſcription is not neceſſary to a deed.

3. Exception. By this agreement the defendant is to pay *per* pound at a day, which is ſix months after the making of the ſtatute; and it is further agreed, that upon payment thereof the creditors ſhall give to the defendant general releaſes. Now this agreement cannot be within the meaning of the act to bind the nonſubſcribing creditors, becauſe it obliges them to give releaſes for debts, which may have accru'd to them ſince the act, and it will be unreaſonable to oblige the other creditors to releaſe them.

Holt chief juſtice. This agreement muſt be underſtood to extend only to debts within the meaning of the act of parliament, *viz.* to debts due before the making of the ſtatute, and the agreement of two thirds of the creditors does not oblige the non-ſubſcribing creditors with reſpect to any debt contracted after the making the act; and although the ſubſcribing creditors may have obliged themſelves by this agreement to give releaſes of all matters to a day after the act, yet they cannot oblige the reſt as to any debt accruing after. *Powell* juſtice agreed a releaſe of all debts &c. to the time of the act, will be a ſufficient performance of this agreement by the non-ſubſcribing creditors, within the meaning of the ſtatute.

Ante 921.

Judgment for the defendant *per totam curiam*, *niſi*, &c.

Servant is a good addition. 6 Mod. 58. The Queen v. Hoſkins. Bro. Additions pl. 30. *Contra*, & indictment p. 49. Bro. Additions pl. 56. Thel Dig. 56. Di. 46. 2 Inſt. 668.

MR. *Williams* mov'd to quaſh an indictment for want of an addition. The defendant was indicted by the name of *J. S.* ſervant, which he ſaid is not a good addition within the ſtatute. But *per Holt* chief juſtice, *et curiam*, it is a good addition, for it is certain. He would have taken ſome exceptions to the caption, but it was not allow'd, for coming in of this term, ſuch errors are amendable in the ſame term.

Taylor *verſ.* Sea.

In *aſſumpſit*, plea *quod ipſe performavit omnia*, general iſſue.

IN *aſſumpſit* on ſeveral promiſes the defendant pleads, *quod ipſe performavit omnia ex parte ſua performanda*, and the plaintiff demurred for that cauſe. Mr. *Ward* for the plaintiff: this plea, if any thing, amounts to the general iſſue. And it was adjudg'd for the plaintiff *per totam curiam*.

Lord Bridgewater *verſ.* Duke of Bolton.

1 Salk. 236. Caſ. of Equity Abr. 17. pl. 177. 3 Danv. Abr. 175. pl. 12. 3 Wms. 163. 1 Ro. Abr. 616. Eq. Caſ. Abr. 411, 412. 2 Vern. 495. Ogle v. Cooke. 20 Feb. 1748. in Canc. Mortgage does not amount to a revocation of a deviſe totally, but only *pro tanto*.

IN the argument this term of the caſe between lord *Bridgewater*, and the duke of *Bolton*, ſerjeant *Powys*, who argued for my lord *Bridgewater*, ſaid, it had been adjudg'd in Chancery, and is now become a ſettled rule, that if a man ſeiſed in fee of lands make his will thereof, and deviſe the ſame to another in fee, and after that make a mortgage of the ſame lands in fee to a third perſon, and afterwards die without having paid the money due on the mortgage, that this mortgage does not amount to a total revocation, but only *quoad*, and the equity of redemption ſhall go to the deviſee. And Mr. *Cowper*, who argued on the other ſide, agreed it.

Sir Edward Longueville *verſ.* the inhabitants of Thiſtleworth.

IN an action on the ſtatute of *Winton* for a robbery the defendants pleaded in abatement, and on demurrer a *reſpondes ouſter* was awarded: after which the defendants pray *oyer* of the writ, and accordingly ſet it forth in their plea, and pleaded over in bar. Mr. *Ward* mov'd to ſet it aſide for the irregularity. Mr. *Mountague*: The writ being return'd and filed, we have a right to demand *oyer* of it in the ſame term, notwithſtanding the award of a *reſpondes ouſter*, if it be neceſſary for us. And by the original writ in this caſe it appears, that the writ was not ſued out within twenty days, as the ſtatute 39 *Eliz.* requires, and we would by this way prevent a trial and further charge.

S. C. 2 Salk. 498. 6 Mod. 27, 28. 2 Lev. 142. Keb. 32. 3 Keb. 480, 491. Gilb. Hiſt. C. B. 148. 12 Mod. 99. Co. Ent. 320.

After a plea in abatement, and *reſpondes ouſter* awarded, no *oyer* can be granted of the writ, tho' in the ſame term it is return'd. It ſeems there ought to be an oath that it was not made within, &c. as the ſtatute 27 Eliz. &c.

Powell juſtice. When a defendant prays *oyer* of the writ, it is with intent to take advantage of ſome fault in the writ; but the defendant in this caſe not having demanded *oyer* of the writ before his plea in abatement, and a *reſpondes ouſter* awarded, he is now out of time to have *oyer*, which is only to enable him to plead in abatement; but now the defendant here is to plead in chief.

Holt chief juſtice. A variance between the declaration and the original may be aſſign'd for error, and although the party admit it, and paſs it over in plea, if *oyer* be given of the writ, it will appear; and perhaps in that caſe the defendant may take advantage of it in arreſt of judgment, and ſo prevent the court from giving an erroneous judgment, and thereby avoid the trouble and charge of a writ of error. And upon a writ of error after ſuch *oyer* had, the party may aſſign the error, and take advantage of it, without a *certiorari*, becauſe it appears upon the record. It ſeems reaſonable to allow this demand of *oyer* in the ſame term, and eſpecially when the matter pleaded is not dilatory.

Powell juſtice. It is out of courſe, therefore they ought to ſhow us precedents to warrant it.

Holt chief juſtice. If the defendants inſiſt upon their *oyer*, they muſt demand it on record, and if we deny to give them *oyer*, when they ought to have it, the denial muſt be enter'd, that they may take advantage of it on a writ of error. The queſtion is, whether the *reſpondes ouſter* awarded on the plea in abatement be not an *eſtoppel* to the defendant to demand *oyer*. But on the award thereof we do not adjudge, *quod breve praedictum bonum et ſufficiens eſt*

Denial of *oyer* error.

in lege, but *quod placitum* of the defendant *minus ſufficiens in lege exiſtit*. This is not like pleading a new plea in abatement, which ſhall not be received; but here the writ being in court, they may demand *oyer* of the writ in the ſame term with the plea in abatement, though they cannot in a ſubſequent term.

Powell juſtice. The demanding and having *oyer* is to enable a man to plead ſomewhat.

Oyer of a deed in the King's Bench after imparlance, not in the Common Pleas.

Giving *oyer* where it ought not, not aſſignable by the defendant for error, where given to him.

Holt chief juſtice. No, it is to make the thing appear on record, that ſo the party may take advantage of any error therein; and if there be a fault in the writ, the defendant may take advantage of it, although he plead any other matter; but it will be a good exception in arreſt of judgment, and ſave the party the trouble of bringing a writ of error. In this court the party may demand *oyer* of a deed after imparlance, though it is not allowed in the Common Pleas. If the plaintiff conteſts the giving *oyer*, he muſt ſtrike out the plea, and demur, or counter-plead the *oyer*. The granting *oyer* will do the plaintiff no harm, for the giving *oyer* where it ought not to be allow'd, is no error, nor aſſignable by the defendant, being in his advantage; but the denial of it, where it ought to be allowed, is error, *quod Powell conceſſit*. We will conſider of it.

Afterwards at another day *Holt* chief juſtice ſaid, we are all of opinion, that *oyer* ought not to be given in this caſe. I was indeed of opinion, that it ought to have been granted, being in the ſame term, for the reaſons I mentioned, but I am now ſatisfied, that it ought not; for the true reaſon why *oyer* of the writ is given to the defendant, is for the defendant to demur for matter which goes to the whole original, or to plead in abatement for ſome matter contain'd in the writ, which makes it ill; as that it varies from the count, or from the regiſter, as appears *Co. Intr.* 320. But when the defendant has pleaded in abatement, he has nothing more to do with the writ. The matter which ſtuck in me was, that the defendant ought to have *oyer*, that ſo he might move in arreſt of judgment upon the inſufficiency of the writ appearing on record as a default; but it is only mov'd as *amicus curiae* to inform the court, and to prevent them from giving an erroneous judgment. *Powell* agreed. The law has preſcribed and ſettled the order of pleading, which the party is to purſue, *viz.* to the juriſdiction of the court, to the diſability of the perſon, to the count, to the writ, and laſtly, to the action. Now in this caſe you have already pleaded in abatement, and might have taken benefit of the *oyer* then, but you cannot pray *oyer* in order to plead in bar; for you have done with the writ, and you cannot plead two dilatories, but muſt now plead to the action. But *oyer* was never given after a *reſpondes ouſter* awarded, to enable the party to plead in chief: to allow this courſe would be to invert the order of pleading.

Let the *oyer* be ſtruck out of the plea, *per totam curiam.*

Regina *verſ.* Dixon.

S. C. Salk. 150. 6 Mod. 61.

On *certiorari* to remove an indictment after conviction by verdict, day muſt be given the party here in court.

THE defendant was indicted for ſelling goods, affirming them to be worth ſo much, whereas in truth they were not, *in deceptionem, &c.* Upon not guilty pleaded the defendant was convicted, and now the record was remov'd by a *cortiorari*, and Mr. *Broderick* mov'd to quaſh it, as not being an offenſe indictable.

Holt chief juſtice. Why do you remove it after a trial? But you have given the party no day here in court, as you ought upon the return of a *certiorari* to remove an indictment after conviction. Upon reading the *certiorari*, it appear'd to be only for removing the record of the indictment, which *Holt* ſaid was not ſufficient to remove the conviction; for if the defendant ſue out a *certiorari* to remove an indictment, and ſtays till he is convicted before he delivers it, he has loſt the benefit of it.

A *certiorari* to remove an indictment will not remove a conviction on that indictment.

Berwick *verſ.* Andrews.

Intr. *Paſch.* 2 *Ann.* B. R. Rot. 64.

S. C. Salk. 314. 6 Mod. 125.

Debt by an executor on a *devaſtavit* by the defendant after a judgment recover'd againſt him as adminiſtrator to *J. S.* by the plaintiff's teſtator.

IN debt by an executor, ſetting forth, that his teſtator had recover'd a judgment againſt the defendant, as adminiſtrator of *J. S.* and ſuggeſting, that the defendant had committed a *devaſtavit* in the life of the plaintiff's teſtator, ſo that neither the teſtator, nor the plaintiff could have execution of the ſaid judgment, *per quod actio accrevit* to the plaintiff. Judgment herein was given againſt the defendant in the Common Pleas by default, and thereupon a writ of error was brought. Mr. *King* for the plaintiff in error inſiſted, that the executor cannot maintain this action for a waſte done in the life of his teſtator; for the executor ought to make himſelf a party to the original judgment by a judgment on a *ſcire facias* brought by himſelf againſt this adminiſtrator, before he can maintain an action of debt upon a ſuggeſtion of a *devaſtavit* in his own time. This method of proceeding by action of debt is a late practice, and the firſt judgment was obtain'd with difficulty, *viz.* the caſe of *Wheatley* againſt *Lane.* 1 *Saund.* 216. 1 *Lev.* 255. which was an action brought by the party himſelf, who obtain'd a judgment againſt the executors; and therefore for the objections urged in that caſe it has been ſince reſolved, that actions of this nature ſhall not be carried farther than that reſolution: as in the caſe of *Ent v. Withers*, 1 *Ventris* 315, 321. 2 *Lev.* 209. 3 *Keble* 735, 825. where it was adjudged, that ſuch an action would not lie againſt an executor upon a bond of the teſtator, before any judgment recovered againſt the executor. And ſo it was reſolved in this court, *Paſch.* 11 *Will.* 3. between *Crosby* and *Geering*. Where an action of debt ſuggeſting a *devaſtavit* was brought upon a judgment recovered againſt the inteſtate, before any judgment recovered againſt the adminiſtrator himſelf; and upon a demurrer it was reſolved, that the action was not maintainable. But the preſent action is to carry it farther than any of thoſe caſes; for here the judgment was recovered by the plaintiff's teſtator, and the waſte is ſuggeſted to be done in his time. Now this waſte is a perſonal wrong done to the teſtator, whereas the foundation of the action is, that the party himſelf, who brings the action, is intitled to the eſtate of the teſtator by matter of record, and ſo the waſte by the executor is a wrong to him. But here the plaintiff has no title to an execution, till he obtain an award of it on a *ſcire facias*, ſo that the waſting before he had a right to ſue execution can be no injury to him, and conſequently he can have no action, and he has founded his action on no other damage, but that by the waſting he could not obtain ſatisfaction of the ſaid judgment by ſuing execution. This action is againſt a rule of law: *Actio perſonalis moritur cum perſona.* No action lay at the common law againſt the executor of an executor for a *devaſtavit* of the firſt executor upon the reaſon of that rule. But it was given by the ſtatute of *Charles* 2. But the ſtatute does not extend to this, ſo that by conſequence this action is not maintainable, not being helped by that or any other act of parliament.

Croſby verſ. Geering.

Debt againſt an adminiſtrator on a *devaſtavit*, after a judgment recover'd againſt the inteſtate, does not lie.

Mr. *Mountague* for the defendant in error urged, that this action would lie. The ſame objection, that it was *actio perſonalis*, was made in the caſe of *Wheatley verſ. Lane*, 1 *Saund.* 216. 1 *Sid.* 397. and there fully anſwered; for though the action ariſes from a *tort*, yet this *tort* veſts an intereſt in the party. As in caſes of ſubſtraction of tithes on the ſtatute of *Edward* 6. and of an eſcape out of execution, where the executor for that reaſon ſhall maintain an action of debt for the ſubſtraction or eſcape in the time of his teſtator. This action goes no farther than the former caſes. The caſe of *Cory verſ. Thynn*, 2 *Sid.* 102. is this caſe in point; for the plaintiff there was executor to him that had obtained the judgment.

Holt chief juſtice. But the executor in that caſe had recovered a judgment in his own name, on a *ſcire facias* on the principal judgment.

Mountague. The *tort* veſts a debt in the party wronged, and then it ſurvives to the executor, as on the ſtatute of *Edward* 6. And the ſame objections, as are made now, were made in the caſe of *Wheatly* and *Lane*, and there over-ruled by the judges, ſo that this caſe in effect is already determined.

Holt chief juſtice. Surely this action will well lie, and as well for the executor, as for the teſtator himſelf. And indeed it is the ſame thing; for this action is brought againſt the ſame perſon againſt whom the recovery was had, and by that recovery *aſſets* were admitted, and then the defendant has waſted. You agree this action might be maintained by the teſtator himſelf, but you ſay, it will not go to his executor, becauſe it is a perſonal wrong, which dies with him. But it is not a mere perſonal injury. This action is founded on the ſame reaſon, as an action of debt by the executor for an eſcape out of execution in the time of the teſtator. It is true no action lay againſt the executor of an executor for the waſte of the firſt executor before the ſtatute, becauſe it was only a wrong committed by the executor. And ſo no action lies againſt an executor for an eſcape out of execution in the time of his teſtator, for it was a wrong done by another perſon, for which he ſhall not anſwer, nor ſhall his eſtate be liable. An executor may maintain an action on the caſe at the common law for an eſcape out of execution in the time of the teſtator, but not for an eſcape on *meſne* proceſs. So an executor of a parſon ſhall have an action of debt on the ſtatute of *Edw.* 6. for ſubſtraction of tithes in the time of the teſtator. Theſe are injuries to the teſtator's right, and within the equity of the ſtatute of *Edw.* 3. *de bonis aſportatis in vita teſtatoris.* So an action on the caſe for an eſcape in the time of the teſtator, a *quare impedit* for a diſturbance in the life of the teſtator, are given to the executor by the equity of that ſtatute. In the caſe of *Crosby* and *Geering* there was no judgment againſt the adminiſtrator, and ſo it did not appear, that he had *aſſets*, and it was like the caſe of *Ent* againſt *Withers.*

No action lies againſt an executor for an eſcape in the time of his teſtator.

Ante 41.

Vide 4 Mod. 403, 404.

Powell juſtice. This action ſhall not be carried farther to charge the defendant, without a judgment firſt recovered againſt himſelf. And my lord *Hale* was of that opinion: he was of counſel with the plaintiff in the caſe of *Cory* againſt *Thinne*, and told me, he had judgment for his client beyond his expectation; but now that action is ſettled. This is not a perſonal wrong, which lies not againſt an executor; as an action for an eſcape in the life-time of the teſtator lies not againſt an executor. But the ſtatute of *Edw.* 3. is a remedial law, which has always been taken by equity, and wherever there is a matter of property in queſtion, it is brought within the ſtatute. So here, the teſtator had a right in the *aſſets* in the defendant's hands, and the executor was intitled to that right by a *ſcire facias*, and this is within the reaſon of goods taken, *&c.* It was once a queſtion, whether an executor could maintain an *aſſumpſit* upon a contract with the teſtator, becauſe it is founded upon a breach of promiſe; but it was agreed, that he might, becauſe it was a wrong to the teſtator's property and eſtate, and an intereſt in the teſtator.

Powys juſtice agreed.

Gould juſtice agreed. Here is a debt ariſing *ex delicto.*

Holt chief juſtice. Upon this judgment this executor might have ſued a *ſcire facias* as executor, and upon that a *fieri facias*, and might have had a *devaſtavit* returned thereupon, and upon that a general judgment; now this action is brought in lieu of that proceeding, and that is the reaſon of this action on ſuggeſtion of a *devaſtavit.*

But then an exception was taken by Mr. *King* to the declaration, and upon that it was adjourned.

Monckton *verſ.* Paſhley & alios.

S. C. Salk. 638.
S. C. 6 Mod. 38.
9 Mod. 38.
Treſpaſs for breaking the plaintiff's cloſe, and treading and conſuming his graſs, and hunting in his free warren, *continuando tranſgreſſion. praedict. diverſis diebus et vicibus, &c.*

IN treſpaſs *de eo quod* the defendants, 1 *Septembris, primo Annae, &c. vi et armis, &c. clauſum* of the plaintiff, *apud, &c. fregerunt et intraverunt, et herbam ſuam ad valentiam* 10 *l. ibidem nuper creſcentem, pedibus ſuis ambulando conculcaverunt et conſumpſerunt, et aliam herbam ſuam ad valentiam aliarum* 10 *l. ibidem ſimiliter nuper creſcentem, cum quibuſdam averiis, viz. &c. depaſti fuerunt, conculcaverunt, et conſumpſerunt* (and lays ſeveral other treſpaſſes upon the ſame place) *ac liberam warrennam* of the plaintiff *apud, &c. adtunc fregerunt, et intraverunt, et in eadem ſine licentia et voluntate ipſius* the plaintiff, *adtunc venati fuerunt, et ducentos lepores pretii* 10 *l. adtunc et ibidem occiderunt, ceperunt, et aſportaverunt, tranſgreſſion. praedict. quoad herbae praedictae pedibus ambulando conculcationem et conſumptionem, ac aliae herbae praedictae cum averiis praedictis conculcationem et conſumptionem, ac in libera warrenna praedicta ſine licentia* of the plaintiff *venationem praedictam, a praedicto primo die Septembris, anno primo ſupradicto, uſque diem exhibitionis hujus billae, viz. vigeſimum diem*

Octobris, eodem anno, diverſis diebus et vicibus continuando, &c. To this declaration the defendants pleaded not guilty. But the jury found for the plaintiff. And now Mr. *Salkeld* mov'd in arreſt of judgment, that the *continuando* is laid of a matter, which does not lie in continuance, *viz. quoad venationem in libera warrenna* of the plaintiff, for every day's hunting is a ſeveral hunting. He ſaid, that it appeared from the books, that a treſpaſs with *continuando* does not lie where the act terminates in itſelf, and can be but once executed: as a treſpaſs *quare equum ſuum occidit continuando* is ill; becauſe it is not an act, which can be alleged in continuance. So a treſpaſs for breaking his fenſe, or proſtrating his houſe, lies not with a *continuando.* 2 *Roll. Abr.* 315. *p.* 41. 3 *Hen.* 6. *Tranſ.* 19. So a treſpaſs for cutting down his trees *continuando* is ill, as was held in this court in *Eaſter* term, between *Brooks* and *Biſhop. Ante* 823. (*vide* 21 *Hen.* 6. 43.) for in theſe caſes the act cannot be repeated. He farther inſiſted on this difference, that where the firſt treſpaſs is without an *ouſter*, there all the ſubſequent acts are freſh treſpaſſes; but where by the firſt treſpaſs there is an *ouſter*, there the ſubſequent acts are not diſtinct treſpaſſes, but a continuance of the firſt. And therefore a releaſe of the firſt treſpaſs will diſcharge all the ſubſequent acts in this caſe, but in the former caſe it will not, becauſe every day's entry is a freſh treſpaſs: as *Yelv.* 126. *Thorp* and *Strickland.* 1 *Brownl.* 223. 3 *Cro.* 182. And with this difference muſt the opinion of *Fitzh. N. B.* 91. *C.* be underſtood, where he ſays, that a treſpaſs of his houſe or cloſe proſtrated may be alleged with continuance, or elſe the books are not reconcileable. 20 *Hen.* 7. 2, 3. *p.* 7. but an actual *ouſter* muſt be intended.

Difference where there is an *ouſter* in a treſpaſs, and where not.

Holt chief juſtice. Why ſhall not an actual *ouſter* be intended in this caſe?

Salkeld. I will ſhew why it cannot. In the caſe of *Hoſkins* and *Jennings*, 2 *Roll.* 549. *n.* 5. it is reſolved, that a treſpaſs *quare ſuccidit et aſportavit* 10 *arbores continuando, &c.* is ill. So the caſe of *Lichford* and *Elliot*, as it is reported 1 *Sid.* 224, 249. treſpaſs for throwing logs on the plaintiff's cloſe *continuando* is ill, and there judgment was given for the plaintiff, becauſe the declaration was, that the defendants *jecerunt* the logs inſtead of *jacuerunt*, which word was held inſenſible as to that purpoſe, and ſo no damages given for it. *Vide* 1 *Lev.* 210, 211. *Butler* and *Hedges.* 1 *Sid.* 319. In the caſe at bar, though the continuance be impoſſible, yet damages muſt be intended to be given for it by the jury, becauſe it is expreſly alleged to be continued, and ſo the intendment of the court is excluded, *viz.* that the jury gave no damages for the continuance, by the ſhewing of the party; neither can the court intend, that there was an actual *ouſter*, becauſe it is alleged, that he entred and hunted ſuch a day, and ſuch a day.

Mr. *Mountague* for the plaintiff urged, that the *continuando* is proper, and ſo is the conſtant form. He cited *Cicero de natura deorum*, and *Terence*, *continuando potionem*, for the propriety of the word. Here are ſeveral defendants, ſo that one might reſt while the others hunted. In this caſe if the *continuando* be poſſible, then it will be good after verdict; and if it be repugnant and impoſſible, then it ſhall be intended, that the jury gave no damages for it. So is the caſe of *Lichford verſ. Elliot*, 1 *Sid.* 224, 249. 1 *Lev.* 210, 211. and *Butler* and *Hedges*, 1 *Sid.* 319. 1 *Lev.* 210, 211. And to the ſame purpoſe was the reſolution of this court laſt *Eaſter* term, in the caſe of *Brook* and *Biſhop*.

A man may lay a treſpaſs in hunting, *continuando venationem praedictam diverſis diebus et vicibus, &c.*

Upon the firſt ſtirring of this caſe *Holt* chief juſtice ſaid, I ſee no reaſon, why a man may not allege an entry and hunting on ſuch a day, *continuando venationem praedictam diverſis diebus et vicibus* till ſuch a day: the defendant hunts one day and the next, and it is not one act, which continues from one day to another, nor the ſame treſpaſs. That caſe in *Yelv.* is not law, the reſolution was in favour of the judgment. For if a treſpaſs be brought *continuando, &c.* and the defendant anſwers to the original treſpaſs, but not to the continuance, if the firſt act and the continuance were the ſame treſpaſs, then the continuance would be anſwered by the anſwer to the original treſpaſs; but it is not ſo, for the continuance muſt be directly and poſitively anſwered, becauſe the continuance is a treſpaſs. There is a difference between a *continuando* of a repeated act of the ſame nature as here, and a *continuando* of cutting down wood, becauſe that is impoſſible. For if a man cut a quantity of wood one day, he cannot cut the ſame quantity again the next day. In the caſe of *Butler* and *Hedges* the *continuando* appeared to be void and inſenſible upon the face of the declaration, and therefore it ſhall be intended no damages were given for it; for the exception, that it is not a matter that lies in continuance, ought to be taken on the trial. And in ſuch caſe the plaintiff ought not to be allowed to give in evidence more than one day's cutting of wood or the like. Treſpaſs was brought for taking oyſters *continuando*, which cannot be, and judgment was arreſted.

Difference between a *continuando* of a repeated act of the ſame nature, and cutting wood.

Exception, that it lies not in continuance, ought to be took at the trial.

Powell juſtice. A *continuando* is not to be ſuppoſed to mean a continuance without any intermiſſion, for that would deſtroy all *continuandos*, for cattle cannot eat always. The cutting of trees cannot be laid with a *continuando*. Nor would it lie here *continuando* the hunting and killing ten hares. So no *continuando* for carrying away fifty loads of corn. Therefore in thoſe caſes the plaintiff ought to lay the fact to be done between ſuch a day and ſuch a day; for elſe you can have but the benefit of one treſpaſs, and can recover damages only for one day's carrying, &c. where the thing does not lie in continuance. Why cannot hunting be continued as well as depaſturing?

Holt chief juſtice. As to the caſe of an entry with *ouſter*, it may be ſet forth ſpecially in the count, or not; with a *continuando*, or *diverſis diebus et vicibus* between ſuch a day and ſuch a day; but then you muſt prove that the plaintiff re-entred before the action brought, or elſe you cannot aſſign the mean treſpaſs. (*Quod fuit conceſſum per Powell*) for by the *ouſter* the defendant has got the plaintiff's poſſeſſion, and he cannot be a treſpaſſer to the plaintiff; but when the plaintiff re-enters, the poſſeſſion is in him *ab initio*, and he ſhall have the *meſne* profits.

If an entry is laid with an *ouſter* and conſuming graſs *diverſis diebus et vicibus* till ſuch a day, re-entry muſt be prov'd.

Powell juſtice. *Fitzherbert* ſays, that cutting of graſs may be laid with a *continuando*, and yet a man cannot cut always.

Afterwards, *viz.* the laſt day of the term, the court gave judgment for the plaintiff. And *Holt* chief juſtice ſaid, that hunting might be laid with a *continuando* as well as conſuming and ſpoiling the plaintiff's graſs.

Hunting may be laid with a *continuando*.

Powell juſtice. It was ſo adjudg'd lately in the Common Pleas.

Holt. Cutting a quantity of wood cannot be with a *continuando*, but it ought to be laid, that *diverſis diebus et vicibus* between ſuch a day and ſuch a day, &c. But in this caſe it may be well alledged *continuando*, and need not be laid *diverſis diebus et vicibus*, &c. It is but a ſmall treſpaſs, which may be continued.

Powell. When you lay a *continuando* of a thing that does not lie in continuance, you can only give in evidence a treſpaſs on one day, and can recover damages for no more: which *Holt* agreed.

Wyatt qui tam *verſ.* Eyland.

IN an action on the ſtatute of uſury the *memorandum* was general of the firſt day of the term, but bail was not put in till the middle of the term; and the court gave leave to the plaintiff to enter up a ſpecial *memorandum*, for the defendant is not in court till bail filed. And this is only to make the entry according to the truth, which appears on record; and the court ſaid, it was an amendment at the common law, and not on the ſtatutes.

S. C. Salk. 324, 325. 3 Lev. 375. 12 Mod. 248. Memorandum amended by making it of a particular day.

Elderton's

Elderton's caſe, the bailiff of Weſtminſter.

S. C. 3 Salk. 91, 284. 6 Mod. 73. Holt 590.

A commitment by the commiſſioners of the Green-cloth for a riot in entring Whitehall to execute a *fieri facias* without leave.

Phillips's Regale neceſſarium, cap. 1, 3.

HE was committed by the duke of *Devon*, and other commiſſioners of the board of *Greencloth*, for executing a *fieri facias* within the palace of *Whitehall*, without leave of the board; and being brought up by *habeas corpus*, ſeveral exceptions were taken to the commitment and return. The commitment was for riotouſly and forcibly entring into a houſe within the palace of *Whitehall*, not having leave from the officers of the houſhold. Mr. *Mountague* for the priſoners urged, that the warrant of commitment was inſufficient; it is, "Whereas information has been made to this board, &c." Whereas the board of *Greencloth* have no authority to commit perſons for breach of the peace, or the like. Their buſineſs is to regulate the affairs of the family, and to puniſh the miſdemeanors of the queen's menial ſervants; and though the warrant be ſigned by the commiſſioners, by their particular names, yet it cannot be intended to be a commitment made by them as they are juſtices of the peace. The ſtatute of 28 *Hen.* 8. *c.* 12. creates *Whitehall* a palace, and therefore it ſhall have no larger privileges than that ſtatute gives, wherein is a ſaving of the liberties of the old palace at *Weſtminſter*; and when the Queen does no longer live at *Whitehall* the privileges determine, and therefore this is no crime puniſhable by the board of *Greencloth*. The Queen's honour is as much concerned to ſee juſtice duly adminiſtred, as for the privileges of her own palace; and ſince the Queen is removed from *Whitehall*, it ought to be as free as any other houſe in *King ſtreet*. Officers may lawfully execute the Queen's proceſs there. If they would have this taken to be a commitment by the commiſſioners, as juſtices of the peace, they ſhould have made it as ſuch expreſly. The commitment is, "and them to keep, till they ſhall find ſureties to appear in her Majeſty's court of the verge, or till farther order from hence." But the court of the verge is not a proper court, nor has juriſdiction in this caſe; and the words, "till farther order," make the commitment illegal and void, for want of a proper concluſion.

Mr. *Parker*. The commitment is for riotouſly and forcibly entring without leave of the officers, &c. whereas they cannot give leave to commit a riot. Beſides, the board of *Greencloth* cannot puniſh perſons for a breach of the peace. It ought to appear in the warrant, that they were juſtices of the peace, which it does not, but only in the return. It does not appear as it ought, what are the courſe of proceedings in this court of *Greencloth*, and when they ſit, and what is their authority.

Mr. Attorney General for the Queen. The authority of the perſons committing need not appear in the warrant, nor ever does; but the ſubſcribing of their names is ſufficient. This court is not now to inquire into the nature and buſineſs of the court of *Green-cloth*. There are ſtanding commiſſions for the peace, both for the verge and the palace, wherein the officers of the board of *Green-cloth* are always commiſſioners; and here they committed theſe perſons as juſtices of the peace, for breach of the peace, for want of ſureties, as every juſtice may do. It does not come now into conſideration, whether an execution may be executed within the verge, though the palace ought to have ſuch privilege. And to that purpoſe he cited *Jacob Hall*'s caſe, but that matter does not appear in the return; but the commitment is for a riot, as by juſtices of the peace, and they may try this matter. The ſtatute of *Hen.* 8. is only to aſcertain the bounds of the palace of *Whitehall*, for the Queen may declare any houſe a royal palace without the parliament. For it is the prerogative of the crown to give that privilege to any houſe the Queen pleaſes. By the return it is ſet forth, that the perſons committing were juſtices of the peace within the verge and palace, and the court will take notice of their power as juſtices. The words (without leave of the officers, *&c.*) does not make the offenſe leſs, but ſhew that the fact was done without any colour. A warrant of commitment need not be ſo certain as pleading, thoſe who make it are gentlemen not underſtanding the forms of law; but in this warrant the offenſe, and their authority, ſufficiently appear, and the concluſion of the warrant, "till they "find ſureties, or, farther order," is ſo of courſe, for when men are committed for want of ſureties, they muſt ſtay in cuſtody till they can find ſureties.

1 Vent. 169.
1 Mod. 76.
2 Mod. 181.
2 Keb. 846.

Serjeant *Darnall* cited 3 *Inſt.* 140, 141. and *Stamford*'s pleas of the crown, that formerly it was held a miſpriſion, to cite or ſummon a man within the King's palace.

ſee Staundf. P. C. 38. a. but it is ſtrictly as here ſtated; the paſſages being relative to striking in the king's palace.

Mr. Attorney General. This commitment is not by way of puniſhment, but only for ſafe cuſtody till the matter is determined.

Mr. *Mountague.* Every commitment is a puniſhment; this commitment is to the porter of the verge, which is ill; for he is not a proper officer, to whom a juſtice can commit. They ought to direct their warrant to the conſtable, who is the officer appointed by the law.

A warrant made by juſtices of the peace need not mention they are juſtices.

Holt chief juſtice. It need not be mentioned in the warrant, that they are juſtices, for they need not mention their office in the warrant; but it muſt appear in the return, and ſo it does here. The priſoners are charged with a riot, and ſhould they not be tried? And thoſe, who made the commitment, have an authority as juſtices within the verge and palace by particular commiſſion, diſtinct from their authority as officers of the houſehold. But it is not ſaid in the return, that the Queen is perſonally reſident at *Whitehall*, which makes it a palace.

The Queen's perſonal reſidence makes it a palace.

Mr. Attorney General. After the King has once declared a houſe to be his palace, which is done by his declaration under his great ſeal, it continues a palace, although he remove afterwards.

Holt chief juſtice. Suppoſe a murder be committed at *Whitehall*, whilſt the Queen is reſident at *Windſor*, can the murderer be tried before the lord high ſteward, and on the ſtatute of 33 *H.* 8. *c.* 12. and that ſtatute is only declaratory of the law?

Jones's caſe.

Mr. Attorney. One *Jones* in the reign of Queen *Elizabeth* was convicted of the murder of a man in the *Tower*, and though the Queen was not reſident there, judgment was given againſt him to be hang'd, and to loſe his right hand; and his hand was accordingly cut off before execution.

The King's Bench takes notice of every thing relating to the Queen's privilege.

Holt chief juſtice. Here the parties are committed till they find ſureties to appear at the court of verge, and it does not appear, that court has juriſdiction of the fact. We are indeed bound to take notice of every thing that belongs to the Queen's privilege: that *Whitehall* is a palace, and that there is a court of verge, which was a court before the ſtatute of *Hen.* 8. and has no ſtated times of ſitting; it is held by virtue of an original authority in the high ſteward. The ſtatute was read.

Powell juſtice. The privileges of the palace are by the common law in reſpect of the Queen's preſence, but that privilege does not determine ſo ſoon as ever ſhe turns her back, when a houſe has been declared a palace. As a private man may have two manſion-houſes, and live ſometimes at the one, and ſometimes at the other. I remember the caſe cited by Mr. Attorney, it is alſo mentioned in *Crompton*.

Holt chief juſtice. It is a new caſe, I will conſider the ſtatute. But I doubt of *Jones*'s caſe. Shall a man have his hand cut off for the ſtroke firſt, and then be hang'd for the murder? Shall the ſame act be a miſpriſion and a murder too? When the offenſe amounts to felony, it drowns the miſpriſion. If ſuch a judgment was given, it was not conſidered. I ſhould hardly agree to it.

Felony drowns a miſpriſion.

Privilege of the palace remains, though the Queen be abſent.

Powys and *Gould* juſtices agreed with *Powell*, that the privilege of the palace remains, though the Queen be not reſident.

Holt chief juſtice. If the court be kept there, though the Queen's perſon be not preſent, it is a reſidence; but when the Queen, and the whole court, and all the officers, be removed, has it then the privilege of a palace? There is a difference between a total abſence, and an abſence for a time only.

Powell juſtice. Breaking of the Exchequer has been held burglary, though none of the Queen's ſervants reſided there.

Holt chief juſtice. This matter was never ſtirred before, and I will uſe caution in it. It may be a contempt where the royal perſon is, becauſe of the diſturbance; as it would be in *Weſtminſter-hall*, the court ſitting; but it does not appear, in this caſe, the Queen was reſident.

Powell juſtice. A number of people without leave ought not to enter in a rude manner into the palace. We do not know the juriſdiction of the board of *Greencloth*; but we muſt take notice of this commitment, as made by juſtices of the peace.

Holt chief juſtice. Surely the court of the verge has juriſdiction of riots, and it is not founded on the ſtatute of *Hen.* 8. which *Powell* agreed.

Holt chief juſtice. It appears to be a commitment made by them as juſtices; for though they were ſitting at the board of *Greencloth*, yet having power to commit for this offenſe as juſtices, if they have not power as commiſſioners of the board, it muſt be taken to be done by virtue of the power they have, and not by colour of a power they have not; but their ſitting there does not make them to be leſs juſtices ſurely.

Commitment to the porter of the verge.

Powell juſtice. The commitment to the porter may be only to take them into cuſtody for a time.

Holt chief juſtice. He may have authority by warrant to take and carry them, but not to detain them in cuſtody, as it is here;

and the commitment is directed to him by name, as *janitori*. I will conſider many things in this caſe.

Powell juſtice. The commitment is well as juſtices by force of the power they have; but the exceptions, that the authority of the court of verge does not appear, and that the commitment is *janitori*, which is not a legal priſon, are conſiderable.

But *per Holt*, we cannot ſend the priſoners back again, we muſt take care of them; but let them come up again by rule, without any alteration, and let things ſtay *in ſtatu quo*. Adjourn'd.

But this matter never come before the court again, for the priſoners were diſcharged the next day.

Afterwards the laſt day of the term *Holt* ſaid, I have ſearched for the caſe cited about killing a man in the *Tower*. It is *Burdett* and *Muſkett*'s caſe. Being diſſatisfied with my lord *Coke*'s report of it, therefore I ſent for the record, which is *Mich.* 15 & 16 *Eliz.* *rot.* 2. and there is judgment of death given, but no judgment that his right hand ſhould be cut off. It is indeed ſo related in *Stow's Chronicle*, and in fact his hand was cut off; but there was no judgment for it.

Jordan *verſ.* Tomkins.

S. C. 6 Mod. 77. 1 Salk. 22, 25, 29, Hob. 216. In *aſſumpſit* to pay for meat, &c. for another.

INdebitatus aſſumpſit, for that the plaintiff *ad requiſitionem* of the defendant did provide meat, drink, and lodging for *J. S.* and *J. D.* and the plaintiff had judgment by default. Mr. *Acherley* moved in arreſt of judgment, that an *indebitatus aſſumpſit* did not lie in this caſe, but the plaintiff ought to have declared ſpecially.

Vide ante, 842.

But *per Holt* chief juſtice *et curiam*, it is well; for it is a contract between the plaintiff and defendant, and no action lies againſt *J. S.* or *J. D.*

Johnſon *verſ.* Shippen.

S. C. 1 Salk. 35. S. C. 6 Mod. 79. 11 Mod. 30. Suit on a hypothecation in the admiralty.

A Ship was outward bound to and being in diſtreſs at ſea in her voyage, put into *Boſton* in *New England*, and there the maſter took up money, which he applied in neceſſaries for the ſhip; and as a ſecurity for the re-payment, by way of hypothecation, made a bill of ſale to the party of part of the ſhip, who now libelled in the court of admiralty againſt the ſhip and owners, to compel the payment of the money. Serjeant *Darnall* mov'd for a prohibition, and a day was given to hear counſel on both ſides. On the day ſerjeant *Darnall* inſiſted, that as this caſe is, there ought to go a prohibition, becauſe it appears upon the face of the libel, that this hypothecation was upon land in port, *viz.* at *Boſton*, and not upon the ſea, as it ought to be, to give that court a juriſdiction. Beſides, this appears to be a bill of ſale of part of the ſhip, upon which the party may have his remedy at common law, and not a proper hypothecation. Alſo the proceedings are againſt the owners, as well as againſt the ſhip; and if the owners are liable, they are chargeable at common law.

Mr. *Cheſhyre* againſt the prohibition. It makes no difference, whether the hypothecation were upon the ſea or upon land, being done in a voyage; and a prohibition has been denied upon the ſame point as this caſe, in this court, between *Coſſart* and *Lawdſley*, *Trin.* 1 *Will. & Mar.* where the hypothecation was in port, *viz.* at *Roterdam.* The ſame was adjudg'd here, *Hil.* 1696, between *Benoir* and *Jeffrys*: and about a year ſince between *Juſtin* and *Ballam* a prohibition was granted, becauſe it did not appear there was any hypothecation. In this caſe the neceſſity of the thing requires that it be done at land, and it would be prejudicial to navigation, if this ſuit in the admiralty ſhould not be.

Ante 152.
3 Mod. 244.

Ante 577, 805.

Holt chief juſtice. The caſe of *Coſſart* and *Lawdſley* was the ſame as this, and there on a demurrer to a declaration in a prohibition, a conſultation was awarded by the whole court. When an hypothecation is made either for money to buy neceſſaries, or for neceſſaries for the ſhip, in a voyage, the Court of Admiralty have a juriſdiction, for the party has no other remedy; we cannot give him any remedy againſt the ſhip; and if the ſuit there ſhould not be allow'd, the maſter will have no credit to take up neceſſaries for the uſe of the ſhip.

Powell juſtice of the ſame opinion. The original matter is conuſable in that court, and the hypothecation upon land is of neceſſity; for it muſt be done in port, and cannot be done upon the ſea, and the party has no remedy but by the maritime law.

Holt chief juſtice. No maſter of a ſhip can have credit abroad but upon the ſecurity by hypothecation, and ſhall we hinder the Court of Admiralty from giving remedy, when we can give none ourſelves? It will be the greateſt prejudice to trade that can be, to grant a prohibition in this caſe. Indeed if a ſhip be hypothecated here in *England* before the voyage begin, that is not a matter within the juriſdiction of the Court of Admiralty, for it is a contract made

Ante 576, 805.

here, and the owners can give ſecurity to perform the contract. Which *Powell* agreed.

Ante 576.

Prohibition *quoad* the ſuit againſt the owners.

Holt chief juſtice. There is no difference, whether the hypothecation be alleg'd in the libel to be made in port, or appears ſo to be by the ſuggeſtion, as it was in the caſe of *Coſſart* and *Lawdſley*. And as to what you ſay, that this is a bill of ſale, and ſo a remedy at law, that is not ſo, for the maſter has no authority to ſell any part of the ſhip; and his ſale transfers no property, but he may hypothecate. And ſince the proceedings in the Court of Admiralty are againſt the owners, as well as againſt the ſhip; let a prohibition go *quoad* the proceeding againſt the owners, and let them go on to condemn the ſhip. To which the reſt of the judges agreed.

Preſgrave *verſ.* Saunders.

S. C. Salk. 5.

Property in replevin ought to be pleaded in bar, and not in abatement.

1 Salk. 5.
Vent. 249.
2 Lev. 92.
12 Mod. 122.
6 Mod. 81, 103.
2 Cro. 519.
2 Ro. Rep. 64.

IN replevin for taking ſeveral goods of the plaintiffs, *apud parochiam ſancti Clementis Dacorum in comitatu Middleſexiae praedicto, in quodam loco ibidem vocato* a chamber *in Devereux Court*, and the defendant pleaded, *quod praedictus* the plaintiff *actionem ſuam praedictam inde verſus eum habere ſeu manutenere non debet*; *quia dicit, quod, quoad praedictum unum lectum, &c. de bonis et catallis in narratione praedicta mentionatis parcellam, idem* the defendant *dicit, quod proprietas bonorum et catallorum illorum eſt, et praedicto tempore captionis bonorum et catallorum illorum fuit, ipſi praefato* the defendant, *abſque hoc, quod proprietas bonorum et catallorum illorum praedicto tempore quo, &c. fuit praedicto* the plaintiff, *prout per narrationem praedictam ſuperius ſupponitur, et hoc paratus eſt verificare. Et quoad praedictum unum repoſitorium, et decem alios libros, &c. de bonis et catallis in narratione praedicta mentionatis reſiduum, praedictus* the defendant *dicit, quod tempore captionis bonorum et catallorum illorum reſiduorum ultimo mentionatorum proprietas eorundem bonorum et catallorum fuit cuidam Richardo Frith, abſque hoc, quod proprietas bonorum et catallorum illorum reſiduorum praedicto tempore quo, &c. fuit praedicto* the plaintiff, *prout per narrationem praedictam ſuperius ſupponitur, et hoc paratus eſt verificare et probare; unde petit judicium, ſi praedictus* the plaintiff *actionem ſuam praedictam inde verſus eum habere, ſeu manutanere debeat, &c. petit etiam retornum omnium et ſingulorum bonorum et catallorum praedictorum, una cum damnis, &c. ſibi adjudicari, &c.* Upon a demurrer to the plea Mr. *Ward* objected, That it ought to have been pleaded in abatement, and not in bar. But it was held, that it ought to be pleaded in bar, and not in abatement; for it deſtroys the plaintiff's action utterly. And ſo is the caſe in 31 *Hen.* 6. 12. 39 *Hen.* 6. 35. and 2 *Lev.* 92. where it is ſaid, that it was at the election of the defendant, to plead it one way or the other; but the caſe was denied as to the election, for it was ſaid, that it ought to be pleaded in bar and not otherwiſe.

2. It was objected, that the concluſion of the plea went but to part of the matter, *viz.* the word *inde* referr'd only to that part of the plea, that alledg'd the property in *Frith*. *Sed non allocatur*, it goes to the whole. And it was held, that the defendant need not avow for a return in this caſe: and judgment for the defendant *per curiam*; and it is the ſame thing, where property is laid in a ſtranger, as in the defendant himſelf. *Ex relatione magiſtri Smith.*

Note, I took Mr. *Ward*'s objection to be, that property in a ſtranger could not be pleaded in bar; but the court held it might be pleaded, either in bar, or abatement, as well as property in himſelf: and it is all one to the plaintiff who has the property, if he has none; and it has been ſo adjudged lately, though formerly it was held otherwiſe. *Pengelly.*

Hil. 4 Will. & Mar. Butcher verſ. Porter. Salk. 94. Paſch. 10 Will. 3. Parnell verſ. Schrimſhaw. *Ante* 217.

Salkeld, who was counſel with the defendant, agreed with Mr. *Pengelly*. And that which the court denied in *Levinz*, was the report of the caſe of *Wildman verſ. North*. For the plea was, property in the defendant, as it is reported in 1 *Ventr*. 249. and not property in a ſtranger, as *Levinz* reports.

Ante 217.

Day *verſ.* Muſkett.

S. C. Salk. 640.
S. C. 6 Mod. 80.

Treſpaſs for a treſpaſs ſaid to be done in the King's reign, and concludes *contra pacem* of the Queen.

IN treſpaſs, *quare vi et armis primo die Februarii, anno Domini milleſimo ſeptingenteſimo primo, clauſum ſuum fregit*, and concludes *contra pacem Dominae Annae nunc reginae, &c.* The defendants pleads, that he and others did the treſpaſs jointly, and pleads a releaſe to one of them. The plaintiff replies, *non eſt factum.* And the defendant demurs.

Mr. *Ellis.* The treſpaſs being laid in the time of King *William*, for he died in *March* 1701, the concluſion *contra pacem* of the preſent Queen, is ill, and a variance. 22 *Ed.* 4. 24. *p.* 23. And it was held in this court *Hil.* 6 & 7 *Will. & Mar.* between *Melwood* and *Leach*, that it is not aided after a verdict.

Ante 38.

Mr. *Cheſhyre.* Since the *capiator pro fine* is taken away, it is not neceſſary to allege the treſpaſs *contra pacem.*

Holt chief juſtice. No, it is the *vi et armis* may be omitted.

Vi et armis may be omitted.

Mr. *Cheſhyre.* The defendant has confeſs'd the treſpaſs, and therefore he cannot take advantage of this miſtake on a general demurrer, for it is only matter of form. If there had been no *contra pacem* at all, the declaration had not been ill in ſubſtance; and this being impoſſible and repugnant, it is as if there had been none. And ſo it is held 1 *Sid.* 253. that a wrong *contra pacem* is only form.

Mr. *Ellis.* That caſe differs from this, for there it was a treſpaſs *continuando per* five hundred years, and concludes *contra pacem domini Regis nunc*, whereas it was in the reigns of ſeveral Kings. But there it was right in effect, for the ſtating of the treſpaſs brings it out of the former King's reigns, and makes it only a treſpaſs in the reign of the laſt King, and ſo *contra pacem domini Regis nunc* was well.

Holt chief juſtice. This concluſion is ill, and inconſiſtent with the treſpaſs alleg'd, for we muſt take notice of the demiſe of the King, which was *nono Martii*, and the treſpaſs is laid *primo Februarii*, which was before his demiſe. So that there is a fault in the deſcription of the treſpaſs, which is matter of ſubſtance, and not of form only; if the *contra pacem* had been held only matter of form. But here it is repugnant, and it cannot be merely void, becauſe it is a part of the deſcription of the treſpaſs. And upon this declaration you cannot give in evidence a treſpaſs *contra pacem* of the late King. But this would be aided after a verdict by the ſtatute of *Charles* II.

Contra pacem wholly omitted is form.

Powell juſtice. It is ill and inconſiſtent, and though in treſpaſs you may give in evidence a treſpaſs on another day than is alleg'd in your count, yet there muſt not appear a repugnancy in your declaration as here. Whereupon Mr. *Cheſhyre* prayed leave to diſcontinue, which the court granted upon payment of coſts.

Naſh *verſ.* Batterſby.

S. C. 6 Mod. 80.

Debt on a bond by the name of gentleman. Pleaded, he is no gentleman. Plaintiff demurred.

In debt upon a bond, the plaintiff declares by the name of *Edward Naſh generoſi.* The defendant pleads in abatement, that the plaintiff is no gentleman. To which the plaintiff demurred, which is ill; for it amounts to a confeſſion, that he is no gentleman, and then not the ſame perſon named in the count: but he ſhould have replied, that he is a gentleman. Judgment was given, that the writ ſhould abate.

Comes Banbury *verſ.* Wood.

S. C. Salk. 5.

In a *homine replegiando*, there needs no addition.

IN a writ *de homine replegiando*, the defendant appear'd and pleaded in abatement of the writ, that the writ does not ſet forth of what ville, hamlet, or place, the defendant is. It is, *quod replegiari facias A. B. quem Johannes Wood mercator*, &c. without any addition of his abode. The plaintiff demurred. Serjeant *Hall* for the plaintiff. No addition is neceſſary in this caſe, becauſe no *exigent* lies here. In actions of treſpaſs *vi et armis*, proceſs of *exigent* did lie at the common law; but the writ *de homine replegiando* is not *vi et armis*, and ſo no proceſs of outlawry lay in it at common law, nor is ſuch proceſs given on this writ by any ſtatute. If by any ſtatute, it would be by the ſtatute of 25 *Edw*. 3. *c*. 17. but that does not extend to it; for it is, that proceſs of *exigent* ſhall be awarded in actions of detinue of chattels, and taking of beaſts. In this caſe there ſhall be no fine to the King. The ſtatute of *Edw*. 3. does not extend to give proceſs of outlawry in a writ of entry upon the ſtatute *ubi ingreſſus non datur per legem*. 35 *Hen*. 6. *b*.

Ante 903.

No outlawry in a writ of entry, *ubi*, &*c*.

Mr. *Beresford* for the defendant. This writ is within the ſtatute of additions. 1 *Hen*. 5. *c*. 5. for on this writ proceſs of *exigent* ſhall be awarded. Proceſs of outlawry lay at common law, as well in ſuch actions, where *vi et armis* might be ſuppoſed, as where it was alleged 35 *Hen*. 6. 6. 2 *Roll*. 805. *n*. 1. *C. L*. 128. *b*. *Plowd*. 228. *b*. *F. N. B*. 220. *b*. as in a writ of deceipt, which is in nature of treſpaſs. 11 *Hen*. 4. 15. a *capias* awarded in *homine replegiando*. So proceſs of *exigent* lies in a replevin of goods.

The firſt day this caſe was debated, *Holt* chief juſtice ſaid, the ſtatute of *Hen*. 5. requires there ſhould be additions in all original writs, wherein proceſs of *exigent* lies, but that muſt be underſtood, where the proceedings are upon the firſt writ; but where the proceedings are upon the ſubſequent proceſs, as in a replevin *de averiis*, where the proceedings are upon the *pluries replevin*, that is out of the ſtatute.

Powell juſtice. It ſeems to me to be all one.

Outlawry at common law.

Fine in *homine replegiando*.

Holt chief juſtice. In actions *vi et armis*, proceſs of outlawry lay at the common law; but in actions on the caſe, where no *capias* lay, but diſtreſs infinite, proceſs of outlawry was given by the ſtatute, and did not lie at the common law. But in this caſe the proceſs is not diſtreſs infinite, but a *capias*, and this is an extraordinary writ. It is a treſpaſs, and here the King ſhall have a fine. In replevin of goods proceſs of *exigent* does not lie on the original writ, but when on the return of a *nulla bona* on the *pluries replevin*, a *capias in withernam* iſſues. At the common law there needed no addition in any caſe. If an *exigent* lies upon the *pluries* returned in this caſe by the common law or ſtatute, then there muſt be an addition. Indeed the ſtatute of *Edw.* 3. gave an *exigent* in a replevin of goods, and it lay not at common law, becauſe there are no proceedings upon the firſt writ, which is *vicontiel*, but upon the *pluries* returned a *capias in withernam* iſſues. But in this caſe the proceſs iſſues upon the original writ returned.

Powell juſtice. I ſee no difference.

Holt chief juſtice. Surely the ſtatute of *Hen.* 5. extends to this caſe, for proceſs of outlawry did not lie in a replevin *de averiis* at common law. Pray ſee what is the proceſs in a *homine replegiando*, for it is an original writ, and the defendant is to appear upon the return.

Afterwards, the laſt day of the term, *Holt* chief juſtice ſaid, we are all agreed, that no addition is neceſſary in this caſe, becauſe the *pluries replevin*, upon which we hold plea, is not the original writ, but the original writ is *vicontiel*, and no proceſs of outlawry lies upon it, and therefore it is not within the ſtatute. And ſince there is no addition in the firſt writ, there muſt be none in the *pluries*, becauſe the *pluries* muſt purſue the firſt writ, or elſe it will be a variance. The *pluries* is not the original writ, but is founded on another, *viz.* the firſt. The ſtatute of *Hen.* 5. is to be taken ſtrictly, and not by equity. The words are: that in every original writ of actions perſonal, and in which the *exigent* ſhall be awarded, &c. Now in an aſſiſe of *novel diſſeiſin*, if it be found to be with force, upon which the King has a fine, and a *capiatur* is entered, and proceſs of outlawry lies, yet that is not within the ſtatute of *Hen.* 5. becauſe it is a mixt action, and not meerly a perſonal action.

Aſſiſe with force.

Powell juſtice. We do not hold plea upon the firſt original writ. You never ſaw a writ *de homine replegiando* with an addition.

Holt chief juſtice. If the firſt proceſs be without any addition, and the *pluries* is made with an addition, then it varies from the firſt, and that will be a fault, it will make it naught. The ſecond and third writs are founded on the firſt, and although you can have no *oyer* here (as was objected by Mr. *King*) of the firſt, or ſecond writ, yet that is not material. Let the defendant anſwer over.

MR. *Richardſon* prayed a *mandamus* to the maſter and wardens of the company of gun-makers, to cauſe them to give a proof-mark to *J. S.* a freeman of the company, without which he cannot ſell his guns; for neither the Queen, nor other perſons will buy any guns, which have not that mark. *Holt* chief juſtice. We cannot do it. They are no legal eſtabliſhment. You muſt petition the Queen to iſſue a *quo warranto* againſt them, to repeal their charter for this miſdemeanor; but we cannot help you. Deny the *mandamus*, *per totam curiam*.

A *mandamus* denied to the company of gun-makers, to cauſe them to give a proof mark to *J. S.* a freeman of the company.

IN debt upon a bond with condition to perform an award, ſo as the ſaid award be made in writing, and ready to be delivered to the parties, *&c.* the plaintiff in ſetting out the award in his replication, upon *nul agard fait* pleaded, ſhewed it was made in writing, but did not ſay it was ready to be delivered, *&c.* And upon demurrer it was held by *Holt*, and the court, that it was well enough; for being made in writing, it is ready to be delivered.

Award in writing is ready to be deliver'd. *Ante* 115.

1 Noy 38.

Regina *verſ.* Naſh.

S. C. Salk. 147, 542. 2 Salk. 564. Far. 120. Yelv. 6. 1 Vent. 255.

NASH was convicted before the juſtices upon the late ſtatute, for deer-ſtealing, and the juſtices iſſued their warrant thereon to the conſtable to levy the penalty, who accordingly diſtrained the goods of *Naſh*; but before any ſale of the goods, a *certiorari* was brought to remove the conviction into this court, where it was affirmed. After the *certiorari* brought the conſtable ſold the goods, and levied the money, but refuſes to pay over to the proſecutor according to the ſtatute. And now Mr. *Broderick* prayed a *mandamus* to compel him to pay the money, for that the conſtable having made no return of his warrant, the party has no other remedy.

Naſh convicted of deer-ſtealing, a warrant was iſſued to levy the penalty: the conſtable diſtrained the goods, and before ſale a *certiorari* removed the conviction: the conſtable ſold the goods, but refuſed to deliver the money. No *mandamus* lies.

Mr. *Mountague* and Mr. *Eyre* oppoſed it, and inſiſted that no *mandamus* lies in this caſe, for here is no return to charge him, and the proſecutor has proper remedy by action, as for money received to his uſe.

Mr. *Broderick*. He ought not to be allowed to take advantage of his own wrong, and we have no other remedy for want of proof.

Holt chief juſtice. It was doubtful upon the words of the ſtatute, whether the conſtable had power to ſell the diſtreſs, but we have determined it that he may. Now in this caſe the conviction being removed before us by the *certiorari*, the proſecutor cannot reſort to the juſtices.

Powell juſtice. Cannot we make a rule for him to return his warrant?

Holt chief juſtice. No, we cannot, for it is an authority executed before the *certiorari* awarded, and we have no conuſance of the warrant, no more than of an execution executed on a judgment in the Common Pleas before a writ of error brought in this court. The proſecutor ſhould have kept a copy of the warrant that was delivered to the conſtable, and that would have been evidence againſt him on an action. But this warrant being returned before the juſtices, they may call upon and require the conſtable to make a return of his warrant. For the goods being diſtrained before the *certiorari* awarded, although they were not ſold till after, yet execution being executed in part before the writ iſſued, it does not ſtop the execution of the reſidue, but the juſtices may proceed againſt the conſtable, and this is your proper remedy. As when a *fieri facias* is ſued on a judgment given in the Common Pleas, and the defendant's goods ſeiſed thereon, and then a writ of error is brought in this court, yet notwithſtanding the Common Pleas may award a *venditioni exponas*, upon a return by the ſheriff, that the goods remain in his hands *pro defectu emptorum*: we will not ſtrain theſe things. Take your remedy from the juſtices, who have a coercive power to make the conſtable return his warrant, and may ſet a fine upon him, if he does not; and we can do no more to a ſheriff for not returning an execution. We cannot make laws.

Certiorari no *ſuperſedeas* where the goods were ſeiſed before.

Powell of the ſame opinion.

Holt chief juſtice. If we ſhould grant a *mandamus*, and the conſtable refuſe to comply with the command of the writ, all we can do is to fine him, and it is a round about way. You may indict him, or proceed againſt him by way of information; or the juſtices may fine him high enough to compel him to pay the money.

Let the rule for a *mandamus niſi*, &c. be diſcharged, *per curiam*.

Powell juſtice. Barren incloſed, which is within the meaning of the ſtatute of *Edw.* 6. to be exempted from payment of tithes, muſt be ſuch land as is barren *ſuapte natura*, and not land upon which wood or the like grew before, which is afterwards burnt, and the land converted into tillage. And on a ſuggeſtion for a prohibition to a ſuit for tithes of ſuch land, it muſt be alleged to be barren *ſuapte natura*.

Barren to be exempted from tithes, muſt be barren *ſuapte natura*.
Bunb. 159.

A Man was indicted for aſſaulting and beating a cuſtom-houſe officer in the execution of his office. Mr. *Lutwyche* moved to quaſh it, becauſe the ſtatute of the 13 & 14 *Car.* 2. *c.* 11. *ſect.* 6. inflicts a penalty, and preſcribes the particular method of puniſhing that offenſe, *viz.* by the juſtices of peace, by fine and impriſonment; and therefore no indictment lies for this offenſe, as was adjudged about two years ago in the caſe of the King *verſ. Watſon*, in this court, and reſolved accordingly by all the judges at *Serjeants-inn.* The indictment was quaſh'd, *abſente Holt*.

No indictment where a particular method of puniſhment is preſcribed.
Ante 347.
Regina verſ. Watſon.

HOLT chief juſtice. It was formerly held by all the judges of *England*, that when there was a proceeding *ex officio* in the eccleſiaſtical court, they were not bound to give the party a copy of the articles; but the law is otherwiſe, for in ſuch caſes, if they refuſe to give a copy of the articles, a prohibition ſhall go *quouſque* they deliver it, and accordingly upon motion a prohibition was granted in the like caſe *per Holt et curiam.*

In a ſuit in ſpiritual court *ex officio* the party muſt have a copy of the articles.

Thorneton *verſ.* Bernard.

IN treſpaſs for taking *duas ſarcinas lini*, *Anglice* two packs of flax, *et duas ſarcinas cannabi*, *Anglice* two packs of hemp, after a verdict, Mr. Attorney general mov'd in arreſt of judgment, that this was uncertain, not ſetting out the weight or quantity of a pack or bundle.

Duas ſarcinas lini
2 Sid. 175.
2 Salk. 654.
P 3.
11 Mod. 66.
2 Ro. Rep. 447.

Cro. El. 818, 865. Cro. Ja. 307. Sty. 190, 410. Keb. 508. Vent. 106, 114. Freem. 442. Lev. 303. Barnard. 65. 3 Keb. 694. Sid. 98. See *ante* 518. 7 Mod. 141.

Mr. *Broderick*. There have been ſtronger caſes than this after a verdict, as in *trover* for *duobus peciis vini branditi*, *Anglice* two pieces of brandy, was held good here.

Ante 192.

Holt chief juſtice. It is well enough. You may plead the recovery in this action in bar to any other action brought for the ſame thing; and if the plaintiff ſhould declare of the taking ſo much hemp by weight, you may aver that theſe packs and bundles contain'd that weight. In an action of detinue you declare for a box of writings, without ſetting forth any writing in particular; but if you ſet forth a particular writing, which concerns land, as a charter of feoffment, then indeed the defendant ſhall not be allowed to wage his law.

Let the plaintiff take his judgment, *per curiam.*

Garland *verſ.* Exton.

S. C. Salk. 194.
Comb. 482.
12 Mod. 195.
6 Mod. 88.

Judgment for the defendant on a plea in abatement, he ſhall not have coſts.

THE defendant pleaded a plea in abatement, and the plaintiff demurred, and judgment was given for the defendant, and Mr. *Branthwaite* moved for the defendant, that he might have his coſts, upon the late ſtatute.

Trin. 10 W. 3.
Comb. 482.
Salk. 4.

Mr. *Raymond* for the plaintiff inſiſted, that it had been otherwiſe ruled in this court lately in two caſes, *viz. Tomms verſ. Lloyd,* and *Ogle v. Norcliffe.*

Ante 337.

Holt chief juſtice. The defendant ought not to have coſts by the ſtatute, for judgment in this caſe is not given on the demurrer, but *quod querens nil capiat per billam.* The ſtatute intends only to give coſts, where the merits of the cauſe are determined on the demurrer. Where judgment is given for the plaintiff, it is not final, but only a *reſpondeas ouſter*, and he has no coſts by the ſtatute, and therefore it ought to have the ſame expoſition as to the defendant, that he have no coſts neither; and the like conſtruction ought to be in both caſes; to which the court agreed.

Brough *verſ.* Parkings.

S. C. 6 Mod. 80.
3 Salk 69.

In caſe on an inland bill brought againſt the drawer, good without ſhewing a proteſt in the declaration.

1 Salk. 131.

ERROR upon a judgment in the Common Pleas, in an action on the caſe upon an inland bill of exchange brought againſt the drawer. The plaintiff had judgment by *nil dicit.* Mr. *Raymond* for the plaintiff in error urged, that it does not appear in the declaration, that the bill was proteſted, and ſince the late ſtatute of 9 & 10 *Will.* 3. no action can be brought againſt the drawer, unleſs there be a proteſt made, as the act requires, which ought to be ſet forth in the declaration. At the common law the plaintiff had no remedy againſt the drawer without notice given him of the non-payment by the party on whom the bill was drawn, and unleſs this ſtatute makes a proteſt neceſſary before any action can be maintained againſt the drawer, it does nothing, and the party had the ſame advantage before the act as ſince.

Mr. *Parker* for the defendant in error inſiſted, that the declaration was ſufficient, becauſe this bill is not within the ſtatute; for it does not appear, that the bill was accepted by the underwriting of the perſon on whom it was drawn, as the act requires; and there can be no proteſt without ſuch ſubſcription, and for that reaſon he ſaid, the merchants now refuſe to underwrite an acceptance. But if this bill be within the ſtatute, yet the proteſt need not be ſet forth in the count, becauſe the proteſt is intended for the benefit of the drawer; for no body elſe can be damnified for want of notice, and if he receive damage for want of ſuch proteſt, if the damage amount to the value of the bill, that will be a diſcharge of the action; or if it be leſs, then the drawer ought to have as much as it amounts to. But this muſt be taken advantage of either upon the evidence, or by a ſpecial verdict, whereby it may appear to the court, which cannot be in this caſe.

Holt chief juſtice, In this caſe, as well as upon a foreign bill of exchange, the plaintiff muſt give convenient notice to the drawer, of the non-payment of the bill; for if the drawer receive prejudice by the plaintiff's delay, the plaintiff ſhall not recover. A proteſt on a foreign bill is part of the cuſtom, but on an inland bill no proteſt was neceſſary by the common law, but by this ſtatute. But this ſtatute does not deſtroy, or take away the party's action, 9 & 10 Will. 3. where there is no proteſt, nor is the want of a proteſt any bar of the action, but the act ſeems only to take away from the plaintiff his intereſt or damages, where he has not made a proteſt, or to give the drawer a remedy againſt him by way of action for the coſts and damages.

Powell juſtice of the ſame opinion. I cannot agree to take away a man's right by ambiguous words in an act of parliament, they muſt be expreſs words, which take away a man actions. I believe a proteſt was never ſet forth in any declaration ſince this ſtatute: which *Holt* agreed.

Another exception was taken to the execution of the writ of inquiry. The writ is return'd ſuch a day *in quindena Martini*, and the inquiſition return'd is, *virtute brevis, &c.* return'd *in quindena Martini ultimo praeterito*, which muſt be a year before, *viz.* *Martinmaſs* twelvemonth; and *St. Martin*'s day is a fixt feaſt, and always on the 11th of *November*.

Holt chief juſtice. The return is made on the twenty-eighth of *November*, which is the laſt day in full term.

Mr. *Parker*. You cannot take notice of the day of the month.

6 Mod. 41. 81. 3 Salk. 69, 159, 160, 196. 2 Salk. 626.

Holt chief juſtice. We take notice of all feaſts, and the almanack is part of the common law, the calendar being eſtabliſhed by act of parliament, and it is publiſhed before the common prayer-book. Let the judgment be affirmed.

Smartle *verſ.* Penhallow.

Intr. *Hil.* 13 *Will.* 3. Rot. 380.

S. C. 6 Mod. 63. S. C. Salk. 188.

Cuſtom to grant to three perſons for their lives, and the longeſt liver of them, *habendum ſucceſſive ſicut nominantur in charta*. The grant is to *A.* and his aſſigns, *habendum* to him and his aſſigns for his life, and the life of *J. S.* and *J. N.*

IN ejectment upon the demiſe of *Jonathan* biſhop of *Exon* the jury find, that the lands in queſtion are cuſtomary tenements, parcel of the manor of *Tregoar* in the county of *Cornwall*, and by the cuſtom of the manor are demiſable by copy of court-roll to two or three perſons for term of their lives, and of the longeſt liver of them, *habendum ſucceſſive ſicut nominantur in charta*, &c. *et non aliter*; and that by the cuſtom of the manor, the perſon firſt named in the grant enjoys the tenements to him alone during his life, and ſo the ſecond and third: that by the cuſtom of the manor the lord is to have heriot of every ſuch perſon ſucceſſively dying ſeiſed; that one *Edward Noſworthy*, being lord of the manor by virtue of a demiſe made thereof to him by *Thomas* late biſhop of *Exon*, immediate predeceſſor to the leſſor of the plaintiff, did by copy of court-roll grant the tenements in queſtion to one *Thomas Norton*, and his aſſigns, *habendum* to him and his aſſigns for the lives of *John Penhallow*, *William Walton*, and of the ſaid *Thomas Norton*, and of the longer liver of them *ſucceſſive*, &c. that *Edward Noſworthy* died, whereby his eſtate determined; that *Jonathan* biſhop of *Exon*, the leſſor of the plaintiff, entred into the manor, and was ſeiſed *jure eccleſiae*, and entred upon the tenements in queſtion, *tunc in poſſeſſione* of the ſaid *John Penhallow* the defendant *colore praedictae conceſſionis per dictam copiam rotulorum curiae manerii praedicti per praefatum Edvardum Noſworthy exiſtentia*, and ejected him, and made a leaſe to the plaintiff, &c. and concludes *ſuper tota materia*, if the defendant is guilty of the ſaid treſpaſs and ejectment, &c. Serjeant *Hooper* and Mr. *Eyre* for the plaintiff inſiſted, that this grant made to *Thomas Norton* for his own life, and the lives of the defendant and *William Walton*, is void *in toto*, not being purſuant to the cuſtom. The cuſtom is found to be, to make grants to two or three perſons for their lives, *habendum ſucceſſive*,

ſive, &c. et non aliter; but the grant by *Edward Noſworthy* is to *Thomas Norton* and his aſſigns, *habendum* for his own life, and the lives of *J. P.* and *W. W.* which varies from the cuſtom. And though the grant be of an inferior intereſt than is allowed by the cuſtom, yet it being prejudicial to the lord in reſpect of his tenure, and of his ſervices, &c. the cuſtom will not warrant it, but it will be void againſt the ſucceſſor. In this caſe *Thomas Norton* is tenant for his own life, and the lives of the other two; for *J. P.* and *W. W.* are not named to take any intereſt, but only added by way of limitation of eſtate to *T. N.* ſo that upon the death of *T. N.* if either of the other two lives be in being, there will be an occupant of the copyhold, which will be an injury to the lord, when a ſtranger ſhall have power to come in without his conſent. Where an eſtate *pur auter vie* is made of copyhold lands, an occupancy is incident to it, as well as to an eſtate *pur auter vie* in freehold lands. If upon ſuch a grant the tenant *pur auter vie* ſhould become a bankrupt, the commiſſioners by force of the ſtatute might aſſign over his eſtate, and ſuch aſſignee will hold the land after the death of the tenant during the lives of the *ceſtuys que vies*; for the lord cannot enter againſt his own grant ſo long as either of them live, which will be an inconvenience and an injury to the ſucceſſor. Beſides, this grant, if it be made good, will enure to the prejudice of the lord, by depriving him of his heriot cuſtom; and in this country heriots are very valuable, and a great part of the revenue. For the cuſtom has confined the payment of the heriot to a particular eſtate, *viz.* upon the death of every tenant dying ſeiſed. Now in this caſe if either of the *ceſtuys que vies* die before *T. N.* the lord will loſe his heriot, which he would be intitled to, if the cuſtom was purſued by the grant; becauſe they are not tenants, and ſo not within the cuſtom. And if *T. N.* die firſt, the lord cannot claim a heriot, becauſe he is not the perſon to pay it, not being firſt named to take by the grant. Now though a leſſer eſtate may be included within a power by cuſtom to make a greater eſtate, as by force of a cuſtom to grant for three lives, the lord may grant for one life; yet the full rents and ſervices muſt be reſerved, or elſe the grant will be void. If a man have a power to make leaſes for three lives, he cannot make a leaſe for a thouſand years, which yet is a leſs eſtate in the eye of the law; becauſe the law conſiders the value of the eſtate, and does not merely regard it as a leſs eſtate in quantity in the eye of the law. So if a man have a power to make leaſes for three lives, reſerving the ancient rents and ſervices, a grant for three lives without any reſervation, or with a reſervation made in ſuch a manner as that it will be impoſſible the rent ſhould ever become payable, will be void. In the caſe of the dean and chapter of *Worceſter*, 6 *Co.* 37. and 2 *Cro.* 76. it is implied in the reſolution, that if the ſtatute of 13 *Eliz.* had required the reſervation of accidental ſervices, the loſs of the heriot would have made the leaſe void. And in the principal caſe the loſs of the heriot differs it from the caſe of *Venn* and *Howell*, 1 *Roll.* 511. which is objected, where there was no heriot cuſtom. But admitting this to be a good grant as to *Thomas Norton* for his own life, yet being void as to the limitation for the lives of the other two, it muſt be void in the whole, and cannot ſtand good for part, becauſe the lord grants in a manner under a power by force of the cuſtom, which being exceeded, muſt be intirely void againſt the ſucceſſor as in other like caſes. For howſoever the power be given, whether by act of parliament, by grant, or by cuſtom, all will come under the ſame conſtruction, and when it is exceeded, the eſtate made is wholly void. As if a biſhop make a leaſe for thirty years, or but two and twenty years, it will be void againſt the ſucceſſor in the whole, and cannot ſtand good for one and twenty years, becauſe the eſtate is intire, and cannot be ſevered. So a leaſe *parol* made for four years is void for the whole, by the ſtatute of 29 *Car.* 2. of frauds. So powers under ſettlements muſt be ſtrictly purſued, when the words are particular, according to the diſtinction in *Whitlock*'s caſe. 8 *Co.* 69. *b.* 70.

Next they took ſeveral exceptions to the verdict. 1. That although where a cuſtom warrants a greater eſtate a leſſer is included, yet when the jury only find the cuſtom to make the greater eſtate, as here, that will not warrant the making a leſſer eſtate; for that is only by inference, and argumentative: but the jury here ought to have found poſitively, that by the cuſtom an eſtate *pur auter vie* is grantable. As is 2 *Roll.* 693. *n.* 1, 2. *Venn* and *Howell.* But as this cuſtom is found, the grant here is not within it, for it is, that the lords may make eſtates to two or three perſons for two or three lives, *et non aliter*, which expreſly excludes an eſtate *pur auter vie.* 2. By the verdict it does not appear, that the eſtate granted is yet continuing, for the jury have not found that *Thomas Norton* the tenant *pur auter vie* is alive, and then the court muſt preſume that he is dead (as indeed the truth is) as in an action brought by one that claims under a leaſe made by tenant for life, he muſt aver that tenant for life is living. 2 *Cro.* 622. 2 *Bulſtr.* 263. Indeed where the jury make a ſpecial concluſion to a particular point as in *Goodall*'s caſe, 5 *Co.* all other things ſhall be intended; but here the verdict concludes generally upon the whole matter, if the defendant be guilty, &c. And by the words, *John Penhallow* may as well be ſuppoſed to be in poſſeſſion as an occupant, as under the intereſt granted to *Thomas Norton*; for it is, that the plaintiff entered into the land, *tunc in poſſeſſione praedicti Johannis Penhallow*

hallow colore praedictae conceſſionis, &c. per praefatum Edwardum Noſworthy exiſten. So that here is no title found for the defendant, and the plaintiff is found to be in poſſeſſion.

Mr. *Williams* and Mr. *Mountague* for the defendant argued, that this grant is warranted by the cuſtom for the whole eſtate granted; for a grant to three for the lives of three others, is a leſſer eſtate in judgment of law than a grant to three for their own lives, and therefore muſt be included within the cuſtom by neceſſary implication. It muſt be intended, that when a grant is made to three for their own lives, the grantees may ſurrender and compel the lord to admit them; and he that comes in by ſuch ſurrender, will have an eſtate *pur auter vie*; and if the tenant by his act can make ſuch an eſtate, ſurely the lord may, or elſe it will be in the power of the tenant to alter the cuſtom, and not of the lord, which is not equal. But in this caſe the lord does not grant merely by a nude authority, but he has an authority coupled with an intereſt, and therefore is not tied up to the letter of the cuſtom; but a grant within the reaſon and equity of the cuſtom is good, *Co. Li.* 52. *b.* as in the caſe of *Downs* and *Hopkins*, 3 *Cro.* 323. where the cuſtom was to make grants for one or two lives; and a grant was made to a man and his wife, *habendum* to the huſband for life, and to the wife *durante viduitate ſua*; this was adjudged a good grant, within the cuſtom, which warranted a greater eſtate. So the caſe of *Stanton v. Barnes*, 3 *Cro.* 373. where the cuſtom was, that the lord might demiſe *ſolummodo* in fee, yet it was reſolved he might demiſe for years, or life, or in tail, being leſſer eſtates, and the word *ſolummodo* ſhould not reſtrain his liberty. 1 *Roll.* 511. *n.* 1, 2. *Coke's Copyholder* 155. *Co. Li.* 52. *b.* So in our caſe the grant to *T. N.* for his own life, and the lives of *J. P.* and *W. W.* is a leſſer eſtate in the eye of the law, than if it had been granted according to the letter of the cuſtom, to three perſons *ſucceſſive* for their own lives; and in ſubſtance and effect the cuſtom is purſued, for the grant is for three lives, and in both caſes the continuance of the eſtate is the ſame. The meaning of the cuſtom and of the words, *et non aliter*, is, that the lord ſhall not grant a larger eſtate than for three lives, nor a joint eſtate, but *habendum ſucceſſive*; ſo that they reſtrain the lord as to the quantity and quality of the eſtate granted. If the lord grant to three perſons for their lives without the word *habendum ſucceſſive*, the grantees would be jointenants. *Co. Copyholder* 139. And ſuch grant would be void, becauſe not purſuant to the cuſtom, but excluded by the words *et non aliter*. But it is the ſame thing to the lord, whether the perſons named take it ſeverally for their lives, or that one of them take the whole eſtate for their three lives; and it will be no inconvenience or prejudice to the lord, for he will come to the land again as ſoon.

Nay, in the principal caſe he will have it ſooner, for if *Thomas Norton* die firſt, living the other *ceſtuys que vies*, the lord ſhall enter, and there ſhall be no occupant, becauſe of the prejudice it would be to the lord, as is adjudged 1 *Roll.* 511. *n.* 3. *Venn* and *Howell*, which is our caſe in point. And for the ſame reaſon the ſtatute of frauds, 29 *Car.* 2. does not extend to make eſtates *pur auter vie* in copyhold lands *aſſets* or deviſeable. And though a copyholder *pur auter vie* ſhould become a bankrupt, the aſſignee of the commiſſioners of bankrupts muſt be ſubject to the ſame fine, rents, and ſervices, as all other tenants. And in the principal caſe the lord will not loſe his heriot, for when *Thomas Norton* dies, the heriot becomes due. And in like manner a heriot muſt be paid upon the death of every aſſignee of the commiſſioners of bankrupts; but if *J. P.* or *W. W.* theſe *ceſtuy que vies*, die during the life of *T. N.* then indeed the lord will have no heriot, nor is he intitled to any by the cuſtom; and it would be the ſame, if they two took the eſtate after the death of *T. N.* by the grant, for no heriot is due on their deaths, becauſe they were not in poſſeſſion, as the cuſtom is. But admitting a grant to a man for his own life and the lives of two others is not warranted by the cuſtom, yet a grant to a man for his own life only, which is a leſſer eſtate than an eſtate to three for their lives, muſt be good upon the reaſons and authorities before alleged; and then though this grant be void as to the limitation for the lives of *J. P.* and *W. W.* yet it will ſtand good to *T. N.* for his own life, for the former part of the grant is ſufficient to paſs an eſtate for life to *T. N.* and then the *habendum*, if it be beyond the power, will be ſurpluſage and void, and the grant will ſtand good. The *habendum* is a diſtinct thing from the grant, *Hob.* 171. though there is a difference, where the eſtate is granted by expreſs words in the premiſſes, and where it is only implied. Indeed when tenant in fee makes a grant, the implied eſtate in the premiſſes may be either reſtrained, or increaſed, by the *habendum*; but in this caſe the *habendum* can neither increaſe nor deſtroy the implied eſtate. In copyhold lands there is no legal eſtate for life, it is only an eſtate at will eſtabliſhed by the cuſtom, and the lords are only compellable in equity to make admittances. And grants of copyhold eſtates ſhall be conſtrued by equity, as 2 *Roll.* 67. *Brookes verſ. Brookes*, *Poph.* 125, 126. If the lord had only a naked power to make leaſes for three lives, yet a grant for one life would be good. *Co. Li.* 258. *a*, *b*. *Perkins*, *ſect.* 189. A grant to a man for his own life, remainder to him for the lives of *J. S.* and *J. D.* though it be void as to the remainder, yet it will be good as to the eſtate for life; and here, though *T. N.* is laſt named in the *habendum*, yet it ſhall be tranſpoſed in conſtruction, as if it were firſt limited.

As to the exceptions taken to the verdiđ, it was ſaid, that ſince the grant is found to be made to *T. N.* for his life, it muſt be ſuppoſed that he is ſtill living, and the jury have not found any title in the leſſor of the plaintiff.

The court were all of opinion to give judgment for the defendant upon the firſt argument in *Trinity* term; but upon the importunity of ſerjeant *Hooper* they gave him leave to ſpeak to it again this term, when judgment was given for the defendant by the whole court.

Upon the firſt argument *Holt* chief juſtice ſaid, this matter might have been better found; but though it be not found, that *T. N.* is living, yet when the jury find a grant to him for his life, we muſt intend in a ſpecial verdict, that he ſtill continues alive, eſpecially when the plaintiff is to make out a title to avoid the grant: but it would be otherwiſe in a plea. *Quod fuit conceſſum per Powell* juſtice. We cannot preſume that he is dead, for he being once found alive, we muſt take him ſo to continue, unleſs it were expreſly found, that he is ſince dead.

If a ſpecial verdict find a grant to *J. S.* for life, it ſhall be intended, if the contrary does not appear; otherwiſe in pleading.

Holt chief juſtice. There is no difference in this caſe as to the eſtate of the lord, who made this grant; for a lord that is ſeiſed in fee of the manor can make no greater eſtate of any copyhold than for three lives, according to the cuſtom. Surely a grant for one life is good within this cuſtom; as where the cuſtom is to grant in fee-ſimple, the lord may grant in fee-tail without diſpute. If the reſtrained finding of the jury were to be taken as the plaintiff's council inſiſt, if the lord grant only for one life, it will be void; but the words *et non aliter* muſt be meant only of the extent of the cuſtom, and not that the lord is confined to the formality of a grant for three lives only. The cuſtom, that the grantees ſhall take *ſicut nominantur in charta*, is good. When a grant is made to one named in the premiſſes, *habendum* to him and his aſſigns, during his own life and the lives of two others, the two *ceſtuys que vies* may take in remainder by cuſtom, though named after the *habendum*; but the cuſtom is not ſo found here. But by the cuſtom of ſome manors, he that is firſt named may by ſurrender defeat the eſtates of thoſe in remainder; but the cuſtom ſhall be confined to that particular form of ſurrender in court, and ſhall not be extended to a ſurrender in law by fine, as was adjudged in this court, between *Zinzan* and *Talmage*, *tempore Car.* 2. *(quod vide* 2 *Jones* 142, 143.) Surely in this caſe the grant will be good to *T. N.* for his own life, being an eſtate within the limits of the cuſtom, and the naming of the other two lives will not diminiſh his eſtate.

Cuſtom to grant for three lives, a grant for one is good.

No occupancy of a copyhold granted *pur auter vie*. Forfeiture by copyholder.

As for the caſe put upon the ſtatute of *Elizabeth*, where a leaſe is made by a biſhop for two and twenty years, it ſhall be void in the whole, and ſhall not be good againſt the ſucceſſor for one and twenty years, becauſe the ſtatute ties it up to that form. But if the words of the ſtatute were, that they might make leaſes for any number of years not exceeding twenty-one years, if a leaſe were made for two and twenty years, it would ſtand good for the one and twenty years. It is very plain, that if a grant be made of a copyhold *pur auter vie*, that upon the death of tenant for life living *ceſtuy que vie* there ſhall be no occupant, but the lord ſhall enter. As when there is tenant for life of a copyhold, the remainder for life, and tenant for life commits a forfeiture, the lord ſhall enter, and not he in the remainder. In this caſe the eſtate granted is a leſſer eſtate than a grant to three for their lives, which the cuſtom admits. I do not ſee how the lord will be prejudiced by this grant, by the loſs of his heriot, as is inſiſted; for by the cuſtom a heriot is due upon the death of every tenant dying ſeiſed; ſo that although the leaſe be made *pur auter vie*, yet upon the death of *T. N.* the tenant for life, a heriot will become due, and the cuſtom extends to it.

Powell juſtice. A grant to one for life, *habendum* to him and two others for their lives, is good within the cuſtom. Without doubt there can be no occupant in this caſe, for the eſtate goes no farther than the cuſtom. If by the cuſtom the lord may grant for three lives, he may grant for one life, or for any eſtate coming within the intent of the cuſtom; then the grant here will be good to *T. N.* for his own life, though it ſhould be void as to the limitation for the lives of the other two. The heriot will be due upon the death of *T. N.* if the eſtate be good for his life, as it is.

Powys and *Gould*, judges, agreed.

Holt chief juſtice. If a man grant a rent out of his lands to *A.* for the life of *B.* ſhall not the rent extinguiſh if *A.* die? For there wants a grantee, and ſo it is here. An occupancy is for ſupplying the freehold, but the freehold of a copyhold eſtate is in the lord, and the tenant has only an eſtate at will.

Powell juſtice. There is no colour of doubt. It is agreed, that the lord may grant abſolutely to one for life, for that will not defeat him of his heriot, which binds all the cuſtomary eſtates granted within the cuſtom; and then the addition for the lives of the other two will not hurt the grant for his own life.

Upon the ſecond argument this term *Holt* chief juſtice ſaid to ſerjeant *Hooper*, who argued for the plaintiff, I am glad I have heard another argument, becauſe I ſuppoſe you will now be ſatisfied. The cuſtom conſiſts of three parts: 1. As to the conſtitution of the eſtate granted, it muſt be by copy of court-roll: 2. As to the extent of the eſtate, it muſt not be above three lives: 3. As to the manner of the eſtate, which is different from the conſtitution of the law by the operation of the cuſtom, *viz.* to two or three *habendum ſucceſſive ſicut nominantur*. When a cuſtom enables the lord to grant for three lives, cannot he grant for one life? He may without doubt, for it is within the cuſtom. The caſes cited for the defendant are in point. Where the cuſtom is to grant in fee, yet the lord may grant to one for life, with a remainder to another in tail, as in the caſe of *Stanton verſ. Barnes*, 3 *Cro.* 373. And that is good, though the cuſtom be to grant an intire eſtate in fee-ſimple. So where the cuſtom is to grant for life, a grant *durante viduitate* is good; as in the caſe of *Downs* and *Hopkins*, 3 *Cro.* 323. though it has a different determination, becauſe it is a leſſer eſtate, and ſo within the cuſtom. As to the miſchief you pretend, that if *T. N.* ſhould become a bankrupt, and the commiſſioners grant over his eſtate, the aſſignee ſhall have it during the three lives; ſuppoſe it had been purſuant to the cuſtom to three *ſucceſſive*, and the tenant firſt nam'd had become a bankrupt, and the commiſſioners aſſign his eſtate, the aſſignee is become tenant *pur auter vie* indeed, but no more, and afterwards the aſſignees dies during the life of the tenant, that is out of the cuſtom, yet the lord ſhall have a heriot upon the death of the tenant; for though the ſtatute of *James* 1. makes an alteration of the eſtate, it did not intend to prejudice the lord, and when the aſſignee is admitted, he becomes tenant according to the original conſtitution and tenure of the land. Here the grant is only to *T. N.* during his life, and the lives of the other two, the conſequence of which is, that if *T. N.* die living the *ceſtuys que vies*, ſince there can be no occupant of a copyhold eſtate, the lord upon his death will have his heriot cuſtom, and alſo the land; ſo that it will be no inconvenience, though the lord has no heriot upon the death of the other two, becauſe he has the land itſelf. **Heriot.**

Powell juſtice. If any prejudice might happen to the lord in this caſe, the grant would be void, but there can be none here. This grant is within the cuſtom, and is as extenſive as a grant to three for their lives, and is not a leſſer eſtate than the cuſtom contains, as a grant for his own life only would be; and that diſtinguiſhes this caſe from the caſes cited. The caſe of *Venn* and

Howell, 1 *Roll.* 511. is a ſtrong caſe, for if there can be no occupancy, then there can be no prejudice to the lord, but it will indeed be for his benefit; for upon the death of *T. N.* the other two lives fall in to the lord, ſo that, though he loſe his heriot upon their deaths, it will be no loſs to him. If the *ceſtuys que vies* die during the life of *T. N.* the lord will have no heriot indeed, nor ought he to have any by the cuſtom; for if the grant had been to them three, and they two had died during the life of *T. N.* the lord would not have been intituled to any heriot, for the cuſtom is to have a heriot upon the death only of the tenant in poſſeſſion. This caſe does not differ from that of *Venn* and *Howell:* the eſtate granted here is not greater than the cuſtom warrants, but in effect leſs; becauſe if *T. N.* die, living the other two, the lord will have the whole land. But your caſe upon the bankruptcy is fit to be conſidered, which is by force of a ſtatute made ſince the reſolution of *Venn* and *Howell*'s caſe; but the commiſſioners cannot aſſign any other eſtate, nor in any other manner, than *T. N.* himſelf had it; and when *T. N.* dies, the eſtate determines, or if the aſſignee die, ſhall not the lord have a heriot.

Holt chief juſtice. The lord ſhall not have a heriot upon the death of the aſſignee, but upon the death of the bankrupt. The lord indeed muſt admit the aſſignee, but upon the death of the tenant bankrupt, the lord ſhall have his heriot, to which he is intitled upon the original admiſſion of his tenant, and which is ſav'd by the ſtatute.

Serjeant *Hooper*. By the aſſignment of the commiſſioners, which is uſually made to ſeveral perſons, the whole eſtate for the three lives is transferr'd to the aſſignees by force of the ſtatute, which is the eſtate the bankrupt had, and will continue after his death during the lives of the other two.

Aſſignment by commiſſioners of bankrupts.

Holt chief juſtice. If originally the grant be not good for longer than his own life, and after his death there can be no occupant, ſure the ſtatute cannot enlarge the eſtate to the aſſignees: *quod fuit conceſſum per Powell.*

Holt chief juſtice. The cuſtom is, that the lord ſhall have a heriot on the death of every tenant in poſſeſſion; now if *T. N.* dies, living the other *ceſtuys que vie*, the lord will have his heriot, and the land too, and that is for his benefit.

Powys and *Gould* judges of the ſame opinion.

Powell juſtice. If the aſſignee of the commiſſioners took an eſtate for all the three lives, yet the prejudice thereon to the lord is too remote to be conſidered, but we will give you our opinions upon that. *Holt* chief juſtice agreed.

Afterwards at another day *Powell* juſtice ſaid, the caſe of the bankrupt is not an objection in this caſe; it might have been made at the time of the reſolution of the caſe of *Venn* and *Howell*; it is at the moſt only a remote conſideration of a prejudice by the loſs of a heriot on the death of the tenant; but the lord in this caſe has a great advantage by the coming in of the eſtate upon the death of *T. N.*

Holt chief juſtice. The commiſſioners cannot aſſign a greater intereſt than the tenant himſelf had, *T. N.* being tenant *pur auter vie*; when he dies, the eſtate of the aſſignee determines, and the lord muſt have a heriot upon the death of the tenant, and the cuſtom is only to have a heriot upon the death of the tenant in poſſeſſion; and although the aſſignee comes in by force of the ſtatute without any admittance of the lord, as an heir by deſcent has the eſtate caſt upon him by the law, yet he muſt be ſubject to the fines and ſervices due, under pain of forfeiture of his eſtate, for they are ſav'd by the ſtatute. By the cuſtom of ſome manors, but it is not ſo found here, he that is firſt named in the copy may by ſurrender deſtroy the remainders of the other grantees; but if the firſt tenant purchaſe the manor, whereby the ſervice is extinct, and the copyhold deſtroy'd, yet that does not deſtroy the eſtates of the other two, becauſe it is not by a ſurrender purſuant to the cuſtom; and ſo it was adjudg'd in the Common Pleas ſome years ago. *Powell* agreed *in omnibus*.

Holt chief juſtice. The caſe of the bankrupt is not now before us; when that comes to be the caſe, I know not how it may happen. Let judgment be entred for the defendant, *per totam curiam*.

Gaſcoigne and his wife *verſ.* Ambler.

You are a whore, and keep a man to lie with you.

Cro. J. 325.
2 Bulſt. 86.
Cro. El. 582.
Goldſb. 172. p. 104.
Sty. 352, 387, 299.
3 Mod. 120. ſeems contra.

CASE for theſe words ſpoke of the wife, *viz.* " You are a " whore, and keep a man to lie with you:" on not guilty pleaded, verdict for the plaintiff; and on Mr. ſerjeant *Darnall's* motion in arreſt of judgment, it was ſtaid till, *&c.* the court ſeeming clear, that the words were not actionable.

White's caſe. Ante.

S. C. 3 Salk. 232.
6 Mod. 18.
Sty. 457.

A *Mandamus* was granted to reſtore Mr. *White* to the office of clerk of the company of butchers in *London*, and the court ſaid, it was the ſame caſe with that of a town-clerk.

Hilary Term

2 Annae reginae, B. R. 1703.

Sutton's caſe.

A Motion was made on behalf of *Sutton*, late marſhal of the King's Bench, againſt *Southerne* the preſent marſhal, who attended the court, to reſtore *Sutton* to the poſſeſſion of the King's Bench priſon, out of which he pretended he was turned with force; and it was inſiſted, the court might do it on motion, becauſe the priſon was the priſon of this court, and ſo under the more immediate care of the court, who would protect it from all force and violence. But *per curiam* this court cannot hold plea of a forcible entry on a motion, but *Sutton* muſt apply to the juſtices of peace of *Surrey*, who, on finding the force, may reſtore him, or elſe he may indict them that turned him out forcibly, The motion was denied.

S. C. Caſes in B. R. 557. Hawk. P. C. 140. cap. 64. ſec. 1. Stat. 8 H. 6. c. 9. ſ. 4. 12 Mod. 516. 11 Mod. 42, 47. 2 Salk. 587.

The King's Bench cannot reſtore the marſhal of the Bing's Bench turned out by force.

Carleton *verſ.* Mortagh.

Intr. *Mich.* 2 *Ann.* B. R. Rot. 76.

ERROR on a judgment in the King's Bench, and want of an original was aſſigned for error. The defendant pleaded a releaſe of errors, but laid no *venue* where the releaſe was made. To which the plaintiff in error demurred. And adjudged the plea naught for want of the *venue*. And then the plea amounted to a confeſſion of the error. But the court made a queſtion, whether they could not award a *certiorari ad informandum conſcientiam curiae*, though the defendant cannot pray it: juſt as after *in nullo eſt erratum* pleaded, for the court ought to examine the errors: for if in error a releaſe is pleaded and found for the plaintiff, yet if there is no error, the court cannot reverſe the judgment; and if the releaſe were found for the defendant, a different

judgment

S. C. Salk. 268. S. C. 6 Mod. 113, 206. 3 Salk. 399. 1 Salk. 270.

A releaſe of errors pleaded without a venue, ill.

Error, releaſe pleaded, and found for the plaintiff. 8 Edw. 4. 8. a.

Judgment in error.

judgment muſt be given, according as the error aſſigned is ſufficient or not; for if it is a good error, the judgment muſt be, that the plaintiff be barred of his writ of error, and not that the judgment be affirmed; if it is not a good error, the judgment muſt be, that the firſt judgment be affirmed. And a rule was made for hearing counſel, whether the court ſhould grant a *certiorari* or not. *Poſt.*

Etherington *verſ.* Parrot.

S. C. Salk. 118.
S. C. 6 Mod. 171.
Where the wife ſhall charge the huſband.
Chan. Prec. 502.
12 Mod. 245.
Holt's Rep. 104.

ON evidence at a trial before *Holt* chief juſtice at *Guildhall*, in caſe for goods ſold and delivered, the evidence to charge the defendant was, that the goods were took up by the defendant's wife to make her cloaths, and that they cohabited together: but on the defendant's ſide it was given in evidence, that his wife was an extravagant woman, and uſed to pawn her cloaths for money to buy drink, and be drunk; that ſhe pawned a ſuit of cloaths, which coſt 7 *l.* for 1 *l.* 8 *s.* and when her huſband redeemed them, pawned them again; that at the time of buying theſe, ſhe had very good cloaths; that ſhe had brought cloaths here before, and her huſband had paid for them, but when he paid for them, he gave notice to the plaintiff's ſervant, who received the money, that his maſter ſhould truſt her no more, which he promiſed not to do. And by *Holt* chief juſtice, If a huſband turns away his wife, he gives her credit, wherever ſhe goes, and muſt pay for neceſſaries for her; but if ſhe runs away from him, he ſhall not be liable to any of her contracts, for it is the cohabitation, that is an evidence of the huſband's aſſent to contracts made by his wife for neceſſaries. But if the huſband have ſolemnly declared his diſſent, that ſhe ſhall not be truſted; any perſon, that has notice of this diſſent, truſts her at his peril after; for the huſband is only liable upon account of his own aſſent to the contracts of his wife, of which aſſent cohabitation cauſes a preſumption; and when he has declared the contrary, there is no longer room for ſuch a preſumption. For the wife has no power originally to charge her huſband, but is abſolutely under his power and government, and muſt be content with what he provides, and if he does not provide neceſſaries, her remedy is in the Spiritual Court. But here were ſufficient neceſſaries provided, and alſo the huſband had forbid any truſting her, and notice to the defendant's ſervant uſually imployed by him in his trade was a good notice to his maſter the plaintiff; and he cannot charge the defendant. Therefore he was nonſuited. *Holt* ſaid alſo, if a wife takes up ſilks and pawns them, before they are made into cloaths, the huſband ſhall not be liable for the ſilks, becauſe they never came to his uſe: *contra*, if they were made into cloaths, and wore by the wife, and then pawned by her.

Martin *verſ.* Henrickſon.

AT the ſittings at *Guildhall* before *Holt* chief juſtice, in caſe for ſo negligently managing his ſhip, that it run over the plaintiff's barge. The plaintiff declared, that he was poſſeſſed of a barge laden with divers goods and merchandiſes generally, *&c.* The pilot was produced to give evidence for the defendant. But *Holt* held he was no witneſs, becauſe he was anſwerable to the maſter of the ſhip in an action for the damages he ſuffer'd by his ill management, and conſequently for the damages which ſhould be recovered in this action againſt the defendant, the ſteering the ſhip being his province, and his management therein the cauſe of damage to the barge. Secondly, He held the plaintiff could recover no damage for the goods, becauſe the declaration was too general; but the particular goods ought to have been mentioned, as in caſe for burning a houſe of goods. So this ſame term at the ſittings at *Middleſex*, in caſe for words ſpoke of a woman *per quod* ſhe loſt her marriage with *J. N.* *Holt* refuſed to let evidence be given of a loſs of marriage with any body, but *J. N.*

S. C. Salk. 287.
2 Keb. 345.
The King and Bray, Hil. 10 Geo. 2.
E. Ind. Comp. and Goſling, Mic. 16 Geo. 2.
1 Wms. 239.
See Gilb. Law of Evidence, 122, *&c.*

Caſe againſt the maſter of a ſhip for ſo negligently managing his ſhip, that it run over the plaintiff's barge, the pilot is no witneſs for the maſter of the ſhip. Damage, for what? Vide 3 Lev. 174.

Norris *verſ.* Napper.

AT the ſittings at *Middleſex* before *Holt* chief juſtice, on evidence in an action for money received to the plaintiff's uſe, the caſe was, that the plaintiff was a ſoldier in my lord *Arran*'s regiment of horſe in the defendant's troop; the regiment being commanded for *Holland*, the plaintiff and his horſe were ſhip'd on board a tranſport, and in their paſſage met with ſuch a ſtorm, that by the working of the ſhip the plaintiff's horſe was killed; that ſeveral other horſes were loſt in the ſame ſtorm, and the Queen made an allowance of 15*l.* *per* horſe, for every horſe that was loſt, to remount the troopers, which was paid by the Queen to my lord *Arran*, for all the horſes that were loſt, and by him laid out in buying horſes, fifteen of which horſes were ſent to the defendant, to ſupply the loſs in his troop; that before theſe horſes came over the plaintiff was broke, and ſo was never remounted; that when the plaintiff came into the troop he brought in his own horſe. *Holt* chief juſtice held, that this evidence maintain'd the action; for tho' the captain the defendant did not actually receive the 15*l.* in money, yet he received a ſatisfaction, which was monies worth, and the plaintiff cannot bring *trover* for the horſe, becauſe he cannot claim any one of the fifteen horſes in particular, none having been ever delivered to him. But at the counſel's requeſt it was made a caſe

Indebitatus aſſumpſit by a ſoldier againſt his captain, for money received to remount him.

Quaere, whether it was ever determined?

A man cannot be a witneſs, where his evidence is to mend his ſecurity. Gilb. Law of Evidence 122, &c.

for his further conſideration. *Holt* held alſo in this caſe, that if *A.* advances money to carry on a cauſe, and has a ſecurity depoſited in his hands for it, part of which is the thing in demand, though the reſidue of the ſecurity excluſive of this is ſufficient ſecurity for the money, yet he cannot be a witneſs in the cauſe, becauſe he ſwears to mend his own ſecurity.

Title *verſ.* Grevett.

2 Salk. 413. Will determin'd. Vide Leighton verſ. Theed. Ante 707. Witneſs againſt himſelf.

AT the ſame ſittings at *Weſtminſter*, in evidence on an ejectment, it was ſaid by *Holt* chief juſtice, that if a tenant at will enters upon a quarter, though but one day, he cannot determine his will, but the leſſor may determine his will at any time, but if he does in the middle of a quarter, he loſes that rent. Secondly, A man that conveys lands may be a witneſs to prove he had no title, becauſe that is ſwearing againſt himſelf, but he is not compellable to give ſuch evidence.

See Parker's Rep. 273. are contra. But see acc. Baine v. Hargrave ~~as~~ before Lord Kenyon Peake's ~~Eva~~ Law of Evid. 2d. ed. 184.

Regina *verſ.* Guiſe.

S. C. 3 Salk. 88. 6 Mod. 89. 2 Stra. 1045. *Mandamus* to ſwear two *debite electos.* Return, that they were not *debite electi*, and does not ſay, *nec aliquis eorum*, ill.

A *Mandamus* was awarded to ſwear *A.* and *B.* *debite electos* churchwardens. The return was, that *A.* and *B.* were not duly elected, without ſaying, *nec aliquis eorum*, and therefore the return was quaſhed; for they muſt comply with the writ as far as they can, and if *A.* only was duly choſe, he ought to be ſworn: as where the pariſh chuſe one, and the parſon the other by the canons, they ought to ſwear one, and return the ſpecial matter as to the other. If two be choſen by the pariſh by equal voices, when they ought to chuſe but one, ſo that they cannot tell which to ſwear; ſo if the pariſh chuſe two, where they ſhould chuſe but one; they may return the ſpecial matter. So if the pariſh is to chuſe two, and to preſent them to the parſon, who is to chuſe one of them, and both ſue a *mandamus*, they may return the ſpecial matter; for they cannot tell which to ſwear. *Per curiam.*

Tilly's Caſe.

S C. Salk. 286. 2 Salk. 555, 691. 5 Mod 9, 163, 277. Depoſitions took in Chancery *in perpetuam rei memoriam*; the inheritance of the land deſcended to the witneſs.

ON a trial at bar in the Common Pleas, on evidence this queſtion aroſe: depoſitions had been took in Chancery *in perpetuam rei memoriam*, and it happened afterwards, that the inheritance of the land deſcended to the party, who was ſworn as a witneſs, and was party in the ejectment; and the queſtion was, whether theſe depoſitions could be read in the cauſe. *Trevor* chief juſtice ſeem'd to be of opinion, that they ought to be allow'd, becauſe it was by the act of God the party was diſabled from giving evidence, and it was the ſame in effect, as if he were dead. *Tracy* and *Blencowe* juſtices, *contra*. Thereupon *Tracy* juſtice came into the King's Bench, to aſk the judges opinions, who all agreed, they ought not to be read; for *Holt* chief juſtice ſaid, the intent of ſuch depoſitions was to perpetuate teſtimony in caſe the witneſſes died, and could not be read in any caſe between other parties, till after the witneſs's death, who ought to appear and give evidence ſo long as he liv'd; much leſs can they be read in this caſe, where the witneſs is a party. And to that *Trevor* chief juſtice of the Common Pleas agreed.

Tawney's Caſe.

S. C. Salk. 531. 8 Mod. 338, 339. Comb. 422, 478. 6 Mod. 98. Nelſ. Juſt. 538. Shaw's Prac. Juſt. 34, 43, 217. 10 Mod. 104. Black. 238.

No *mandamus* lies to command church-wardens and overſeers of the poor to make a rate to re-imburſe former overſeers.

UPON a *mandamus* directed to the church-wardens and overſeers of the poor of *Littleport*, in the iſle of *Ely*. The writ ſets forth, that *Tawney* was overſeer of the poor of the ſaid pariſh, and that in the ſaid pariſh there were ſeveral poor people, who were uſually maintained by, and had relief from, the ſaid pariſh: that by reaſon of ſome differences in the pariſh, the church-wardens had not agreed to make a rate for relief of the poor: that *Tawney* being overſeer, that the poor might not ſtarve, had ſupplied them with money for their neceſſary relief, of which he had been reimburs'd but in part only: that he had given in his accounts to the pariſhioners, who had allow'd the ſame, but yet the church-wards did refuſe to agree to a rate for the re-imburſing him, and therefore the writ commands them to make an aſſeſſment, to reimburſe him the reſidue of the money diſburs'd by him, and not yet receiv'd. To this a return was made, that all the pariſhioners had not allow'd his accounts, but that ſome of them did refuſe; and that no juſtices of the peace had ever allow'd the ſame, or had adjudg'd that *Tawney* did diſburſe the ſaid ſum, or that ſo much was ſtill due to him, and therefore, that they could not make any rate. In *Michaelmas* term it was inſiſted by Mr. *Weld*, that this return is ill. For it is not neceſſary, that all the pariſhioners ſhould agree to the allowing his accounts; but it is ſufficient if the majority did, and that ſhall conclude the reſt. And it is not to the purpoſe to ſay, the juſtices have not allow'd the accounts, for the juſtices have nothing to do with it, when the pariſh do allow the account; and the juſtices cannot allow any thing before a rate be made, and after a rate is made by the pariſh the juſtices are to allow it. And this is not within the clauſes of the ſtatute of 45 *Eliz.* whereby the late church-wardens and overſeers ſhall be oblig'd to pay over to the ſucceeding officers ſo much as is remaining in their hands, to which the concurrence of the juſtices is neceſſary; but not in this caſe. It was a charitable act in *Tawney*, and the pariſh ought not to be eas'd thereby, but *Tawney* now ſtands in the place of the poor, as to the money he has diſburs'd for their relief. As if he had diſburs'd money for maintenance of a baſtard child, before any order made by the juſtices for the keeping it, yet the order ſhall have a retroſpect, and he ſhall be reimburs'd. They ought to have return'd in this caſe, that there is not ſo much due to him as he demands.

Mr. *Eyre* inſiſted, that the return was good. The majority in this caſe ſhall not conclude the reſt, but all the pariſhioners muſt concur; becauſe it is not a charge to which they are liable at the common law, as to the repairs of a bridge, or of the church; but they are only chargeable to the relief of the poor by the ſtatute of 43 *Eliz.* by which the juſtices have the ſole power of allowing the account. *Tawney* ought to have ſued out a *mandamus* directed to the juſtices, commanding them to take the account, and determine it, for no rate can be made till that is ſettled, and this is not like a rate made for the poor, which is a publick and viſible thing. This writ is not good, for the overſeer has no relief by law in this caſe. The ſtatute of 43 *Eliz.* gives the juſtices no power to re-imburſe an overſeer, for the act never intended to give the overſeer power to charge the pariſh with a debt, but he muſt firſt raiſe the money by a rate, and then lay it out; and there is no neceſſity, that the juſtices ſhould have ſuch power to re-imburſe an overſeer, becauſe the ſtatute deſign'd, that the money ſhould be diſburs'd only as it is rais'd. And ſo was the law in other parochial offices, as in caſe of conſtables and tything-men, who before the ſtatute of 13 & 14 *Car.* 2. *cap.* 12. *ſect.* 18. had no power to make a rate for the charges they were at in conveying vagrants to houſes of correction, &c. So before the ſtatute of 3 & 4 *Will.* & *Mar.* *cap.* 12. *ſect.* 13. the ſurveyors of highways had no remedy to re-imburſe themſelves, for the money they expended in buying gravel and other materials, for amending the highways; and theſe were much harder caſes, for the conſtables and ſurveyors before thoſe ſtatutes had no power at all to make any rate, but the overſeers have a power to make a rate before they lay out their money: it is a defect in the law. The writ does not ſhow, that the money diſburs'd by *Tawney* was expended by him for the relief of ſuch poor as wanted it that year he was overſeer, ſo that for ought appears, he laid out the money for the relief of ſuch poor as had ſubſiſted before his time without his help. Beſides, if he could have any relief in this caſe, he ought to have proſecuted it preſently, and not to lie ſtill ſo long as five years after. Perhaps the perſons, that are now to be charg'd, were not then inhabitants, and paid to the poor in another pariſh. You will not allow reſtitution to be awarded on a forcible entry after three years, as was adjudg'd in this court, in the caſe of the *King verſ. Harris.* The writ is not good as to the form of it, for it ought to command the overſeers, *&c.* to raiſe a certain ſum, and not leave it to their diſcretions, to raiſe what they think fit.

Trin. 11 Will. 3
Salk. 260.

Mr. *Weld.* If the inhabitants are not concerned in this matter, then their conſent is not neceſſary; but here they have approv'd the account, and conſented to the rate. *Tawney* demanded his money of the pariſh from time to time, and ſo it is alleged in the writ, and it is to his prejudice, that it was not paid before. The pariſhioners are liable by the ſtatute of 43 *Eliz.* to pay for the relief of the poor, but they were not liable to pay any thing in the caſe of vagrants before the ſtatute of 13 & 14 *Car.* 2. nor in the caſe of ſurveyors before the ſtatute 3 & 4 *Will. & Mar.* The words of the writ reſtrain the money to be diſburs'd for the relief of the poor of his time; the writ imports a certain ſum, for the remaining debt is certain.

Holt chief juſtice. The queſtion in this caſe is, how the law now ſtands? The ſtatute of 43 *Eliz.* directs a method for the relief of the poor, by way of rate made by the officers with conſent of the pariſhioners; but here *Tawney* has diſburs'd his money without any rate: can he do thus without any rate? He cannot diſburſe what money he thinks fit, the ſtatute never intended to give the overſeers ſuch an authority; for then they might diſpoſe of the pariſh money of their own head, as they pleas'd. Suppoſing, that new poor happen to come into a pariſh after a rate made, the pariſhioners muſt make a new rate to ſupply them. The juſtices have a ſuperintendency by the act as to poor rates, and you muſt purſue the method appointed by the act. It is hard indeed he ſhould not be re-imburs'd, but he cannot claim it of right, becauſe he has not purſued the method of the ſtatute.

New poor come into a pariſh after a rate is made, a new rate muſt be made to ſupply them.

Mr. *Weld.* It cannot be material, whether the rate be made before, or after the money expended, if the pariſh agree to it; and then it muſt be ſign'd by the juſtices, who have power to relieve any one that is aggrieved on appeal, and the overſeers can raiſe no more after the money laid out, than if the rate had been made before.

Holt chief juſtice. The rate muſt be made for relief of the poor, and not to reimburſe the overſeers; though if they have laid out money before, they may re-imburſe themſelves out of the money levied upon ſuch rate. You muſt give up your account to the juſtices, to bring this within the equity of the ſtatute, that ſo it may appear

If overſeers lay out money for the poor, and then a rate is made, they may re-imburſe themſelves out of that rate.

Y y y

But a rate cannot be made to re imburſe them.

appear to them, you are intitled to a rate. It is not material indeed, whether the money be diſburs'd before, or after a rate made; but then you muſt raiſe money by a rate for the relief of the poor, and not to re-imburſe yourſelf. The overſeers cannot charge the pariſh with what ſums they pleaſe. The ſtatute does not preſcribe a particular method, as to the maintenance of baſtards.

Powell juſtice. I would help you if I could. You laid out your money at your peril, for you cannot diſpoſe of the pariſh money as you pleaſe. And on ſudden accidents, if an overſeer diſburſe money, he depends on the pariſh, but he cannot compel them to re-imburſe him. The rate is not good, though the pariſh agree to it, till the juſtices approve it, nor is it leviable before. You ſhould have complain'd before to the juſtices. If any of the pariſhioners oppoſe it, it cannot be made, and it is no rate till confirm'd by the juſtices, and I doubt the defect is there.

A rate is made for the poor, which by accidents falls ſhort; the overſeers lay out money; the pariſh make a new rate, if the juſtices refuſe to confirm it, *mandamus* lies.

Holt chief juſtice. If a rate be made, and accidents happen, which raiſe the neceſſary ſum higher, no doubt but the overſeers may diſburſe ſo much as the rate falls ſhort, and then make a new rate for relief of the poor, but not to re-imburſe themſelves; and they muſt not be their own judges in that caſe, but ought to apply to the juſtices, who will certainly confirm ſuch rate. *Tawney* ſhould have made ſuch a rate, whilſt he continued in his office; the juſtices are intruſted with that matter, but if they had refus'd to ſign and allow ſuch rate, you ſhould have had a *mandamus* commanding them to do it as uſual.

Powys juſtice agreed, *Gould* juſtice agreed. You are not oblig'd to diſburſe your money, before you receive the pariſh money. It is an uſual thing indeed, but if you do ſo, you muſt take care to make a rate for relief of the poor, and get it allow'd by the juſtices, and thereupon levy the money, and re-imburſe yourſelf.

Powell juſtice. It ſeems you have had a *mandamus* already to the juſtices, but it was too ſoon, becauſe no rate was made by the pariſh; for there muſt be a preparatory rate to be approv'd by the juſtices. But you ſay, the pariſh turn'd *Tawney* out of his office before his time was expir'd.

Holt chief juſtice. Then he muſt bring his action. We will ſee to help you to a good *mandamus*: it is a compaſſionate caſe, but you muſt be relieved in another manner than by this *mandamus*.

This caſe was ſpoken to again that term. And Mr. *Page* inſiſted, that this *mandamus* lies within the meaning of the ſtatute of

43

43 *Eliz.* for it will take away the whole effect of the act, if it ſhall be intended, that the overſeers ſhall not lay out any money for relief of the poor, till it be raiſed; for then the poor might ſtarve before any money levied, and ſo the ſtatute would make no proviſion for the relief of the poor. See *Dalton's Juſt.* 153. On the other ſide Mr. *Parker* ſaid, the ſtatute does not extend to this caſe. There is no remedy for him, to re-imburſe himſelf, after his year is out. It is too late to purſue this writ now after ſo long a diſtance of time, *&c.* much to the ſame effect with Mr. *Eyre.*

Holt chief juſtice. The queſtion is, whether we can relieve him now, when he has neglected to make uſe of the power he had to help himſelf. There is no neceſſity that he ſhould pay money out of his pocket, for the churchwardens and overſeers with the confirmation of the juſtices may order a ſum of money to be levied for the relief of the poor without the concurrence of the pariſh. You ſhould have made a rate during your own time. I cannot ſee any foundation for us to grant this *mandamus.* The law has preſcribed a particular method, and we cannot alter the law, nor prevent the inconveniencies. Shall we relieve a man, that truſts when he needs not?

Churchwardens and overſeers with the confirmation of the juſtices may order money to be levied for the poor without the concurrence of the pariſh.

Powell juſtice. We cannot take notice of the uſage in any county: we are now upon the conſtruction of an act of parliament. This *mandamus* is very extraordinary, and ſo I thought when it was granted. You ſhould have applied to the juſtices during your office. You laid out your money at your peril.

FH
MVSEVM BRITANNICVM

Powys and *Gould* juſtices agreed.

Holt chief juſtice. If an overſeer lays out money for the relief of the poor, and then a rate is made after the ſame proportion, he may re-imburſe himſelf; but here he has elapſed his time. Let the writ be quaſhed, *per totam curiam.*

Regina *verſ.* Jones.

S. C. Salk. 379. Far. 40. 6 Mod. 42, 61, 104, 301, 311. 1 Salk. 286.

MR. *Parker* moved to quaſh an indictment. It is, that the defendant came to *J. D.* and pretended to be ſent to him by *J. S.* to receive 20 *l.* for his uſe; whereas *J. S.* did not ſend him. This is no crime, and he has remedy by action.

Indictment, that the defendant came to *J. D.* and pretended to be ſent by *J. S.* to receive 20 *l.* for his uſe.

Holt chief juſtice. It is no crime unleſs he came with falſe tokens. Shall we indict one man for making a fool of another? Let him bring his action. *Powell* juſtice agreed. Quaſh it *niſi.*

Nutt *verſ.* Mills.

Intr. *Mich.* 2 *Ann.* B. R. Rot. 333.

6 Mod. 105. *Suſcepit ſuper ſe ordinem militarem.* 1 Salk. 6.

Ante 853. Poſt.

No venue.

IN an action of debt, the defendant pleaded in abatement, *quod ante exhibitionem billae querens ſuſcepit ſuper ſe ordinem militarem, et jam miles exiſtit.* To which the plaintiff demurred; becauſe, as it was ſaid, the plea is uncertain, inaſmuch as it did not appear what ſort of knight the plaintiff was created; he might be a knight of the garter, or a knight of *Malta*, *&c.* but *per curiam*, *ordo militaris* is certain enough. Then it was ſaid, that there was no *venue* laid, where the plaintiff *ſuſcepit ordinem.*

Holt chief juſtice. There needs none, becauſe the plea going to the perſon, it ſhall be tried where the action is laid. By the demurrer the plaintiff has confeſſed himſelf a knight.

A woman governor of the workhouſe at Chelmsford.

A Woman was appointed by the juſtices to be governor of a workhouſe at *Chelmsford* in *Eſſex*; and Mr. *Parker* moved to quaſh the order, becauſe it was an office not ſuitable to her ſex. But *per Powell* juſtice and the court, *abſente Holt* chief juſtice, it is a good appointment, and ſhe may act by a deputy. My lady *Broughton* was keeper of the gatehouſe.

Bezaliel Knight's caſe.

S. C. Salk. 329. Doctrina Placit. 67,8. Another action pending.

Relation on diſcontinuance.

AN action was brought againſt him by a wrong name, and he pleaded it in abatement. Thereupon without more the plaintiff declared againſt him *de novo* by his right name, and he pleaded that action pendent, *&c.* for the plaintiff ought to have diſcontinued his firſt action. And *Holt* chief juſtice ſaid, it was too late to do it now, becauſe the diſcontinuance only relates to the time of its being entred upon the record; ſo that if the plaintiff ſhould now enter it, and reply *nul tiel record*, it would be againſt him, becauſe it was a record at the time of the plea pleaded: and it is not like the reverſing a judgment, or outlawry on a writ of error, which avoids the record *ab initio*; ſo that on *nul tiel record*, if the judgment be reverſed before the day given to bring in the record, it is ſufficient.

Emerton *verſ.* Selby, ſerjeant at law.

IN replevin the defendant juſtifies the taking *damage feaſant* in his freehold. The plaintiff in bar ſays, he is ſeiſed of a cottage, and preſcribes for common in the defendant's land for all his cattle *levant* and *couchant*, as appendant to his cottage: the defendant demurred.

S. C. Salk. 169. Preſcription for cattle levant and couchant on a cottage. See Co. Li. 5. b. 2. Inſt. 649. Vaugh. 253.

Ante, 726. S. C. 6 Mod. 114. 1 Bulſt. 50. 3 Keb. 44. 2 Brownl. 101.

Mr. *Page.* A man cannot preſcribe for common for his cattle *levant* and *couchant* upon his cottage, for that cannot be; for there is no land belonging to a cottage, as there is to a meſuage or houſe. But *per Holt* chief juſtice *et curiam*, it is a good preſcription.

Powell juſtice. A cottage containeth a curtilage, and ſo there may be a levancy and couchancy upon a cottage, and it has been ſo ſettled. There is no difference between a meſuage and cottage as to this matter. The ſtatute *de extentis manerii* ſays, a cottage contains a curtilage. If there be four acres laid to it, it is a lawful cottage within the ſtatute of 31 *Eliz. c.* 7. We will ſuppoſe that a cottage has at leaſt a court to it.

4 Edw. 1. 4.

IN treſpaſs, aſſault and battery, if the plaintiff lay the aſſault one day, and the defendant pleads a ſpecial matter that juſtifies at another day, whereby the day becomes material, the plaintiff may reply an aſſault at another day; and it is no departure, although it has been otherwiſe held, for the day is not material, and the plaintiff may maintain his count. *Holt* chief juſtice.

Plaintiff lays aſſault 1 Feb. defendant juſtifies 4 Feb. plaintiff may reply a battery 6 Feb. Bro. Departure de ſon plea, pl. 28. Bro. Replica. pl. 67. 1 Salk. 222. *Ante* 120, 121.

THE plaintiff declared againſt the defendant by the name of *John*, who pleaded in abatement, that he was baptized by the name of *Benjamin*, *abſque hoc*, *quod idem Johannes* was ever known by the name of *John*; and the plaintiff demurred generally.

Plea in abatement, that he was baptized by the name of Benjamin, *abſque hoc*, that *idem Johannes* was ever known by the name of John. 6 Rep. 64. Bro. Miſnoſm. pl. 17. 20, 21. Gilb. Hiſt. C. B. 174, 175. Skin. 620.

Holt chief juſtice. Matters of form may be taken advantage of on a general demurrer, when the plea only goes in abatement; for the ſtatute of *Elizabeth* only means, that matters of forms in pleas which go to the action ſhall be helped on a general demurrer. So here, the plea is ill in form, for it is *abſque hoc*, *quod idem Johannes*, &c. which is a confeſſion of his name to be ſo, and makes

Matters of form in pleas of abatement not aided by a general demurrer.

the ſubſequent matter repugnant; and by this traverſe the defendant has waved the matter that went before, of his being baptized by the name of *Benjamin*, and has made the traverſe the ſubſtance of his plea.

Powell juſtice. This plea is good in ſubſtance, and then will an immaterial traverſe hurt it?

Holt chief juſtice. It is a good traverſe, but informal; for the plaintiff may take iſſue on it; and in this caſe, ſince the defendant has not relied on the plea of baptiſm, the traverſe is become material.

Powell juſtice. I think the traverſe is immaterial, for a man can have but one name of baptiſm; and the defendant has alleged that matter ſufficiently, and it will not be hurt by the traverſe.

Holt chief juſtice. The matter of the baptiſm would have been a good plea of itſelf, for it implies a negative, and he might have concluded with it, and relied upon it, without ſaying that he was never called or known by any other name, for he can have no other *Chriſtian* name. This plea is only dilatory, and not to the merits.

Let the defendant anſwer over, *per curiam*.

Croſſe *verſ.* Bilſon.

Intr. *Trin.* 2 *Ann.* B. R. Rot. 146.

S. C. Salk. 3.
S. C. 6 Mod. 102.
Lill. Ent. 351.
Replevin; the defendant pleads, that he took, *&c. en auter lieu, et juſte*, becauſe it was the freehold of *J. S* and damage feaſant, and traverſes the taking in the place in the declaration, *unde petit judicium et retornum equae praedictae*: the plaintiff offers iſſue: the defendant demurs in abatement: the plaintiff joins in demurrer.

UPON a writ of error in replevin out of the Common Pleas, the plaintiff declares of the taking his mare *apud Hardingſtone in comitatu Northampton, in quodam loco ibidem vocato* the King's highway. The defendant pleaded after this manner: *Et praedictus J. B. venit, et defendit vim et injuriam, quando, &c. et ut ballivus prehonorabilis Willielmi domini Lempſter bene cognoſcit captionem equae, &c. in quodam loco vocato* the Queen's highway, *et juſte, &c.* and ſays it was the freehold of the lord *Lempſter*, and avows the taking there *damage feaſant*; *abſque hoc, quod praedictus J. B. equam praedictam in quodam loco vocato* the King's highway *cepit, prout praedictus S. C. verſus eum narravit*; *et hoc paratus eſt verificare. Unde petit judicium et retornum equae praedictae ſibi adjudicari.* To which the plaintiff comes and ſays, *quod praedictus J. B. &c. captionem equae praedictae juſte cognoſcere* *non debet*; *quia dicit, quod ipſe cepit equam in praedicto loco tunc vocato* the King's high way, *prout,* &c. *et hoc petit, quod inquiratur per patriam.* The defendant demurs thereto in this manner: *Quod placitum replicando placitatum non eſt ſufficiens in lege ad narrationem ſuam praedictam manutenendum, unde ut prius petit judicium, et quod narratio praedicta caſſetur.* The plaintiff joins in demurrer thus: *Ex quo ipſe ſufficientem materiam in lege ad ipſium S. actionem et narrationem ſuas manutenendum ſuperius allegavit,* &c. *petit judicium et damna.* Whereupon judgment was given for the plaintiff in the Common Pleas, and it was entred thus: *Quia videtur juſticiariis, quod placitum praedicti S. C. ſuperius replicando placitatum, ſufficiens in lege exiſtit ad narrationem ſuam praedictam manutenendum, prout praedictus S. C. ſuperius allegavit,* &c. and ſo final judgment was entred. Upon this judgment a writ of error was brought in this court. The matter upon the plea was debated in the Common Pleas, where the court were of opinion, that the plea was made a plea in bar by the concluſion, and that therefore the replication was proper. In *Michaelmas* term 2 *Annae reginae,* it was argued by Mr. *Salkeld* for the plaintiff in error. He inſiſted, that the plea was only in abatement, and that therefore the judgment ought to have been only, *quod ulterius reſpondeat,* and not final. He ſaid, the matter of the plea is only on the place, and the cogniſance of the taking *damage feaſant* in his freehold is no parcel of the plea, but only added to intitle him to a return; which the defendant in replevin has a right to do, being an actor as well as the plaintiff. He cited the caſe of *Butcher v. Porter, Hil.* 4 *Will. & Mar. B. R.* where in replevin the defendant pleaded property in a ſtranger in abatement; and could not have return, becauſe he had made no cogniſance. But it would have been otherwiſe, if he had pleaded property in himſelf, which is admitted by a demurrer, and thereby the property of the cattle is quite diveſted out of the plaintiff. Whenſoever the defendant pleads matter, that goes not to the action, but in abatement only, as *priſel en auter lieu,* he can have no return without making cogniſance. In this caſe the matter does not make the plea an intire cogniſance, but the matter, as to the taking *en auter lieu,* and the cogniſance, are diſtinct, and the cogniſance is not traverſable. 9 *Edw.* 4. 41. *a.* *Hele v. Putt, Paſch.* 2 *Will. & Mar. B. R.* in replevin, the defendant pleads, that he took the cattle *en auter lieu,* and made cogniſance for rent arrear; and the plaintiff traverſed, that any rent was arrear, without ſaying any thing to the place; and the defendant demurred; and it was held a diſcontinuance, becauſe the cogniſance was not traverſable. See the caſe of *Watts* and *Hagden,* 3 *Cro.* 372. Although in this caſe the cogniſance is incorporated with, and made part of the plea, whereas it ſhould have been diſtinct, and ſhould have come after the plea; yet that is only a dif-

In replevin, if the defendant plead property in a ſtranger in abatement, he cannot have a return, unleſs he makes cogniſance; but *contra,* if he plead property in himſelf.

When the defendant pleads only matter that goes not to the action in abatement, as *priſel en auter lieu,* he cannot have a return without making cogniſance.

Hele v. Pitt. Diſcontinuance.

ference in form, and the plaintiff ſhould have demurred to it: but yet that does not make the cogniſance traverſable. The concluſion of this plea is not in bar, it is only, *unde petit judicium* generally; whereas the concluſion of a plea in bar is, *unde petit judicium, ſi praedictus querens actionem ſuam verſus eum habere debeat.* And it is the ſame in replevin, as in all other actions. And when it is ſaid, *et retornum equae*, that makes no difference, for he does not pray return as defendant, but as actor, and conſequently no part of the plea. He admitted, that if a man pleads matter in abatement, and concludes in bar, judgment final ought to be given: but this is only in abatement, for the *petit judicium* without more does not make it a plea in bar, and here is no prayer of damages. If a man plead matter in bar, and conclude in abatement, yet it is a plea in bar, and is not made a plea in abatment by the concluſion,
36 H. 6. 18. a. 37 *Hen.* 6. 24. *a.* but judgment final ſhall given; becauſe if the plaintiff has no cauſe of action, he ought not to bring any writ: but when a man pleads matter in abatement, and concludes in bar, in that caſe judgment final ſhall be given; becauſe by his concluding in bar, the defendant admits the plaintiff's writ to be good. 18 *Hen.* 6. 27, 28. 32 *Hen.* 6. 17. *b.* 36 *Hen.* 6. 18. 22 *Hen.* 6. 53. *b.* *Medina verſ. Stanton, Paſch.* 12 *Will.* 3. *B. R.* *Salk.* 210.

Holt chief juſtice. In that caſe we did not determine, that judgment final ought to be given; but we agreed, that if a *reſpondes ouſter* were awarded, it would be no error aſſignable by the defendant, becauſe to his advantage.

On the other ſide it was inſiſted by Mr. *Pengelly*, that judgment final was well given in this caſe, and ought to be affirmed. He did not cite caſes to prove, that the concluſion of a plea in abatement as in bar makes it a plea in bar, becauſe Mr. *Salkeld* had admitted it. But ſee theſe caſes to that purpoſe. *Bro. Pleader* 14. 35 *Hen.* 6. 12. *Bro. brief* 247. 36 *Hen.* 6. 18. *a. per Littleton.* *Allen* 17, 18, 65, 66. *Burden v. Ferras.* 1 *Sid.* 189, 190. *Wright verſ. Bright.* 1 *Sid.* 190. *Iſam et alii verſ. Hitchcock.* 3 *Cro.* 202. *Putt verſ. Noſworthy.* 1 *Ventr.* 135, 136, 137. 2 *Keble* 795. *Kemp verſ. Andrews.* 3 *Lev.* 290, 291. And in ſuch caſes judgment final is always given, and not only a *reſpondes ouſter.* (See *Bro. Aſſiſe* 146. 9 *Aſſ.* 23. *Onely v. Fontleroy.* *Mo.* 692.) So likewiſe, when a plea begins in bar, though the matter be in abatement only, and it concludes in abatement, yet it is made a plea in bar, and judgment final ſhall be given; as *Green verſ. Cole.* 1 *Lev.* 311, 312. 3 *Keb.* 181. 3 *Lev.* 223. Sir *Oliver Butler*'s caſe. 3 *Lev.* 221, 223. 17 *Ed.* 3. 59. *p.* 58. *Baker v. Beriſford.* 3 *Keble* 181.

As to the form of the plea in this caſe, he ſaid, it was made a plea in bar, though the matter of it be only in abatement. For the defendant having incorporated the cogniſance with the plea, and joined them both together, and having made but one concluſion to both, he has made the whole one intire plea, and the concluſion in bar goes to the place, as well as to the cogniſance; for if it do not, the plea as to the place will be left without any concluſion at all. But the defendant ought to have concluded his plea, as to the place, *unde petit judicium de brevi*, or *de narratione*, and then have made a diſtinct cogniſance, *et pro retorno habendo*, &c. or elſe, when he joins both together, he ought to have concluded in abatement to the whole, *unde petit judicium de brevi*, or *narratione*. And ſo are all the precedents, *Raſt. Replevin, en auter lieu*, 554, 555, 556. *Aſhton* 475. *Hearn* 764, 765, 766, 767. *Thompſon* 274. 1 *Ventr.* 127. 41 *Edw.* 3. 4. *p.* 7. 9 *Edw.* 4. 41. *p.* 25. 1 *Hen.* 7. 21. *p.* 10, 11. 12 *Hen.* 7. 4. *p.* 3. 9 *Edw.* 4. 64, *a.* 61, *a.* And in this caſe, although the defendant has not made his concluſion as full and large as the uſual concluſion is, *ſcilicet*, *unde petit judicium, ſi praedictus querens actionem ſuam verſus eum habere debeat*, but generally, *unde petit judicium*, yet that is a good concluſion in bar, and muſt be ſo intended; and if the defendant would have it taken only in abatement, he ought to have applied it, and have added *judicium de brevi*, or *de narratione*. And the common concluſion of every avowry or cogniſance in bar is as this caſe, *ſcilicet*, *petit judicium et retornum averiorum*, and the commencement of the plea here is the ſame with an avowry or cogniſance. As 1 *Saund.* 187, 191, 194, 347, 348, 349. 2 *Saund.* 194. 197, 283, 284, 310, 314. 2 *Ventr.* 131, 133, 145, 148, 210, 211, 212, 224, 225, 226, 227. *Co. Intr. Replevin* 575, 576, 578, 583. *Raſt. Replevin* 561, 562, 558, 559. And although in this caſe the defendant has not prayed damages, as is done in thoſe caſes, yet that will make no alteration in the plea, nor make it leſs a plea in bar, becauſe at the common law the defendant in replevin did not recover any damages, but they are given by the ſtatutes, 7 *H.* 8. *c.* 4. 21 *Hen.* 8. *c.* 19. yet ſince thoſe ſtatutes the defendant may wave the prayer of damages, and the plea will ſtand compleat, as at common law. He inſiſted farther, that the manner of joining in demurrer, though it be informal, yet it will not hurt the plaintiff; for though the defendant has demurred in abatement, the plaintiff has joined in demurrer in bar, and thereby the whole matter being brought before the court, the court ought to give a final judgment; and the manner of the defendant's demurrer ſhall not alter the judgment of the court: as is adjudged in Sir *Oliver Butler*'s caſe, 3 *Lev.* 221, 223. *Putt verſ. Noſworthy.* 1 *Vent.* 135, 136, 137. 2 *Keble* 795. *Shalmer*'s caſe, cited 3 *Keble* 181. (but it ſeems that caſe is not truly cited there, for the caſe is otherwiſe reported in *Allen* 17, 18.) *Foſter verſ. Jackſon*, *Hob*. 56.

Priſel en auter lieu, plea in abatement.

Holt chief juſtice. The plea of *priſel en auter lieu* is a plea in abatement, and no plea in bar; and therefore being pleaded in bar, as it is in this caſe, it is ill. The defendant ought to have begun as is uſual in abatement, and have concluded, *et petit judicium de brevi*, or *de narratione*, and then made cogniſance diſtinctly, *et pro retorno habendo*; or have ſaid, *petit judicium de narratione, ac etiam petit retornum*, *&c.* and that would have been good. Here the defendant has concluded in bar upon the whole plea, as well upon the matter of cogniſance, as upon the traverſe of the place; and he need not pray damages, becauſe they are given by the ſtatute. By this concluſion the defendant has waved the firſt part of his plea, and his traverſe as to the place; and being in bar, it goes to the matter of the cogniſance. When matter of abatement is pleaded in bar, it is ill, and judgment final ought to be given.

In replevin the defendant need not pray damages.

Powell juſtice. The concluſion is in bar, and judgment final ought to be given. The defendant ſhould have concluded his plea as to the place, *et petit judicium de brevi* or *de narratione*, and have made cogniſance *pro retorno* ſeverally. This plea is as much in bar, as an avowry can be; the defendant in the beginning of his plea makes cogniſance, whereas he ought to begin and pray judgment of the writ or count, and to have concluded in the ſame manner.

And accordingly the judgment was affirmed *niſi cauſa*, *&c. per totam curiam*.

The laſt day of *Michaelmas* term Mr. *Salkeld* came to ſhew cauſe upon the rule. And he inſiſted, that the judgment ought to be revers'd upon other errors. He ſaid, that the whole ſuit was diſcontinued, for admitting the plea to be in bar, and as a cogniſance, and ſo the replication in bar likewiſe; then, when the defendant comes, and demurs in abatement, that is a diſcontinuance; for all the proceedings before being in bar, there is nothing to relate to it; and the plaintiff ſhould not have joined in demurrer as he has done in bar; but ſhould have taken his judgment by *nil dicit* for want of an anſwer. The concluſion makes the plea, and want of a concluſion, or a miſconcluſion, is the ſame; and both make a diſcontinuance. And ſo was it reſolved in this court, between *Carter* and *Davis*, *Paſch.* 3 *Will. & Mar.* In caſe, the plaintiff declares on an *indebitatus aſſumpſit*, and a *quantum meruit*; the defendant, as to the firſt count pleads *non aſſumpſit*, and pleads a matter in abatement as to the ſecond count; the plaintiff takes iſſue on the *non aſſumpſit*, and as to the plea in abatement he demurs,

Carter verſ. Davis, Salk. 218.

Demurrer in bar to a plea in abatement.

murs, *quia placitum minus ſufficiens in lege exiſtit ad ipſum ab actione ſua praecludendum*; and the defendant join'd in demurrer, and it was held a diſcontinuance. But farther he ſaid, there is no final judgment given; for it is according to the defendant's demurrer, *ſcilicet, quod placitum replicando placitatum ſufficiens eſt in lege, ad narrationem ſuam manutenendum*, and not *ad actionem manutenendum*, as it ought to be: ſo that the judgment is only in abatement, and not in bar.

Mr. *Broderick* of the ſame ſide inſiſted on the ſame matter, and ſaid, that the court cannot give judgment to affirm the former judgment; but ought to award a *repleader*. Hereupon the laſt rule was diſcharg'd, and the matter adjourn'd to be ſpoken to again the next term.

In *Hilary* term Mr. *Broderick* inſiſted, that this plea muſt be taken as a compleat cogniſance in bar, and not in abatement, and then there is nothing to ſupport the judgment as given; for here is no replication, as is ſuppos'd, and as it would be in other actions, but it is a bar of the defendant's cogniſance; and therefore both in the demurrer, and in the judgment, it ought not to be as it is, *quod placitum replicando placitatum, &c.* but *quod placitum in barra cognitionis placitatum*. For when the defendant pleads a plea in bar, he begins, *quod querens actionem ſuam habere non debet*, and a replication is, *quod ipſe ab actione ſua habenda praecludi non debet*; but the beginning of a cogniſance in replevin is, *bene cognoſcit captionem averiorum*; and then, when the plaintiff comes, and ſays, *quod captionem juſte cognoſcere non debet*, that is a bar to the cogniſance, and not a replication. Here is a diſcontinuance, and the court can give no judgment but to replead; for a demurrer, as an iſſue, muſt compriſe the whole matter in plea, and if any part be omitted, it is a diſcontinuance, becauſe the whole matter is not brought before the court. As in the caſe of *Johnſon* and *Turner*, *Yelv.* 5, 6. (See *Yelv.* 137, 138.) And in this caſe here is not a ſufficient confeſſion of the plaintiff's action by the defendant's demurrer, upon which the plaintiff ought to have judgment.

On the other ſide Mr. *Ward* ſaid, that by the demurrer the matter of the replication is confeſſed, and the concluſion *ad narrationem* makes it a demurrer in bar, and not merely in abatement; and if it be in abatement, yet it will be no diſcontinuance, becauſe the judgment is to be given on the plea in bar, as an ill plea. But our replication is good, and that is the difference upon the reſolution of *Bonner* and *Hall*, *Mich.* 9 *Will.* 3. *B. R. Rot.* 558. and *Biſſe verſ. Harcourt*, *Hil.* 1 *Will. & Mar.* In this caſe the judgment ought not to be revers'd for this informality, inaſmuch

Carth. 453.
Salk. 177.

as the plaintiff is intituled to have judgment upon the avowry, as in the caſe of *Bennet verſ. Holbeach*, 2 *Saund.* 317, 319. See 1 *Cro.* 443. 1 *Roll.* 805.

Holt chief juſtice. When the defendant pleads a matter of fact in abatement, and the plaintiff in his replication traverſes or takes iſſue thereon, there it is proper for him to pray damages, becauſe if it be found againſt the defendant, judgment final ſhall be given. But where the plaintiff by his replication confeſſes the plea, and avoids it by ſpecial matter, and does not traverſe the matter of the plea, there the plaintiff muſt maintain his writ, and ought not to conclude to the country. In replevin, if the defendant avows the taking in another place, and traverſes the place alleged in the count, without concluding to the writ or count, but makes avowry *pro retorno*; in that caſe the plaintiff muſt maintain his writ and count, and may take iſſue on the place, and pray damages, and that would have been right; the plaintiff has nothing to ſay to the avowry, if it had been but in a proper place, and here he takes iſſue on the place. Where there is a demurrer to a plea in abatement, the judgment is only, *quod ulterius reſpondeat*, but on an iſſue judgment final ſhall be given.

Powell juſtice. This form of pleading is unuſual, but there is not much in the caſe. *Priſel en auter lieu* is a proper plea in abatement. But beſides the defendant muſt make cognizance for a return, for without a title he ſhall not have return; but the avowry to have return is no part of the plea, and the plaintiff can ſay nothing to it, it being only to intitle the defendant to have return, in caſe the writ be abated. But in this caſe, they are both jumbled together, and it looks like a common avowry, but it cannot be taken ſo, but it puts the plaintiff to maintain his count. The point of the plea is only in abatement, and yet upon iſſue found againſt the defendant, the plaintiff would have had a final judgment. This is a replication by the plaintiff, becauſe it is not pleaded to the cognizance; then indeed it would have been a bar, but it is pleaded in maintenance of his count; the manner of joining demurrer will not hurt. But here is final judgment, and that ſeems to be the chief point.

Holt chief juſtice. The whole depends upon the plea in abatement, for the plaintiff cannot anſwer to the avowry, but to the place; and if the writ be bad, the defendant ſhall have return. In this caſe the plea is informal, but it is to the ſame effect; and the want of form ſhall not hinder the plaintiff from having his judgment: it is not a bar of the cognizance, but a replication, being in maintenance of his writ. If the defendant had concluded his plea, *petit judicium de narratione*, and pray'd return diſtinctly, it would have been right; but here he has concluded in bar.

Powell juſtice. By his concluſion he has made it a plea in bar.

Holt chief juſtice. The fault is in the defendant, when he demurs in abatement, but the plaintiff's replication is good.

Powell juſtice. The plaintiff could do no otherwiſe. He can only anſwer to the taking, and could not have entred judgment by *nil dicit* upon the defendant's demurrer; ſo that there ſeems to be no diſcontinuance. *Holt* ſeem'd to agree it, but the court took time to conſider. And afterwards at another day they all agreed that the judgment ought to be affirm'd.

Holt chief juſtice ſaid, the defendant's plea is in bar, and ſo is the replication; and though the defendant concludes his demurrer in abatement, yet that ſhall not alter the judgment of the court, but judgment final ſhall be given. The defendant has both begun and concluded his plea, in bar; and when he traverſes the place, he waives the matter of the cogniſance, which went before; and then concluding, *unde petit judicium et retornum*, *&c.* that is in bar, for he ſhould have concluded *unde petit judicium de brevi* or *de narratione.* An avowry is a bar of the action, and a replevin is in nature of an action to demand his cattle again, and when judgment is given againſt the plaintiff upon the avowry, he is barr'd of his action, and the entry is, *quod querens nihil capiat per breve.* Then the defendant's plea beginning and concluding in bar, the plaintiff in his replication takes iſſue upon it, and when the defendant demurs in abatement, he ſhall not thereby alter his own plea in bar: and although the plaintiff might have taken judgment by *nil dicit*, yet judgment may be well given in bar upon his joinder in demurrer.

Powell juſtice of the ſame opinion, that judgment ought to be affirm'd. The defendant's plea is in bar, and the plaintiff by his replication has taken iſſue thereon; and then, when the defendant demurs in abatement, that ſhall not alter the judgment, but it ſhall be in bar.

Mr. *Broderick.* It is a diſcontinuance, upon the caſe of *Johnſon* and *Turner*. *Yelv.* 5.

Holt. There it is only a demurrer to part of the bar, and nothing ſaid to the other part, and ſo join'd. But ſtill it is better in the preſent caſe; for the concluſion of the defendant's demurrer is, *unde ut prius petit judicium*, and if he had ſtopp'd there, it had been a good demurrer in bar; and then, when he goes on and ſays, *et quod narratio caſſetur,* it is a ſuperfluous addition and void. Judgment affirm'd.

It ſeems this form of the plea is good in bar, *quod quaere.*

Clements *verſ.* Scudamore.

Intr. *Hil.* 13 *Will.* 3. B. R. Rot. 271.

S. C. Salk. 243.
S. C. 6 Mod. 120.
A. having three ſons, *B.* *C.* and *D.* *D.* died, leaving a daughter *E.* then *A.* purchaſed lands in borough Engliſh, and died. Adjudg'd they ſhall deſcend to *E.*
Wms. 66, 69.
2 Keb. 158, 159.
Vent. 261.

IN ejectment the jury found this ſpecial verdict, that *J. S.* having iſſue five ſons, his youngeſt ſon died in the life of *J. S.* the father, leaving iſſue a daughter, who is the leſſor of the plaintiff; afterwards the father purchas'd the lands in queſtion, which are copyhold lands of the nature of *Borough Engliſh*; and the jury find, that by the cuſtom theſe lands are deſcendible to the youngeſt ſon and his heirs. Afterwards the father died, and the eldeſt ſon entred, and made a leaſe to the defendant, upon whom the daughter entred, and made the leaſe to the plaintiff, upon whom the defendant re-entred, whereupon the plaintiff brought his ejectment. This caſe was twice argued at bar, and this term by the opinion of the whole court judgment was given for the plaintiff. *Holt* chief juſtice delivered the reaſons of their opinion as follows.

The queſtion in this caſe is, whether the daughter of the youngeſt ſon, the leſſor of the plaintiff, ſhall inherit to theſe lands *jure repraeſentationis,* or the eldeſt ſon.

We are all of opinion, that the daughter ought to have theſe lands *jure repraeſentationis.* Wherever this cuſtom has obtain'd, the youngeſt ſon is thereby plac'd in the room of the eldeſt ſon, who inherits by the common law; and there is no other difference in the courſe of deſcent, but that the cuſtom prefers the youngeſt ſon, and the common law the eldeſt ſon; and therefore as at the common law the iſſue of the eldeſt ſon, female as well as male, do inherit *jure repraeſentationis* before the other brothers, ſo by the ſame reaſon, where this cuſtom has transferred the right of deſcent from the eldeſt ſon to the youngeſt, it ſhall alſo carry it to the daughter of the youngeſt ſon by like repreſentation; and there is no reaſon to make any difference between a deſcent by this cuſtom, and at common law, though my lord *Coke* is of another opinion.

All lands in *England* gavelkind before the conqueſt.

Yet it appears from the beſt authors, as *Lambard's Saxon laws, inter leges Gulielmi primi,* 36 *fol.* 167. and *Selden's Eadm.* 184. that all the lands in *England* were of the nature of gavelkind, and deſcended equally to all the iſſue, before the conqueſt; but this was ſoon after altered, when tenures by knights ſervice were introduced for the defenſe of the realm, and then for the preſervation of the family and tenure, the deſcent was reſtrained only to the eldeſt ſon, but yet, notwithſtanding this alteration, the right of repreſentation did continue to hold place. And by the common law, if the eldeſt ſon happened to die, living his father, leaving iſſue a daughter, the inheritance deſcended to her before any of the other ſons; ſo that a female by way of repreſentation was yet preferred before the males, becauſe the right of repreſentation was not altered. This right of repreſentation is not peculiar to the law of *England*, but is obſerved by the laws of all countries; as you may ſee in *Numbers*, *c*. 26. *v*. 33. and *c*. 36. for although by the *Jewiſh* law the males inherited excluſive of the females, and the eldeſt ſon had a double portion of his father's eſtate, which was conferred on him as the firſt begotten; yet we find when *Zelophehad* the ſon of *Hepher* died, leaving no ſons but daughters, and the daughters came unto *Moſes*, and claimed the poſſeſſion of their father; this being a new caſe, *Moſes* it is ſaid, brought that cauſe before the Lord, who commanded him to give unto them the poſſeſſion of their father. So that it was here determined, that they ſhould take the double portion belonging to their father as the eldeſt ſon, by right of repreſentation. So is *Selden de ſucceſſionibus apud Hebraeos*, *c*. 23. This right of repreſentation was alſo practiſed among the *Romans*, and was the law of the twelve tables. And this right of repreſentation holds in inheritances deſcendible by cuſtom, as well as by common law; as in caſe of gavelkind lands, where the cuſtom in pleading is thus ſet out. *Raſt. Cuſtom* 143. *a. quod terrae et tenementa de tenura de gavelkind de tempore, &c. inter haeredes maſculos partibilia et partita fuerunt.* And yet, if a man ſeiſed of gavelkind lands have iſſue three ſons, and one of the ſons die in the life of his father, leaving iſſue a daughter, and afterwards the father dies; no doubt but this daughter ſhall inherit the purparty of her father, though ſhe be not within the words of the cuſtom, *viz*. that the lands are partible *inter haeredes maſculos*; but the cuſtom by conſtruction ſhall extend to daughters *jure repraeſentationis*; and there is no difference between the cuſtom of gavelkind and this cuſtom of *Borough Engliſh*, only in reſpect of the quantity of the land which the heir takes. There each ſon takes an equal part, but here the youngeſt ſon takes the whole; but that will not vary the reaſon in conſtruction of the cuſtoms. The common law takes notice of theſe cuſtoms of gavelkind and *Borough Engliſh*, and there is a very remarkable caſe adjudged in my lord *Bridgman*'s time, which is not reported in any printed book; it was in the year 1660, 1661, and it was entred *Hil*. 1655. *Rot*. 779. *C. B. int*. Hale and

There the caſe was, that copyhold lands of every tenant dying ſeiſed were deſcendible by the cuſtom of the manor to the youngeſt

ſon;

A. ſeiſed of gavelkind has three ſons *B*. *C*. and *D*. *D*. dies leaving a daughter *E*. then *A*. dies, *E*. ſhall inherit *D*'s part. So ruled on a trial at bar in ejectment Mich. 8 Ann. 1709. for lands in Kent of the demiſe of three Mrs. Leonard's, nieces to the earl of Suſſex, verſ. the earl.

Pain and Herbert, 2 Keb. 158, 159. there cited.

I have a copy of the reports here referred to in four volumes, & the case here mentioned is in vol. 3. p. 140. & in vol. 1. p. 120. But the name of the case is Payne on demise of Fisher v. Barker. F. H.

ſon; and a ſurrender was made to the uſe of *B.* and his heirs, who died before admittance. If *B.* had been admitted, it was agreed, that after his death the youngeſt ſon ſhould have inherited; but dying before admittance, the queſtion was between the eldeſt ſon and youngeſt ſon of *B.* who ſhould have the lands; and it was adjudged, that the eldeſt ſon in this caſe ſhould inherit, becauſe of the ſtraitneſs of the cuſtom, that the land ſhould deſcend, and ſo here was no eſtate in the anceſtor to deſcend, there never being any ſeiſin in the anceſtor. But by my report, it would have been otherwiſe, if it had been alleged, that the lands were of the nature of *Borough Engliſh* (which it was not, but only ſet forth as a particular cuſtom) becauſe the law takes notice of the cuſtom of *Borough Engliſh*, but not of that ſpecial cuſtom, and in pleading that lands are of the nature of *Borough Engliſh* you need not ſet forth the cuſtom ſpecially for that reaſon. This caſe ſeems at firſt to be againſt me, but the reaſon of the diſtinction there taken makes for me. In the preſent caſe the finding of the cuſtom does not exclude the daughter, but does expreſly comprehend her, for it is found, that the lands are deſcendible to the youngeſt ſon and his heirs, though without that expreſs mention of his heirs the daughter ſhould inherit. Now this cuſtom is not to be ſtrictly taken according to the letter, but muſt be conſtrued ſo as to comprehend the neceſſary conſequences and incidents in the courſe of deſcents; and therefore, though the father be diſſeiſed and die, ſo that he is not ſeiſed at the time of his death, yet the right of entry ſhall deſcend to the youngeſt ſon, and although the ſon ſhould die before any entry, yet without doubt the right ſhall go to the daughter, although the ſon did not die ſeiſed within the words of the cuſtom. And in this caſe if a deſcent be caſt, the youngeſt ſon ſhall have his age, as much as if he were heir at the common 1 Jones 361. 3 Co. 43. a. law. And there is no reaſon why the repreſentative of the youngeſt ſon, *viz.* the daughter, ſhould not be included within the meaning of the cuſtom. See the caſe of *Reeve* and *Malſter*, 1 *Roll.* 624. *n.* 1. 1 *Jones* 361. 1 *Cro.* 410. where the cuſtom of the manor was, that if any perſon died ſeiſed in fee-ſimple of lands within the manor, that the ſame ſhould deſcend after his death *filio juniori hujuſmodi tenentis cuſtomarii ſic obientis ſeiſiti ſecundum naturam de Borough Engliſh* land; a tenant of the manor being ſeiſed in fee, ſurrendered his land to the uſe of himſelf and his wife and his heirs; afterwards he had iſſue three ſons and died ſo ſeiſed of the reverſion; and afterwards the youngeſt ſon died in the life of the wife without iſſue; and then the wife died: and the queſtion was, whether the eldeſt or middle ſon ſhould inherit. And the judges were divided; *Berkley* and *Bramſton* held, that the middle ſon ought to have the land, but *Jones* and *Croke* held, that the eldeſt ſon ought to inherit. Now I obſerve firſt, that there the cuſtom was more ſpecial than in our caſe, for there it was not, that if a man died ſeiſed generally, that the lands ſhould deſcend to his youngeſt ſon, but if he die ſeiſed ſpecially, *viz.* in fee ſimple; and yet in that caſe *Jones* and *Croke* held, that the deſcent of the reverſion to the youngeſt ſon had ſatisfied the cuſtom.

It was objected by Mr. *Weld,* who argued on the part of the defendant, that whoever takes by deſcent muſt make himſelf heir to him that was laſt actually ſeiſed, but the father was never ſeiſed, and the daughter cannot make herſelf heir to the grandfather. But in anſwer to that it muſt be intended in this caſe, that ſhe muſt make herſelf heir to him that was laſt ſeiſed, according to the cuſtom; and if the cuſtom extends to repreſentatives, then ſhe is heir to her grandfather, who was laſt ſeiſed. As the daughter of the eldeſt ſon at the common law *jure repraeſentationis* makes herſelf heir to her grandfather, ſo the daughter of the youngeſt ſon here makes herſelf heir to her grandfather by the cuſtom. The caſe of *Godfrey* and *Bullock,* 1 *Roll.* 623. *n.* 3. is a full authority for me. There the cuſtom was, that if a man died without iſſue male, that his eldeſt daughter ſhould have his land: and the tenant had no iſſue male, but had iſſue ſeveral daughters; the eldeſt daughter had iſſue a daughter, and died in the life of her father: this grand-daughter is within the cuſtom, and ſhall have the land by deſcent upon the death of the grandfather. Now by the common law the eldeſt daughter has not the preference of the reſt, but all inherit equally. Yet cuſtom may give the inheritance to the eldeſt daughter, and then her iſſue ſhall take it *jure repraeſentationis:* this is as ſtrong as a deſcent in *Borough Engliſh.* But the caſe of Sir *John Savage* in 1 *Leon.* 109, 208, is objected: There the cuſtom was, that if any man took to wife a cuſtomary tenant of the manor, and had iſſue, and overlived her, he ſhould be tenant by the curteſy; a man married a woman to whom a cuſtomary tenement did deſcend during the coverture, and had iſſue and ſurvived her; yet it was there adjudg'd, that he ſhould not be tenant by the curteſy, becauſe the woman was not a cuſtomary tenant at the time of the marriage, and ſo not within the cuſtom, which ſhall be taken ſtrictly. Now admitting that caſe to be law, it does not affect the preſent caſe; for there is a particular cuſtom, which gives the eſtate to the huſband under particular qualifications; but here the cuſtom alters the deſcent by the common law to the eldeſt ſon, and carries it to the youngeſt ſon generally, and muſt have all the conſequences of deſcent, only with the difference of the perſon. This expoſition of the cuſtom will tend to quiet and ſettle eſtates and titles in *Borough Engliſh* lands. Whereas, if the other opinion ſhould prevail, it would unſettle them; but by this reſolution they will be left on certain and ſettled foundations.

Judgment for the plaintiff, *per totam curiam*.

Note, upon the firſt argument both *Holt* and *Powell* denied Sir *John Savage*'s caſe, 2 *Leon*. 109, 208. to be law.

Leaſe of *Borough Engliſh* to *A*. and his heirs during three lives, the youngeſt ſon ſhall have it.

Holt chief juſtice. It was adjudg'd in this court in one *Townſend*'s caſe, that where a leaſe was made to a man and his heirs, during three lives, of lands in *Borough Engliſh*, that the youngeſt ſon ſhould inherit that deſcendible freehold, though it were a new created eſtate; becauſe the cuſtom was ſo annexed to the land, as to affect that eſtate. So if a rent be granted out of lands of the nature of gavelkind or *Borough Engliſh* to a man and his heirs, it ſhall deſcend to the youngeſt, or all the ſons.

S. C. 2 Salk. 626. & 6 Mod. 95.

Arreſt on a Sunday of a priſoner eſcap'd by a judge's warrant.

Sir William Moore's Caſe.

MR. *Gould* mov'd to diſcharge a priſoner out of cuſtody, who was taken on a *Sunday* by virtue of a judge's warrant upon the late act of parliament to prevent eſcapes; but it was refuſed by the whole court.

Retaking on a Sunday by the marſhal.

Holt chief juſtice. We are all agreed in this court, that he ought not to be diſcharged, becauſe it is a retaking upon an eſcape, in nature of a freſh purſuit; and although the word warrant be mentioned in the ſtatute of *Charles* II. yet this warrant is not within the meaning of that ſtatute; for that ſtatute muſt be intended of an original taking, and not a retaking, as this is. And if we ſhould not allow this warrant to be executed upon a *Sunday*, the ſtatute would loſe a great part of its effect. The marſhal upon ſuch eſcape may retake a priſoner upon a *Sunday* without a warrant, much more ſhall it be lawful to retake him upon a *Sunday* by force of a warrant upon this ſtatute, which is intended in aid of the creditor. And this warrant being of a new nature, created by a ſubſequent ſtatute, cannot be intended within the intent of the ſtatute of *Charles* II. preceeding; for though a ſubſequent ſtatute may be comprehended within the meaning of an act preceedent, as the ſtatute of 32 *Henry* VIII. of wills within the ſtatute of 27 *Henry* VIII. of jointures; yet that is, when the latter ſtatute is within the ſame reaſon as the former, which this is not. The defendant has done a wrong by eſcaping, and he ought not to be ſuffered to take advantage of it: the words of this act are general without any limitation as to time. The judges of the Common Pleas are of another opinion, but I cannot ſatisfy myſelf with their reaſons. I think the better day the better deed.

Powell juſtice agreed *in omnibus*. This act was made to ſuppreſs a miſchief, and ought to be extended.

Per curiam, bring your *audita querela*, and then you may have this matter ſettled at this parliament.

The barons of the Exchequer, as I was inform'd, are equally divided.

There was the like motion before this term, and the court were then of the ſame mind.

Regina *verſ.* Langley.

S. C. Salk. 697. You, Mr. Mayor, I care not a fart for you, not indictable. Comb. 46, 66.

THE defendant was indicted, for ſpeaking certain words of the mayor of *Saliſbury*, *viz.* "You, Mr. Mayor, I care not " a fart for you," at one day; and on another day, " You are a " rogue and a raſcal." And to this indictment the defendant demurred.

Mr. *Ward*. No indictment lies for theſe words, for although they are laid to be ſpoken of the mayor of *Saliſbury*, yet it does not appear they were ſpoken of him whilſt in the execution of his office. 1 *Roll. Rep.* 79. 11 *Co.* 95, 96, 97. A man cannot be impriſoned or fined for ſuch words ſpoken of a magiſtrate out of court, and then he cannot be indicted. 3 *Cro.* 78, 689. *Moore* 247. 1 *Ventr.* 16.

Mr. *Eyre*. The words are indictable, for they reflect upon the mayor's integrity, and arraign him of a crime, and it concerns the publick to maintain the honour of magiſtrates. 1 *Cro.* 503, 504. 2 *Bulſtr.* 139, 140.

Holt chief juſtice. The mayor had done well, if he had bound the defendant over to his good behaviour. It is a diſparagement of the government, who put an ill man into office.

Powell juſtice. If the mayor had been in the execution of his office, he might have committed the defendant; and the difference of the officer's being in execution of his office or not is taken in caſes of juſtification in falſe impriſonment, or on a *habeas corpus*, where the party is brought up in cuſtody. But what remedy is there when the officer cannot commit the offender? What is the meaning of the words in a commiſſion of *oyer* and *terminer*, *et de propalationibus verborum*?

Holt chief juſtice. They mean words againſt the government, or which amount to a *ſcandalum magnatum*. But this is an extraordinary thing to indict a man for theſe words.

At another day in *Michaelmas* term Mr. *Mountague* inſiſted, that it is an offenſe indictable; for it is laid, that the defendant ſpoke the words to the mayor, being then in *Sarum*. So that, though he was not in the execution of his office, yet he was within his juriſdiction, wherein he is always in execution of his office, and the words relate to his office.

Mr. *Ward* ſaid, there is a difference between an officer appointed by the Queen, as a juſtice of peace, and an officer elected by a corporation.

Holt chief juſtice. It does not appear, that the mayor of *Sarum* is a man of worſhip, that he is a juſtice of peace; for though he be a mayor, it does not follow, that he is a juſtice; for that muſt be by a particular grant in the charter.

Note, the book is *contra*.

Gould juſtice. See *Darby*'s caſe, 3 *Mod.* 139. "You are a "buffle-headed juſtice," and held not indictable, and yet they were ſpoken to his face.

Powys juſtice agreed. See 1 *Ventr.* 16.

Powell juſtice. Theſe words ſpoken to the mayor's face tend to the breach of the peace.

Holt chief juſtice. They are not a breach of the peace, but they may provoke to it. But I do not know what power Mr. *Mayor* has.

Powell juſtice. He is the head of the body politic, and it is an office which concerns the government.

Bound over, for ſpeaking words, to his good behaviour.

Holt chief juſtice. Theſe words do not tend more to the breach of the peace, whether ſpoken in his preſence or abſence, to himſelf, or to ſome other perſon. A magiſtrate may commit the party for ſpeaking ſuch words, if he refuſe to find ſureties for his good behaviour; but ſuch commitment muſt be made preſently.

This term the indictment was quaſh'd, *Powel mutata opinione*.

Holt chief juſtice. I am not ſatisfied that theſe words will maintain an indictment. It is not ſaid, that the mayor is a juſtice of peace, nor that he was in the execution of his office. Theſe words are cauſe to bind the defendant to his good behaviour. If the defendant had abus'd him in writing, that would have been indictable; as is *Somer*'s caſe, 1 *Sid.* 270, 271. 1 *Lev.* 139. for that is a libel; and the mayor might alſo have his action. A man was indicted for ſaying of an alderman, that whenever he put on his gown *Satan* entred into him; but it was quaſh'd, as not being indictable. See 1 *Ventr.* 16.

Powell juſtice. Words that tend directly to the breach of the peace are indictable.

Holt chief juſtice. Yes, if one man challenges another.

Powell juſtice. They are rude words. The mayor ſhould have bound him to his good behaviour.

Let the indictment be quaſh'd, *per totam curiam.*

Ruſſell *verſ.* Corne.

IN treſpaſs, aſſault and battery, brought by *baron* and *feme*, for the battery of the wife; there are ſeveral counts laid in the declaration, which are ſingly for the battery of the wife. But there is one count for beating her, *per quod negotia ipſius* the huſband *infecta remanſerunt*, and concludes, *ad damnum ipſorum.* Upon not guilty pleaded a verdict was given for the plaintiff, and intire damages. Mr. *Mountague* took an exception in arreſt of judgment, that the huſband and wife cannot join, as this count is laid; for the wife cannot join for the damage accruing to the huſband by the loſs and delay of his buſineſs, in which ſhe has no intereſt.

S. C. Salk. 119.
S. C. 6 Mod. 127.
Aſſault and battery by *baron* and *feme*, for beating the *feme*, *per quod negotia* of the huſband, *&c.*
11 Mod. 265.
Godb. 369.
Sid. 346.

Serjeant *Darnall* for the plaintiff ſaid, the *git* of the action is the aſſault of the wife, and the *per quod, &c.* is only in aggravation of damages.

Holt chief juſtice. If it had been, *per quod conſortium amiſit*, the wife could not have been joined.

Powell juſtice. There the *per quod, &c.* is the *git* of the action, to intitle the husband to maintain an action alone without his wife. But now as this caſe is, I will not intend, that the judge allowed any evidence to be given as to the ſpecial damage to the huſband; but only admitted proof as to the battery.

Holt chief juſtice. I remember a caſe, where an action of ſlander was brought by *baron* and *feme* for words ſpoken of the wife, *per quod* the husband loſt his trade; and it was held, that if the words would maintain an action without the ſpecial damage, then they ſhould have judgment; but if the words were not actionable without the ſpecial damage, then it was ill: for the wife ought not to be join'd. See 1 *Lev.* 140. Suppoſe the husband was at charge upon this occaſion, he may give it in evidence. *Gould* juſtice remembered the ſame caſe.

At another day *Powell* juſtice ſaid, I do not know what they mean by ſaying, *per quod negotia ſua infecta, &c.* a woman is to comfort her huſband. In this caſe the *git* of the action is not the *per quod*; but if the huſband had brought the action, then it would have been the *git*.

Gould juſtice. There was a caſe in this court *Paſch.* 7 *Will.* 3. treſpaſs was brought by the *baron* alone for breaking his houſe, and beating and wounding his wife, and impriſoning of her for three hours, and alſo for detaining the poſſeſſion of the houſe, and for menacing his wife and ſervants, *per quod negotia ſua infecta remanſerunt.* I mov'd in arreſt of judgment, that for ſome of theſe wrongs, as the beating and impriſoning the wife, the wife ought to be joined; but judgment was given for the plaintiff by *Eyre* and *Rokeby*, *dubitante Holt*, for they held, that the *per quod* went through the whole count.

Treſpaſs for matters jointly, which would not lie ſingly.

Holt chief juſtice. An action of treſpaſs may lie for a matter jointly with others, which could not be maintained ſingly. As a man may have an action of treſpaſs for entring his houſe and beating his ſervant, without ſaying, *per quod ſervitium amiſit*, becauſe the beating the ſervant is part of the ſame treſpaſs, and only a deſcription of it by way of aggravation. But if he lay it in another count, and at another day; it will be ill, without ſaying *per quod ſervitium amiſit.* So a man cannot maintain an action againſt another for aſſaulting his daughter and getting her with child; but he may maintain an action againſt another for entring his houſe and aſſaulting and getting his daughter with child *per quod ſervitium amiſit*, and that is a great aggravation.

Let the plaintiff take his judgment, *niſi, &c.*

Orchard *verſ.* Ireland.

Jan. 28, 1703.

THE plaintiff brought an action of debt againſt the defendant upon a bond, conditioned for the payment of money at a day long ſince paſt. Upon which Mr. *Raymond* moved, that upon payment of principal, intereſt, and ſuch coſts as the maſter ſhould tax, proceedings ſhould be ſtaid in this action. Mr. *Mountague* oppoſed it, becauſe the defendant was indebted to the plaintiff upon a ſimple contract, to which the defendant threatened he would plead the ſtatute of limitations, it being above ſix years ſince the debt was contracted, and no reviver ſince; and therefore ſince this motion was not for a matter of right, but for a favour, and it was in the diſcretion of the court, whether they would grant it or not, he inſiſted, that if the defendant would have equity, he muſt do equity; and therefore hoped the court would not refer this action, unleſs the defendant would alſo wave his plea of the ſtatute of limitations, or refer that cauſe of action to the maſter, as well as the other. But the court granted the motion, and ſaid the debts were diſtinct, and the plaintiff by his own negligence had loſt the ſimple contract debt, and it was not in their power to deprive the defendant of the benefit of the ſtatute, which the law had given him.

If debt is brought againſt the defendant on a bond, conditioned for payment of money, though he owes other money to the plaintiff on ſimple contract, which is loſt by the ſtatute, the court will refer what is due on the bond, without compelling him to conſent to wave the benefit of the ſtatute.
2 Salk. 597.
Stat. 4, 5 Ann. c. 16. ſ. 13.

Eaſter

Eaſter Term

3 Annae reginae, B. R. 1704.

Regina *verſ.* Lane.

S. C. 3 Salk. 190.
6 Mod. 128.
Indictment on 5 Eliz. ought conclude *contra pacem.*

MR. *Pengelly* moved to quaſh an indictment on the 5 of *Eliz.* for exerciſing the trade of a barber, not having been an apprentice ſeven years, *&c.* becauſe the indictment did not conclude *contra pacem.*

Vide 1 Salk. 67. 2 Salk. 613. 6 Mod. 220. 4 Mod. 145, 146, 164. *Poſt.* 10, 39, 1104.

Holt chief juſtice, *et caeteri praeter Powell,* that there was no great reaſon for the exception.

Powell juſtice. Every act done contrary to the law is a breach of the publick peace.

The indictment was quaſhed.

Smith *verſ.* Ayrey.

S. C. 3 Salk. 14, 175.
6 Mod. 128.
Holt 329.
Money won at play.
12 Mod. 81.
Lutw. 180.
5 Mod. 14.
1 Salk. 23.
2 Show. 82.
3 Lev. 118.
2 Vent. 157.
Carth. 336.
10 Mod. 312.

IN an action upon the caſe for money won at play, the plaintiff in his declaration laid ſeveral counts: the firſt was on mutual promiſes, in conſideration that the plaintiff had promiſed the defendant to pay him ſo much as he ſhould win of the plaintiff, the defendant promiſed the plaintiff to pay him what he ſhould win, *&c.* and avers, that he won 16*l.* 15*s.* 6*d.* and then comes the ſecond count, *cumque etiam idem* the plaintiff *poſtea ſcilicet eiſdem die et anno apud London praedictum, ad ludum praedictum, al'* 16*l.* 15*s.* 6*d. de eodem* the defendant *lucrifecit et adeptus fuit*; *et in conſideratione inde idem* the defendant *ſuper ſe aſſumpſit, &c. ſolvere eandem ſummam, &c.* To this declaration the defendant pleaded *non aſſumpſit,* and there was a verdict for the plaintiff, and intire damages. And Mr. *Southhouſe* moved in arreſt of judgment, that this ſecond count was not good, and therefore damages being intire, the judgment ought to be arreſted.

Indebitatus aſſumpſit does not lie for money won at play.

1 Ventr. 152. Hardr. 485.

Holt chief juſtice ſaid, that winning money at play did not raiſe a debt, nor was debt ever brought for money won at play, and an *indebitatus aſſumpſit* would not lie for it; but the only ground of the action in ſuch caſes, was the mutual promiſes. That though there were a promiſe, yet debt would not lie upon that. That he remembred a caſe brought before *Hale* in the Exchequer, and the ſame caſe was brought again before him here, *viz.* an *indebitatus aſſumpſit* againſt the acceptor of a bill of exchange, and declared that he was indebted to the plaintiff in ſo much upon the acceptance of a bill of exchange; but it was held, that the action would not lie; and yet there was a promiſe in that caſe.

Mr. *Parker* in anſwer to the objection ſaid, 1. That this muſt be tied to the firſt count, and the mutual promiſes muſt be taken in here, all one as if they had been repeated; and this play muſt be taken to have been upon the agreement, it being ſaid *ad ludum praedictum.* 2. That after a verdict, it muſt be intended, that there were mutual promiſes; for the jury had found, that the plaintiff had won the money, which he could not do, except there were mutual promiſes. But *Holt* held, that the ſecond count is a diſtinct independent declaration, and cannot be mended by the firſt; and that the other matter was but an implication.

Powell juſtice ſaid, that it was adjudged in the Exchequer chamber, that an *indebitatus aſſumpſit* would lie for money won at play: that that differs from the caſe of an *indebitatus aſſumpſit* upon a bill of exchange, becauſe there the promiſe was raiſed by cuſtom. But *Holt* ſaid, that yet there was a promiſe.

Gould juſtice agreed, that there was ſuch a caſe as *Powell* cited, adjudged in the Exchequer chamber, but that in this court judgment had been arreſted in ſuch a caſe. And *Holt* ſaid, that he had done it himſelf.

Darnall Queen's ſerjeant ſaid, that in a caſe in the Common Pleas, in which he was council, judgment had been arreſted in ſuch a caſe, upon debate; and the caſe cited by *Powell* in the Exchequer chamber was cited in that caſe in the Common Pleas, and, as he thought, the very roll brought into court. Which *Gould* juſtice agreed.

Then *Powell* juſtice ſaid, that he only remembred, that there was ſuch a caſe in the Exchequer chamber, but that he thought the action could hardly be maintained. That that caſe in the Exchequer chamber was before he was a judge, and that judgment muſt ſtay till it was moved of the other ſide.

Regina *verſ.* Goodenough.

If the defendant pleads three years poſſeſſion in ſtay of reſtitution upon an inquiſition of forcible entry, according to 31 Eliz. c. 11. and it is found againſt him, he muſt pay coſts, for the ſtatute has given coſts in expreſs words.

AN inquiſition of forcible entry found before a juſtice of peace in the country, was removed in the King's Bench by *certiorari.* And in ſtay of reſtitution, the defendant pleaded poſſeſſion by three years before the indictment found, according to the 31 *Eliz. c.* 11. And upon a traverſe to the plea, it was found againſt the defendant. And now upon motion to the court by Mr. *Lechmere,* that the defendant ought not to pay coſts in this caſe, the court upon view of the ſtatute ordered the maſter to tax coſts. And *Holt* chief juſtice ſaid, that by the 8 *Hen.* 6. immediately upon the finding the inquiſition of forcible entry, the juſtice was to award reſtitution, and the defendant had no plea to it. And now the ſtatute of 31 *Eliz.* had given the defendant the plea of three years quiet poſſeſſion in bar of reſtitution; but in caſe the plea was found againſt him, it had given coſts in expreſs words. As to the ſtatute of 5 & 6 *Will.* & *Mar. cap.* 11. he did not take it to be within the ſtatute, becauſe the inquiſition was not found at the ſeſſions; but if it had been found at the ſeſſions, and removed from thence by *certiorari,* the defendant muſt have paid coſts by the ſtatute.

Treviban *verſ.* Lawrence.

Intr. *Hil.* 1 *Ann.* B. R. Rot. 221.

Eſtoppel in point tried.
S. C. 1 Salk 276.
6 Mod. 256.
3 Salk. 151.
2 Brownl. 150.

Note, the plea was of that term, but it being an iſſuable plea, it went down to the aſſiſes; and the day in bank was *Tres Mich.* at which day the plaintiff had his judgment.

AN ejectment upon the demiſe of *Richard Vivian* clerk, and upon not guilty pleaded, the jury find a ſpecial verdict, that one *Stephen Robins* gentleman was ſeiſed in fee of the tenements in queſtion; and being ſo ſeiſed, one *Humphrey May* in the year of our Lord 1656, in the court of upper bench, recovered a judgment for 127*l.* 1*d.* againſt the ſame *Stephen Robins:* and they find the record of the judgment *in haec verba, Trinity* term 1656, &c. and they farther find, that in *Hilary* term 13 *Will.* 3. a *ſcire facias* iſſued to the ſheriff of *Cornwall* out of the King's Bench, reciting, that whereas one *Humphrey May* in *Trinity* term 1656, in the court of upper bench, had recovered a judgment againſt *Stephen Robins* for 127 *l.* 1 *d.* and after the ſaid *Humphrey* died inteſtate, and adminiſtration was committed to *Richard Vivian* clerk; and alſo the ſaid *Stephen Robins* died ſeiſed of ſeveral lands and tenements in his demeſne as of fee; it commanded the ſheriff, to warn the tenants of all the lands and tenements in his bailiwick, of which the ſaid *Stephen* was ſeiſed the 6 of *June* 1656, which was the day of the judgment given, or ever ſince, to ſhew cauſe, &

&c. the ſheriff returned *ſcire feci* to *Thomas Lawrence, &c.* to be at *W. &c.* and that there were no other tenants of any tenements of *Robins*, which he had the day of the judgment given, *&c.* and the jury further find, that *Thomas Lawrence, &c.* appeared of that term, of which the writ was returned; and *Vivian* produced his letters of adminiſtration, *quae commiſſionem adminiſtrationis praedictae in forma praedicta teſtantur*, and prayed execution: the defendants pleaded, no ſuch record of the judgment: the plaintiff replied, *quod habebatur tale recordum recuperationis debiti et damnorum praedictorum, quale per idem breve ſuperius ſupponitur, prout per recordum inde inter recorda ejuſdem curiae de termino ſanctae Trinitatis, anno Domini* 1656, *Rot.* 1036, *in curia dicti nuper regis, coram ipſo nuper rege tunc reſidens liquebat et apparebat:* and upon a day given to bring in the record, it was brought in, and judgment was given for the plaintiff, *pro eo quod videbatur eidem curiae, quod habitum fuit tale recordum recuperationis debiti et damnorum praedictorum, quale per breve de ſcire facias praedictum ſuperius ſupponitur*; that he ſhould have execution againſt the defendant, and 6 *l.* for his coſts: the jury further find, that the plaintiff at his prayer, and upon his election, had an *elegit* awarded, and upon that an inquiſition was taken, and the lands in queſtion extended, and delivered to the leſſor of the plaintiff, to hold as his freehold, until the debt was ſatisfied: whereupon the leſſor of the plaintiff entered into the lands in queſtion, and made the leaſe to the plaintiff, *prout, &c.* and if for the plaintiff, for the plaintiff: and if the defendant, for the defendant.

Note, That before the opening of the caſe Mr. *Broderick* of counſel with the defendant, complained of an irregularity in drawing up the ſpecial verdict; for that the *ſcire facias* and proceedings upon it were entered up as found in the ſpecial verdict, different from what in truth they were. For that in the record of the *ſcire facias*, in the plaintiff's letters of adminiſtration there was the ſame fault committed, which was in the caſe of *Adams verſ.* the terre-tenants of *Savage*, which the plaintiff had now deprived the defendant of taking the advantage of, by entring the commiſſion of adminiſtration generally, without ſaying by whom, but only that *poſt ejus mortem adminiſtratio, &c. cuidam Richardo Vivian clerico creditori principali praedicti Humfridi* 8 *Jan. anno regni noſtri* 13, *apud St. Evall praedictum, debita legis forma commiſſa fuit.* But becauſe this objection ought to have been made at the drawing up, and ſettling the ſpecial verdict, and was now too late to be made; and becauſe, though it was not according to the fact, yet it made no alteration in the merits of the cauſe, the court ſaid, it ſhould ſtand as it was. *Poſt.* 1048.

Mich.

Mich. Term

3 Annae Reginae, B. R. 1704.

Grant of the office of chamberlain of the King's Bench priſon, is void, becauſe it is an incident inſeparable from the office of marſhal.

A Motion was made on the behalf of one, who had a grant of the office of chamberlain of the King's Bench priſon, to admit him to the office, the marſhal refuſing to let him have the exerciſe of it.

But *Holt* chief juſtice ſeemed to be of opinion, that the grant of the office was void, it being an incident inſeparable from the office of marſhal; becauſe the marſhal is reſponſible for the chamberlain's well demeaning himſelf, and conſequently, though upon the grant of the office of marſhal, the granting this office was reſerved, ſuch a reſervation would be void.

But however, this was ſuch an office as the court would not take any notice of, and therefore they denied the motion.

Regina *verſ.* Franklyn.

S. C. Salk. 370. Cro. Jac. 19, 20 Cro Eliz. 635, 108. p. 3. 4 Rep. 41, 42.

MR. *Eyre* moved, to quaſh an indictment againſt the defendant, for exerciſing the trade of a goldſmith, not having ſerved ſeven years apprenticeſhip according to the ſtatute, *&c.*

Firſt, Becauſe by the 31 *Eliz. cap.* 5. *ſect.* 5. all indictments, *&c.* upon penal laws, where a moiety of the forfeiture is given to the informer, muſt be exhibited within a year after the offenſe committed; and here it appeared upon the face of the indictment, that the offenſe was committed above a year before the ſeſſions in which this indictment was found. But upon looking into the ſtatute it appeared expreſly, that the Queen had two years to proſecute in ſuch caſes after the informer's year, and conſequently this being an indictment, the exception was held to be frivolous.

Secondly, that this indictment was found at a ſeſſions for the borough of *Portſmouth*, and by the ſame ſtatute, *ſect.* 7. theſe proſecutions are reſtrained to the quarter-ſeſſions of the county. And for this two caſes were cited, where indictments had been quaſh'd for this reaſon; which the court agreed, but ſaid, that ſince that, upon debate they had held an indictment upon this ſtatute in a ſeſſions for a borough to be well. (Note, the words of the ſtatute are only, "and not in any wiſe out of the ſame county, where "ſuch offenſe ſhall happen, or be committed.")

At ſeſſions in borough.

Ante 514, 1034.

Thirdly, the caption was *preſentant exiſtit*, for *preſentant*; and this being in another term was not amendable, and for this it was quaſh'd. *Tueſday* 24 *October*.

Preſentant exiſtit.
4 Mod. 343.
1 Salk. 371.

Holt chief juſtice ſaid in this caſe, that it might be a queſtion, whether or no the whole forfeiture ſhould not go to the Queen, and ſhe ſhould have the whole 40*s.* *per* month. If a ſtatute inflicts a forfeiture of ſo much in a groſs ſum, and then diſtributes one part of the forfeiture to the Queen, and the other to the proſecutor, if the proſecutor will ſue, he ſhall have half, but if he will not ſue, the Queen ſhall have the whole forfeiture; for the ſtatute makes the whole forfeited.

The whole forfeiture goes to the Queen, if the informer does not ſue.

Purſlow *verſ.* Baily.

Intr. *Paſch.* 3 *Ann.* Rot. 178.

TO an action of treſpaſs the defendant pleaded a *parol* ſubmiſſion to an award, and that the arbitrators awarded, that the defendant ſhould provide a couple of pullets to be eaten at his houſe in ſatisfaction of the treſpaſs, and avers, that he did provide a couple of pullets to be eaten at his houſe, and the plaintiff did not come. The plaintiff replied another award. And the defendant tendered iſſue upon it. And the plaintiff demurred.

S. C. Salk. 76.
S. C. 6 Mod. 221.

It was inſiſted by Mr. *Whitaker* for the plaintiff, firſt, that the award was no plea, at leaſt not without performance. But ſecondly, if it were a good plea with performance pleaded, the performance here was not well pleaded, becauſe he ought to have pleaded, that he gave the plaintiff notice of the time they were to be eaten; and alſo he had laid no *venue* where the performance was.

9 Co. 79.
Keilw. 120.
19 E. 4. 10.
46 E. 3. 17 b.
16 E. 4. 8.
1 Ro. Ab. 128.

Holt chief juſtice was of opinion, that the plea was good without performance, and therefore all the other exceptions were out

7 Hen. 6. 36.
2 Ventr. 254.

of the caſe. And though he agreed there was a difference in the old books, which Mr. *Whitaker* cited, between where money was awarded, and where a collateral matter; becauſe the law was taken then, where a collateral matter was awarded the plaintiff had no remedy upon a *parol* ſubmiſſion to compel performance, as he had where money was awarded; for he might have debt for that: yet now he held the law to be otherwiſe, for as the law is now, the party might have an action upon the caſe for the breach of his promiſe in non-performance of the award. For the ſubmiſſion is an actual mutual promiſe to perform the award of the arbitrators; and in ſuch actions, while he was a practiſer, and ſince he had been judge, the ſubmiſſion had been always held ſufficient evidence to maintain the action. And if ſo, then it is within the ſame reaſon, as where a ſubmiſſion is by bond, and a collateral matter is awarded; or where, upon a *parol* ſubmiſſion, money is awarded; in which caſes the award is a good plea without performance, in regard the party has a remedy to compel it.

Powell juſtice ſeemed to have a reſpect for the old difference, and yet allowed, that an action might be maintained upon a *parol* ſubmiſſion, upon non-performance (*quod mirum videtur*); but he held, that the performance was well pleaded.

But the court would not give judgment, but exhorted the parties to eat the pullets together; which they would have done at firſt, if they had had any brains.

Want of a venue aided.

As to the *venue*, *Holt* ſaid, that was aided by pleading over, as if in debt on a bond no *venue* is laid where the bond was made, if the defendant pleads a releaſe, this admits the bond, and aids the want of a *venue*. *Adjournatur*.

1 Salk. 331, 404.
Sid 180.
Lev. 156, 311.
2 Keb. 129.
1 Cro. 46.
Freem. 124. p. 122, 260, 314, 317, 387,
12 Mod. 598
Ante 211, 223
6 Mod 303.
11 Mod 7.
Saund. 74.
Gilb Hiſt. C. B. 152, 153.
Poſt. 1310.

Davis *verſ*. Stannion. Ante, 795.

A Writ of error of a judgment given in the *Marſhalſea*, wherein the plaintiff declared, that whereas he the plaintiff *apud M. infra*, &c. had put his horſe to the defendant, who was a common innkeeper, ſafely to keep him, and ſafely to re-deliver, *pro rationabili pretio* to be paid by the plaintiff to the defendant, he the defendant *eiſdem die anno et loco adtunc et ibidem praedictis, ſpadonem praedictum tam negligenter cuſtodivit, quod ſpado praedictus adeo graviter equitatus fuit et verberatus, quod totaliter ſpoliatus fuit, ad damnum*, &c. judgment was given for the plaintiff below. And now upon the writ of error this exception was taken, that it did not appear, that this immoderate riding and beating was within the juriſdiction, which ought to have been preciſely averred; for that the court would never intend any thing to be within the juriſdiction of an inferior court, that was not poſitively averred ſo to be; and wherever two matters were laid in a declaration as the foundation of the plaintiff's action, and one was laid to be within the juriſdiction, and the other not, that is ill. As in an *indebitatus aſſumpſit* if the promiſe is laid within the juriſdiction, but either no place is laid for the being indebted, or a place which is not averred to be within the juriſdiction, the declaration is ill. To which purpoſe there are many caſes. So in an action on the caſe for calling the plaintiff whore, *per quod* ſhe loſt her cuſtomers, the words were laid to be ſpoke within the juriſdiction, but the loſs of the cuſtomers was out of the juriſdiction, the action was held not to lie within the inferior juriſdiction. 1 *Sid.* 95.

All this was agreed by the counſel for the defendant in error; but then they inſiſted, that the immoderate riding and beating the horſe was laid only in aggravation of damages, and if that ſpecial matter had been left out, the action would have well lain for ſo negligently keeping his horſe, *quod totaliter ſpoliatus fuit.* For this defendant being a common innkeeper, and having a reward for keeping this horſe, he is according to the reſolution of *Cogg*'s and *Bernard*'s caſe bound to keep and deliver the horſe ſafely *Ante* 909. again, and is chargeable for not doing ſo, without ſhewing any ſpecial neglect. So that the defendant in this caſe is chargeable in an action upon the bare *nonfeaſance*, without the *misfeaſance* of immoderate riding and abuſing the horſe, which is put in only to induce the jury to give greater damages. And that the action would lie without the ſpecial matter, a writ was cited in the *Regiſter* 110. *b.* where the allegation was only general, *quod* the defendant *tam negligenter*, *&c.* *cuſtodivit*, *&c.* *quod oves multipliciter deterioratae fuerunt*, which could not be good, if a ſpecial damage were neceſſary to be ſhewn. And if that be ſo, then according to the agreed difference in all the books, though the matter, which is added in aggravation of damages, be out of the juriſdiction, yet the jury may well inquire of it, and it is well as long as the matter which is the *git* of the action is alleged to be within the juriſdiction. Otherwiſe, if any part of the matter, which is neceſſary to maintain the action be out of the juriſdiction. And to warrant this difference were cited 20 *H.* 6. 14. 37 *H.* 6. 2, 3. 1 *Jones* 448. *March* 47. 1 *Jones* 450. 1 *Cro.* 510. 1 *Sid.* 342. 2 *Keb.* 267.

To this it was urged for the plaintiff, that there muſt be a fact alleged, as an inſtance of the neglect and damage; and ſuch a general declaration, as had been put by the counſel for the defendant, would not have been good. And if that be neceſſary, there muſt be a place laid, where that ſpecial fact was done.

The court affirmed the judgment. And *Holt* chief juſtice ſaid, ſuppoſe the declaration had been, that the defendant ſo negligently kept the horſe, that he was taken out of the ſtable, and rode a journey into *Somerſetſhire*, *per quod* he was much damnified; yet the action might have been well maintained in that inferior court. For conſider what ſort of neglect this could be, it muſt have either been ſuffering the horſe to be taken out of the ſtable, and then abuſed; or elſe ſuffering him to be abuſed in the ſtable; and which ever of theſe it was, the neglect was at the ſtable, in the juriſdiction, by ſuffering the horſe to be taken out of the ſtable; or more apparently if he were abuſed in the ſtable. So if the neglect was ſtarving him, as I remember an hoſtler that uſed to greaſe the horſes teeth, to hinder them from eating their oats. The default is at the ſtable.

Powell juſtice. The cauſe of action is laid well enough. It is a good declaration, leaving out the ſpecial matter, upon the neglect. If the declaration had been as my lord chief juſtice has put the caſe, that the horſe was rid into *Somerſetſhire*, and there beat, that is triable below; becauſe the neglect is within the inferior juriſdiction, which is the letting the horſe be carried out of the ſtable. This is only ſhewing the manner of the neglect.

Upon a former argument of this caſe *Holt* chief juſtice ſaid, that if that declaration had been here, the defendant could not have demurred, becauſe no *venue* was laid for the immoderate riding. He ſaid alſo, that the caſe of the taylor in *Jones* and *Croke* differs from this, becauſe there the words were actionable of themſelves, and ſo the other matter merely laid in aggravation of damages. At the ſame time *Powell* juſtice ſaid, that the caſe of the *indebitatus aſſumpſit* differed; becauſe both the being indebted, and the promiſe, are neceſſary to maintain the action. And ſo in treſpaſs by the maſter for beating his ſervant, *per quod ſervitium amiſit*; becauſe the *per quod* was neceſſary to maintain the action. But here the *git* of the action is only the neglect, though the plaintiff muſt ſhew how he is damnified.

Mr. *Raymond* and Mr. *Cheſhyre* for the plaintiff in error; Mr. *Ward* and Mr. *Mountague* for the defendant.

Robert *verſ.* Harnage.

S. C. Salk. 659. S. C. 6 Mod. 228. Variance.

IN an action of debt upon a bond, the plaintiff declared in common form, *quod cum* the defendant ſuch a day, *&c. apud London in parochia beatae Mariae de arcubus in warda de Cheape per ſcriptum, &c. cognovit ſe teneri, &c. ſolvendum eidem* the plaintiff, *&c.* Upon *oyer* the bond was ſet out, and was thus (as far as concerned the preſent queſtion) *viz.* the *ſolvendum* was to the lawful attorney of the plaintiff, or his aſſigns; and the bond concluded thus: ſealed with my ſeal, and dated in *Fort St. Davids* in the *Eaſt Indies*, ſuch a day, *&c.* After *oyer* the defendant pleaded the variance in the *ſolvendum* in abatement, and the plaintiff demurred.

As to the variance mentioned in the plea Mr. *Broderick* ſaid, that by the firſt words of *Noverint, &c. me J. S. teneri, &c. J. N.* there is a debt ſufficiently raiſed to *J. N.* and though the *ſolvendum* be to *J. S.* as the book of 4 *Edw.* 4. 29. is, or to a ſtranger, as the caſe is in 1 *Sid.* 295. 2 *Keble* 81. or as it is here, to the attorney, or aſſigns of the obligee, the *ſolvendum* is void. And by the firſt words the debt is created, and conſequently the money payable to *J. N.* 4 *Edw.* 4. 1 *Sid.* and 2 *Keble*, *ubi ſupra*, which was agreed by the court. And beſides *Holt* ſaid, that payment to his attorney, or to a perſon appointed by him, is a payment to himſelf, and ſo that was well enough.

Then Mr. *Parker* ſhewed another variance, *viz.* that the bond was dated at *Fort St. Davids* in the *Eaſt Indies*, but the declaration was upon a bond dated *apud London, &c.* and ſo not the ſame bond.

Mr. *Broderick* ſaid, that the place was laid as a *venue*, and not as the place of making the bond.

Ante, 185.

Holt chief juſtice. Always where a bond has a place of date mentioned in the bond, you muſt make your declaration agree with it. Here the bond is mentioned to be dated at *Fort St. Davids* in the *Eaſt Indies*; therefore in your declaration you ſhould have ſaid, that the defendant *apud Fort St. Davids* in the *Eaſt Indies*, *viz. apud London in parochia beatae Mariae de arcubus, &c. per ſcriptum, &c.*

Powell juſtice. Dating a bond makes it local. You ſhould have declared, that the defendant *apud Fort St. Davids, &c. ut ſupra.*

The court gave Mr. *Broderick* time to try if he could make it good. But he the next day deſpairing to make it good, moved to abate their own writ for expedition. And it was abated accordingly.

Wells *verſ.* Oſman.

S. C. 6 Mod. 258.
Libel in the admiralty for wages due in the river.
Vide 1 Salk. 31, 33.
2 Salk. 424.
3 Mod. 244.

UPON a motion for a prohibition to the admiralty, in a ſuit there for ſeamens wages, the caſe appeared to be thus. *Wells* the plaintiff built a ſhip and launched her, and after upon a treaty between him and one *Barell*, who was to buy the ſhip of him, in order to get to be maſter of her (as is uſual in ſuch caſes) but before any bill of ſale executed by *Wells* to him, *Barell* hires *Oſman* and other ſeamen to launch and rig the ſhip, and to go with him in this ſhip a voyage propoſed, and ſends them aboard the ſhip, and *Wells* permits them to come aboard; and there the ſeamen continued for four months, fitting the ſhip out to go to ſea: but after upon ſome difference between *Barell* and *Wells*, the treaty for the ſhip was broke off, and the things fetch'd from ſhipboard, and the ſeamen diſcharged, having never been with the ſhip any lower than *Deptford*, where the ſhip lay, when they went aboard. And now the ſeamen libelled in the admiralty againſt the body of the ſhip for their wages, and upon a ſuggeſtion that the work and labour was done *infra corpus comitatus*, Mr. *Eyre* and Mr. *Whitaker* moved for a prohibition. And they grounded their motion upon this, that though here was a voyage intended, yet no voyage having been made, the mariners could not ſue in the admiralty for their wages. For the reaſon of the juriſdiction of the admiralty is, becauſe the ſuit is for wages for work and labour done upon the high ſea, and that reaſon is given in 3 *Lev.* 60. which fails here, where all the work was done in the river of *Thames*. And that this was like the caſe of tackle bought in the river *Thames*, in which caſe in a ſuit in the admiralty againſt the body of the ſhip, a prohibition was granted. 3 *Keble* 552. But yet ſuch a contract made upon the high ſea, is within the admiralty's conuſance. It was objected alſo, that this was the common courſe of dealing between the ſhipbuilders and the maſters of ſhips; and that it would be very hard to ſubject the builders of ſhips to the ſeamens wages, where the contract never proceeded, the builder having nothing to do with the ſeamen; but they ſhould be put to their remedy againſt the maſter who contracted with them.

Holt chief juſtice. Suppoſe a maſter of a ſhip deſigns to go a voyage, and hires and takes aboard ſeamen in order to it; afterwards the owners cannot agree about ſending the ſhip the voyage, and upon that the ſeamen are diſcharged; ſhall not the ſeamen have the ſame remedy for their wages, they ſhould have had, if the ſhip had gone the voyage? The reaſon of the admiralty juriſdiction is, becauſe they are mariners, and they are equally intitled to their wages, as if they had gone the voyage, and therefore it is plain they ſhall have their remedy againſt the ſhip in that caſe for their wages. Then the matter is, if it makes any difference, that the ſhip was not ſold to owners, but was ſtill in the builder's hands. The builder permits the intended maſter to put ſeamen on board, and then he and the buyer differ; ſhall that take away the ſeamens remedy? No. The builder by permitting the ſeamen to be put on board, conſents to the charge upon the ſhip, and by his own act makes it liable to the wages. And there is no reaſon to conſider the builder, for when he truſts the contractor ſo far as to let the ſeamen go aboard, there is no reaſon to help him. The ground of this proceeding in the admiralty is uſage time out of mind.

Powell juſtice. It is clear, that ſeamen taken on board a ſhip in order to a voyage, though the voyage never proceeds, are equally intitled to their wages. And there is great reaſon why they ſhould have this remedy, becauſe in the admiralty the body of the ſhip is liable, and the ſeamen may join in action. They are hired for ſuch a voyage, and they look no farther, they do not concern themſelves with the property of the ſhip, nor are privy to the bill of ſale, or any other matters between the maſter and the builder; and therefore it would be hard for any thing that paſſes between the maſter and the builder to take away their remedy. And beſides, the builder might have taken ſecurity to be indemnified, before he let the ſeamen come aboard his ſhip, and by that means ſubjected it to a charge.

Beſides *Holt* chief juſtice ſaid, that upon the libel the matter appeared to them to be for ſeamens wages, and proper for the admiralty juriſdiction, and if the defendant below had any matter to plead, he might appeal. This was as to the defendant *Wells*'s property being not bound, as was pretended, to pay the ſeamens wages.

The motion was denied. Mr. *Dee* counſel for the defendant.

Davenant *verſ.* Raſtor.

Intr. *Trin.* 3 *Annae Reginae.* B. R. Rot. 54.

S. C. 3 Salk. 214. 6 Mod. 235. Holt 563. Releaſe of errors pleaded. 6 Mod. 113, 114, 206. 1 Sid. 84.

A Writ of error of a judgment in the Common Pleas, in an action of debt upon a bond for 600 *l.* and want of an original aſſigned for error; but the plaintiff in error had not taken out a *certiorari*, and got the want of the original certified. The entry of the judgment was, *quod querens recuperaſſet debitum praedictum et damna occaſione detentionis debiti illius ad, &c.* The defendant in error came in *gratis*, and pleaded, that the plaintiff *per ſcriptum ſuum, &c. datum* ſuch a day (which was after the judgment) *remiſiſſet, relaxaſſet, &c.* the errors in the judgment. The plaintiff craved *oyer* of the releaſe, and upon *oyer* it appeared to be a releaſe of all errors, &c. in a judgment for 600 *l.* debt, beſides coſts of ſuit. And after *oyer* he replied, that there were two judgments againſt the plaintiff for the ſame ſum, and that this releaſe was given of the errors in the other judgment, *abſque hoc*, that it was given of the errors in the judgment in queſtion. And to this there was a demurrer.

Traverſe bad. Trin. 10 Will. 3. *B. R.* Groenvelt verſ. Burwell. Ante, 465.

The court held the replication naught, becauſe the plaintiff did not in his plea ſet forth the record of the judgment ſpecial, as of what term, &c. but pleaded generally, *quod fuere duo judicia, &c.* And *Holt* chief juſtice held, that the traverſe too was naught, being a traverſe of an intent, like the traverſe of the *virtute cujus* in 1 *Saund.* 20, 21. *Bennett verſ. Filkins.* But that the plaintiff ought in his replication to have pleaded the judgment at large, and that the releaſe was of that judgment, *et hoc paratus eſt verificare.* But *Powell* juſtice held, that it was a good traverſe, for that nothing elſe could be traverſed in this caſe, but the intent of the releaſe. And *quaere per Salkeld* as to the opinion of *Holt*; for what would have been the difference, for the defendant could have only rejoined, that it was a releaſe of the judgment in queſtion, *et hoc petit quod inquiratur per patriam*, and then the intent of the releaſe muſt have been tried?

Then Mr. *Salkeld* took an exception to the plea, that it was *relaxaſſet*, which imported a time paſt, and might be ſeven years ago before the judgment. But to that the court anſwered, that it was *per factum ſuum datum* ſuch a day *relaxaſſet*, which tied it down to that day, which was after the judgment.

Then he took another exception, that there was a variance between the judgment recited in the releaſe, and the judgment upon which this writ of error was brought; for that the judgment recited in the releaſe was a judgment for 600 *l.* debt, and coſts; and the judgment before the court was for 600*l.* debt, and damages *pro detentione debiti*. He agreed, if it had been *damna* generally, it would have been well; becauſe *damna* ſignifies coſts, but here the ſenſe was determined to damages, by adding the words *pro detentione debiti*, and excluded coſts. Variance.

But to this it was anſwered and agreed by the court, that the conſtant form of entries of judgments in debt upon demurrer in the Common Pleas was thus, and that they gave coſts by the name of *damna pro detentione debiti*, and that the court would take notice of the form of entries in that court; though in caſe of judgments after a verdict in debt in that court, and in caſe of judgments either upon demurrer, or after a verdict, in debt in this court, the entry is *debitum ſuum praedictum necnon libras pro damnis ſuis que ſuſtinuit tam occaſione detentionis debiti illius, quam pro miſis et cuſtagiis ſuis, &c.* (Note, This ſeems to be the moſt proper entry.)

Ex relatione magiſtri Salkeld counſel with the plaintiff in error. And note, that he ſaid, that there was another great fault in the replication, which was not ſeen by Mr. *Eyre, viz.* that the pretended judgment was pleaded as a judgment *verſus praedictum Willielmum*, whereas the name of the plaintiff in error was *Robert*.

Holt chief juſtice ſaid alſo, that there was no variance, for the words of the releaſe are only 600*l.* beſides coſts of ſuit, which do not affirm poſitively, that there were any coſts of ſuit, nor can it be neceſſarily inferred from them.

Mr. *Eyre* ſaid, that admitting the variance in the releaſe, yet the court could not reverſe the judgment without examining the errors, and that the want of an original was not well aſſign'd. For that to make the aſſignment of that error compleat, the plaintiff ought to take out a *certiorari*, and get the want of the original return'd, and ſo ſatisfy the court, that there was no original.

To which *Holt* chief juſtice anſwered, that indeed true it is, that where the want of an original is aſſigned for error, the courſe is for the plaintiff in error, before he can bring in the defendant to plead to the errors, to ſue out a *certiorari*, and get a certificate, that there is no original. But if the defendant will come in *gratis* without proceſs, and plead a releaſe, he confeſſes the error; and if there be an original, he muſt take out a *certiorari*, and get it certified; or elſe it ſhall be taken that there is none, and the judgment revers'd.

The judgment was, *quod* the plaintiff *nil capiat per breve, niſi, &c.* within a fortnight.

See this caſe ſtirred again, and ſome exceptions taken, and the caſe ſtated from the record. *Poſt.* 1052.

Treviban *verſ.* Lawrence.

SEE the ſtate of the caſe. *Ante,* 1036.

It was argued on the behalf of the plaintiff in the ejectment, that the judgment in the *ſcire facias* made ſuch an alteration, that it put the original judgment out of the caſe, and was of itſelf without that a ſufficient title for the plaintiff: and therefore, though the judgment, which they had given in evidence, did vary from the judgment recited in the *ſcire facias*; yet the producing the original judgment not being neceſſary to maintain their title, that variance would not be material, and that the judgment in the *ſcire facias* did make an alteration. It was urged that the *ſcire facias* was not a meer writ of execution, but was in nature of an action, and came in lieu of a new original; and therefore to authorize the plaintiff's attorney to ſue out a *ſcire facias*, he muſt have a new warrant, otherwiſe of ſuing out a writ of execution. And ſo is the caſe in 3 *Cro.* And a releaſe of all actions is a bar to a *ſcire facias*, otherwiſe of an execution. *Litt. ſect.* 503. and the caſe in 34 *Hen.* 6. *pl.* 48. was cited, where in replevin by leſſee for years, the leſſor avows, that an *elegit* iſſued reciting a judgment, and how the plaintiff had pray'd an *elegit*, and that upon it the ſheriff delivered the defendant the lands in queſtion, by virtue of which the avowant was poſſeſſed, and being ſo poſſeſſed demiſed to the plaintiff for years rendering rent, and for rent arrear, &c. And upon exception this avowry was held to be good, without ſhewing the judgment. So here, the judgment in the *ſcire facias* is a ſufficient title to the plaintiff, without ſhewing the original judgment.

Secondly, It was urged, that this was no variance, becauſe, where the record is between the ſame parties, and for the ſame matter, upon the iſſue of *nul tiel record*, a variance in the day is not material. *Hob.* 209. 2 *Roll.* 576. 38 *Edw.* 3. 17. *Bro. failer de record.* 2. and 15.

Thirdly, The judgment of *Mich.* 1656, which is found *in haec verba* in the verdict, is not by any thing found in the verdict, affirmed to be the record, on which the *ſcire facias* was grounded.

Fourthly, The terretenants, among whom was the defendant, having been returned, warned on the *ſcire facias*, and having appeared and pleaded *nul tiel record*, and that tried againſt them, are now eſtopped, to ſay there is no ſuch judgment of *Trinity* term, 1656.

Mr. *Broderick* for the defendant argued, that there was no title found for the plaintiff, for that the foundation of the plaintiff's title was the judgment, and that the recital of ſuch a judgment in the *ſcire facias* was not a ſufficient evidence, that there was ſuch a judgment, but that the original judgment ought to be produced, and not only the record of the *ſcire facias*, and judgment thereupon. And for that he cited 2 *Keb.* 499. and where-ever a man is to make a title to himſelf, the recital of one record in another is not a ſufficient evidence, that there is ſuch a record, without producing the original record.

Recital of a judgment in a *ſcire facias* not evidence of the judgment.

Secondly, The judgment here found is of another term, which is going a ſtep farther than bare not producing the original judgment. And though upon the iſſue of *nul tiel record*, there is ſuch a judgment adjudged to be as is recited in the *ſcire facias*, *viz.* of *Trinity* term 1656, that will not eſtop the defendant, becauſe there are other defendants, who muſt be bound, and turned out of poſſeſſion by this eſtoppel (for if execution go it muſt go againſt all the terretenants) who are ſtrangers to the judgment in the *ſcire facias*.

Thirdly, The judgment in the *ſcire facias* makes no alteration. If an executor brings a *ſcire facias* on a judgment, or a recogniſance, and gets a judgment *quod habeat executionem*, and dies inteſtate, the adminiſtrator *de bonis non* muſt bring a *ſcire facias* upon the original judgment, and cannot proceed upon the judgment in the *ſcire facias*. The difference is, that ſheriffs and officers need not plead the judgment, for they are to look no further than the proceſs, which comes to them, which they are to execute, and not to take upon them to judge, whether it be legal or no, but the party himſelf muſt plead the judgment.

Holt chief juſtice. The caſe of 34 *Hen.* 6. is nothing to the purpoſe, for there was a demiſe ſhewed to the leſſee, which was all that was neceſſary to be ſhewn, being an avowry againſt his own leſſee,

Ante 132, 331.

leſſee, and all the reſt is impertinent. It is a ſufficient commencement of a particular eſtate, in an avowry upon his own leſſee; but it may be a queſtion, whether it would have been good, if it had been an avowry for rent by tenant by *elegit* of a reverſion, againſt a leſſee by a leaſe prior to his title. [Note, this is the reaſon the book goes upon, becauſe the leſſee is eſtopped by the leaſe to plead *nil in tenementis*, and ſo conſequently the leſſor's title is not in queſtion.]

Variance.

Holt chief juſtice. If the leaſe depended upon the variance, it is certainly a variance. For the judgment hath a different relation, and the charge in caſe of the one extends much farther than the charge in caſe of the other; the one charges all the lands, of which the defendant was ſeiſed the ſixth of *June* 1656. the other thoſe only, of which he was ſeiſed the twenty-third of *October* 1656. and the inquiry is different.

No falſifying the point tried.

Judgment, when neceſſary to be produced in evidence.

But the queſtion is, if the defendant is not for ever concluded. For the judgment is ſet forth in the *ſcire facias*, as a judgment of *Trinity* term, and the terretenants have pleaded *nul tiel record*, and the iſſue is tried againſt you, and it is entred on the roll, *quod habetur tale recordum*: can you falſify this in the point tried? There is no need in this caſe for the plaintiff to ſhew any judgment, becauſe upon iſſue upon *nul tiel record* it is found that there is ſuch a judgment, and the defendant can never ſay, that this was not the judgment againſt him, but that it was another judgment; becauſe it is determined already againſt him, that there is ſuch a judgment againſt him. As the iſſue in tail ſhall never falſify a verdict in a real action, in the point tried; but he may ſay, that there was ſome matter omitted. As put caſe in any real action, there was a verdict againſt tenant in tail, the iſſue in tail can never falſify this verdict in the point tried directly, but only in a ſpecial manner, as by ſaying that ſome evidence was omitted, *&c.*

Obryan v. Ram, 1 Mod. 170.

Judgment in *ſcire facias* alters the property of the original judgment.

Woodyer v. Greſham, Salk. 116.

The judgment in the *ſcire facias* does alter the matter, as in the caſe of *Obryan* and *Ram*, where judgment was obtained againſt a *feme ſole*. She marries; then the plaintiff ſues a *ſcire facias* againſt huſband and wife, and has a judgment *quod habeat executionem* againſt both. Then the wife dies, and the plaintiff ſues out a *ſcire facias* againſt the huſband, and has judgment *quod habeat executionem* againſt him, and reſolved to be well, upon a writ of error out of *Ireland*: and ſo *vice verſa* (in the caſe of *Woodyer* againſt *Greſham*, *Mich.* 9 *Will.* 3. *B. R.*) a *feme ſole* recovered a judgment, and then took huſband, and the huſband and wife ſued out *ſcire facias*, and had judgment *quod habeant executionem*, and then the wife died, and the huſband brought a *ſcire facias*, and had execution.

The caſe of *Tilborne verſ. Rag* in 1655 was thus: the defendant in a judgment was tenant in tail, and died, and upon a *ſcire facias* againſt the heir and terretenants the iſſue in tail was returned heir and terretenant, and warned, and judgment was given againſt him by default, and the intailed lands were extended upon an *elegit*; and upon an ejectment brought by the tenant by *elegit*, the deed of intail was given in evidence, and all this matter ſpecially found. And it was reſolved, becauſe the defendant had an opportunity to have pleaded this once to the *ſcire facias*, and had not pleaded it; he was eſtopped to ſay it now, and ſo a judgment that did not bind the iſſue in tail at firſt, was by his neglect of pleading his title to the *ſcire facias* made an unavoidable charge upon him. And that reſolution was founded on the book of 39 *Aſſ.* 18. where the eſtoppel is of ſuch a nature, as that it creates an intereſt in, or works upon, the eſtate of the land, there the jury are eſtopped. If this caſe had been in ſpecial pleading, and the plaintiff had declared in debt upon a judgment of *Trinity* term 1656, and the defendant had pleaded *nul tiel record*, if the plaintiff had replied, *quod habetur tale recordum*, he had been gone; but if he had replied this *ſcire facias*, and all the proceedings upon it, and concluded his replication upon the eſtoppel, the defendant had been concluded. So upon a demiſe by indenture, by one who has nothing in the land, if the leſſor brings debt for rent, and declares upon the demiſe, and the defendant pleads *nihil habuit in tenementis*, if the plaintiff replies that he had a ſufficient eſtate whereout to make the demiſe, he has loſt the benefit of the eſtoppel; but if he replied that the leaſe was made by indenture, and concludes, *unde petit judicium*, if he ſhall plead this plea againſt his own acceptance of the leaſe by indenture, there the defendant ſhall be eſtopped; but if the defendant had pleaded *nil debet*, the plaintiff might have taken advantage of the eſtoppel upon evidence, becauſe the pleadings are not brought to ſuch a point in the caſe, as to give the plaintiff an opportunity of replying the the eſtoppel.

See Trin. 12 Will. 3. Rock verſ. Layton. *Ante* 589.

Note, *Holt* chief juſtice ſaid, the plaintiff in ſuch a caſe as this might declare upon the judgment in the *ſcire facias*.

Note, this caſe muſt be intended of ſuch proceedings againſt the original defendant, *quod cum dimiſit* generally, without mentioning that the demiſe was by indenture.

Powell juſtice. Here the iſſue is tried by the record, and here is the judgment of the court, *quod habetur tale recordum*, and you and all that claim under you are eſtopped by this, to ſay there is no ſuch judgment. And as to the other defendants you ſpeak of, we muſt take it, that all theſe either were defendants in the *ſcire facias*, or claim under them that were, becauſe all the lands muſt be taken to have been extended upon the *elegit*. The law is clearly with the caſe of *Tilburn* and *Ragg*, if *ſcire feci* is returned, and the heir in tail omits his time of coming in and pleading, and lets judgment go by default.

This term the caſe came on again in the paper, and after opening the caſe only by Mr. *King* for the plaintiff, no body offering to argue for the defendant, judgment was given for the plaintiff.

The judges ſaid but little, as I was informed, for I could not hear where I ſat, and what they did ſay was to the ſame effect with what had been ſaid before, and all agreed to give judgment upon the point of the eſtoppel. *Powys* juſtice cited the caſe of *Day verſ. Guildford*, 1 *Lev.* 41. (which is a caſe of the ſame nature with that of *Tilburn verſ. Ragg*) where tenant for life, the reverſion to his ſon and heir in fee, acknowledged a ſtatute, and the heir let judgment go by default, *&c.* as in that caſe.

Note; Mr. *Broderick* in his argument in *Eaſter* term cited a caſe between *Manaton* and *Norris*, 34 *Car.* 2. but what it was I know not.

Holt ſaid to it, that in that caſe the award was joint and ſeveral.

Davenant *verſ.* Rafter. Ante 1046.

Error.

Fault of original.

Releaſe of errors pleaded.

ERROR of a judgment in the Common Pleas, in an action of debt upon a bond of 600*l.* and judgment by *nil dicit*, *quod* the plaintiff *recuperet verſus* the defendant *debitum ſuum praedictum et damna ſua occaſione detentionis debiti illius ad* 50 *ſolidos eidem* the plaintiff *ex aſſenſu ſuo per curiam hic adjudicata, et* the defendant *in miſericordia.* The plaintiff in error *in propria perſona* aſſigns for error the want of an original, *&c. et ſuper hoc* the defendant in error *ſimiliter venit* by attorney, and prays *oyer* of the writ of error, which is entred *in haec verba*, and then pleads, *quod* the plaintiff *praedictum breve de errore proſequi ſeu manutenere non debet*, becauſe after the judgment, and before the writ of error ſued forth, *viz.* 10 *February* 1703 at *London*, in the pariſh of St. *Mary le Bow* in the ward of *Cheap*, the plaintiff *per nomen, &c. per quoddam ſcriptum ſuum relaxationis, &c. gerens datum* the ſame day and year, *remiſiſſet, relaxaſſet, et in perpetuum quiete clamaſſet* to the defendant *omnes et omnimodos errores, &c. habitos factos, &c. in, circa, tangentes ſeu concernentes judicium praedictum, ſeu in, circa, tangentes ſive concernentes aliqua warranta, &c. quaecunque de vel aliquo modo concernentia idem; et hoc paratus eſt verificare, unde petit judicium, ſi praedictus* the plaintiff *breve de errore praedictum proſequi aut manutenere debeat, et quod idem judicium in omnibus affirmetur.* The plaintiff craves *oyer* of the releaſe, and it is entred *in haec verba*, and purports a releaſe by the plaintiff to the defendant of all and all manner of errors, &c. had, made, &c. in, about, touching or concerning one judgment obtained againſt the plaintiff by the defendant this preſent *Hilary* term for 600*l.* debt, beſides coſts of ſuit, or, in, touching or concerning any warrant, &c. whatſoever, of or any way concerning the ſame; In witneſs, &c. the tenth of *February* 1703. And then replies, *quod* the defendant in the ſame term of St. *Hilary* in the plea of the defendant mentioned *duo judicia de ſimili ſumma et cauſa actionis verſus eundem* the plaintiff *obtinuit*, and that the plaintiff the aforeſaid deed of releaſe *ſuperius recitatum non dedit, nec intenſ. inter eos fore dat. fuit, tempore ſigillationis ejuſdem*, of the errors, &c. *de et circa judicium praedictum*, of which he has now brought his writ of error, *ſed de alio judicio ſic ut praefertur obtent. abſque hoc, quod* the plaintiff *remiſit, relaxavit*, &c. to the defendant *omnes et omnimodos errores*, &c. *in judicio praedicto modo et forma prout* he has alleged, *et hoc paratus eſt verificare*; *unde* the plaintiff *ut prius* ſays, *quod in recordo*, &c. *manifeſte eſt erratum, allegando errores praedictos ſuperius per ipſum allegatos*; and prays, *quod judicium praedictum ob errores praedictos, et alios errores in recordo et proceſſu praedictis compertos, revocetur*, &c. And to this the defendant demurs, and the plaintiff joined in demurrer.

Note, the *placita* was, *Placita irrotulata apud Weſtmonaſterium coram Thoma Trevor*, &c. *juſticiariis dominae reginae de banco de termino ſancti Hilarii, anno regni dominae Annae Dei gratia Angliae*, &c. *ſecundo.*

Mr. *Broderick* moved on the rule for judgment *niſi*, and took this exception to the plea, that the defendant in the concluſion of his plea prays that the judgment may be affirmed, whereas he ought to conclude it upon the eſtoppel, if the plaintiff *manutenere ſeu proſequi debeat* his writ of error againſt the defendant contrary to his own deed of releaſe. And ſo is the entry in Sir *William Pelham*'s caſe, 1 *Co.* 14. *a.* and 21 *Edw.* 4. 43. another entry accordingly. (Note, in the book of *Edw.* 4. there is no *contra ſcriptum*, nor *breve*, but it is pleaded to the errors.) For the court upon this plea cannot affirm the judgment, but can only award a *nil capiat per breve*, as they have done in this caſe. And it is a general rule, that wherever the defendant by his plea demands ſuch a judgment as the court cannot give, the plea is ill. And upon that foundation the caſe of *Biſſe verſ. Harcourt* was ruled, where in *aſſumpſit* the defendant pleaded in abatement an attainder in the plaintiff, and the plaintiff replied a pardon, and concluded his replication, *unde petit judicium et damna*, &c. and that was held to be a diſcontinuance, for he ought not to have concluded in bar, but only have affirmed (*a*); for the matter of the replication being triable by the record, and not by the country (in which caſe only upon a plea in abatement after trial had the plaintiff can have final judgment) the plaintiff could have only a *reſpondes ouſter*. To this it was anſwered and reſolved by the court, that the beginning of the plea, and the concluſion of it, till you come to thoſe words, *et quod idem judicium, &c.* was proper and right, and therefore the addition of thoſe words was but ſurpluſage, and that ſhould be rejected. And *Holt* and *Powell* ſaid, that the plea was a bar of the writ of error; and *Powell* ſaid, he wondered how Mr. *Broderick* could fancy it was an eſtoppel. *Holt* ſaid, that where in debt for rent the plaintiff counts on a demiſe, and does not ſay by indenture, the defendant pleads *nil habuit in tenementis*, the plaintiff may reply, the demiſe was by indenture, and demand judgment, if againſt that the defendant ſhall be admitted to plead the plea; it is a good replication, and the defendant is eſtopped. But if in that caſe the defendant had replied an eſtate, and gone to iſſue, on evidence the iſſue might have been againſt him, becauſe he did not rely on the eſtoppel in pleading; but here this releaſe is not an eſtoppel, but a bar.

(*a*) This was not ſaid by Mr. *Broderick*, but I report it as the true ground of the reaſon of the caſe of *Biſſe v. Harcourt*, as I have often heard it from the chief juſtice.

The words *Holt* uſed were, diſcharge of the errors.

What averment is good?

Then Mr. *Broderick* took another exception, that it was not averred any where in the plea, that this judgment, of which the writ of error was brought, was the ſame judgment, the errors in which were releaſed, except only in the body of the pleading of the releaſe, as if there were ſuch an averment in the releaſe itſelf, which was naught: for no iſſue could be taken on that; but there ought to have been a diſtinct averment of that, either in the end of the plea, as you ſee it often in pleas of recoveries in other actions, *&c.* or elſe after the words, *de et concernen. judicium praedictum*, the defendant ſhould have added, *exiſtens idem judicium*, of which the plaintiff has now brought his writ of error; and ſo upon that averment iſſue might have been taken.

Holt chief juſtice ſaid, there was never ſuch a form of pleading. And *Powell* ſaid, it was better this way.

Holt chief juſtice. The plea is good now after the releaſe is ſet out upon *oyer*, for now it appears to be a releaſe of this judgment, and it ſhall not be intended that there was another judgment between the ſame parties of the ſame term. And your replication is not good; for if there were another judgment, to which this releaſe might be applied, you ſhould have pleaded it ſpecially and certainly, and have averred, that this releaſe was a releaſe of the errors in that judgment, and ſo have given the plaintiff an opportunity of anſwering that judgment, as by pleading *nul tiel record*. For if there be no ſuch record, the very foundation of your replication is gone; for if there be no other judgment, this releaſe releaſes this judgment, and the traverſe is of a thing in the air.

Mr. *Eyre* ſaid, that there was a precedent in *Raſtal*, where a releaſe of errors was pleaded, and the concluſion of the plea was as this is. But the court agreed it was not the proper way of pleading.

The court would not alter the rule.

Copley *verſ.* Delaunoy.

S. C. 1 Mod. Ca. 366. Want of ſpecification pleaded in bar.

IN an action of debt upon a bond in the Common Pleas, the plaintiff declares, *quod cum* the defendant at *London*, *&c. per quoddam ſuum obligatorium*, *&c.* omitting the word *ſcriptum*. The defendant prays *oyer* of the bond, and it is entred *in haec verba*, and pleads in bar, that the plaintiff had not ſpecified the bond according to the act of parliament, and the plaintiff demurred.

Mr. ſerjeant *Whitaker* moved the court upon the rule for judgment for the plaintiff, *niſi*, *&c.* that this was a good plea in bar, for it was a temporary bar. Like the caſe of an outlawry, which is a good plea in bar in an action of debt. And as in this caſe, after the time limited in the act of parliament, or that the plaintiff has paid the penalty, he is intitled to ſue again; ſo in the caſe of an outlawry, after a pardon, or reverſal of the outlawry by writ of error, the party is reſtored to his action. And yet the judgment upon the plea in bar is final to the plaintiff in that caſe, as well as in this; and therefore this may as well be pleaded in bar as that. Secondly, if this be no plea in bar, yet now by the demurrer the plaintiff has confeſſed, that he has not ſpecified the bond, and therefore the court cannot give judgment for him; for by the expreſs words of the act of parliament the debt is not recoverable. Thirdly, the declaration is naught, for the omiſſion of *ſcriptum*; for the debt cannot be raiſed without deed.

Serjeant *Selby*. That the reaſon of the caſe of outlawry is, becauſe the debt is forfeited to the crown, and ſo the plaintiff had no right of action, which diſtinguiſhes it from this caſe. But that according to *Ferrar*'s caſe, if this plea be a good bar, it muſt be a perpetual bar, which it is not by the act of parliament, and therefore it is no plea in bar. As to the third objection, he ſaid, that the bond being ſet out upon *oyer*, it did now ſufficiently appear to the court, that there was ſuch a bond, and that made the declaration good.

Poſt. 1243.

Trevor chief juſtice. This matter cannot be pleaded in bar, for it is a temporary bar, and that is but a plea in abatement; and that is the difference between a plea in abatement and bar.

Co. Litt. 128. b. Gilb. Hiſt. C. B. 162.

Tracy. The words are, the debt ſhall not be recoverable, but yet the right of action remains. The difference in the caſe of outlawry in the plaintiff, where it ſhall be pleaded in abatement, and where in bar, makes this matter plain. In treſpaſs, and other actions where the damages are uncertain, and conſequently the right of action not forfeited, there outlawry can be only pleaded in abatement; becauſe, though the plaintiff is under a diſability of ſuing, yet the right of action remains in him. Otherwiſe in debt, *aſſumpſit* for a ſum certain, *&c.* there the debt being forfeited to the crown, the plaintiff has no right of action in him, and therefore in thoſe caſes outlawry may be pleaded in bar. But the proper way of pleading this is, with a *ſi reſponderi debeat quouſque, &c.*

It ſeems that it is no confeſſion, for a demurrer confeſſes nothing but what is well and ſufficiently pleaded. Rex v. the biſhop of Cheſter.

Trevor chief juſtice. As to the demurrer, though it does confeſs the matter of not ſpecifying, yet that ſhall not hinder the plaintiff from having his judgment; for want of a ſpecification, like all other matters, muſt be taken advantage of in a regular way, and by proper pleading.

Per ſcriptum ſuum obligatorium omitted in debt on a bond. Cro.Car. 209.

Tracy juſtice. As to the third objection, the caſe of Sir *William Courtney verſ. Greenville* is in point, that it is well enough. Note in that caſe, *per quoddam ſcriptum ſuum obligatorium* was left out; but yet there being a *profert* of the bond in the end of the declaration, and upon *oyer* the condition of the bond being ſet forth, and by that it appearing to be a bond with a condition, and alſo it being found by the verdict upon iſſue upon *ſolvit*, that there is a debt due to the plaintiff, the court gave judgment for him.

And the like judgment was given in this caſe, the rule being made abſolute.

Co. Lit. 47. a. 144. a.

Biſhop of Wincheſter *verſ.* Wright.

Debt does not lie for arrear of rent reſerved upon a leaſe for three lives, living the lives.

IN debt for rent upon a demiſe of a fiſhery to the defendant for three lives, the plaintiff in his declaration ſet out the demiſe, *virtute cujus* the leſſee entred, *et fuit et adhuc eſt inde poſſeſſionatus.* The defendant pleaded *nil debet*, and there was a verdict for the plaintiff.

plaintiff. And ſerjeant *Pratt* moved in arreſt of judgment, that it appeared upon the declaration, that the eſtate for three lives was continuing, and therefore debt did not lie, it being a rent iſſuing out of a freehold.

Serjeant *Hooper* in anſwer ſaid, that this was well enough after a verdict, for that *nil debet* put all the matter in iſſue, and if the eſtete had not been determined, the plaintiff could not have had a verdict; and that that matter indeed was the greateſt matter litigated at the trial, and therefore the continuing not appearing directly, the court would take the eſtate to be determined.

Pratt ſaid, that the averment in the declaration of the *fuit et adhuc, &c.* was an expreſs averment that the eſtate did continue; but if it were only indifferent, it would not be good, for the plaintiff ought to ſhew expreſly in his declaration, that the eſtate for three lives was determined, or elſe he was not intituled to bring his action of debt within the ſtatute of *Hen.* 8. Which was agreed by the court, and the judgment arreſted.

Buckſome *verſ.* Hoſkin.

A Writ of error was brought of a judgment in ejectment in the Common Pleas, and the defendant in error ſued out a *ſcire facias quare executionem non*, to compel the plaintiff to aſſign his errors, and there was a variance in the *ſcire facias* from the judgment; for the judgment was of two meſuages, and the *ſcire facias* recited it to be but of one. And Mr. *Raymond* for the plaintiff in error, perceiving the variance, pleaded *nul tiel record* of the judgment. And now Mr. *Williams* moved, that the *ſcire facias* might be amended, becauſe it was but *vitium clerici* in varying from the record, which was his inſtructions; and he cited 2 *Ventr.* 49. where an original in treſpaſs, of treſpaſſes done in two Kings reigns, *contra pacem noſtram*, was amended and made, *contra pacem noſtram et contra pacem Jacobi nuper regis*, by the curſitors inſtructions.

S. C. Salk. 52. 6 Mod. 263, 310. 3 Salk. 32. *Scire facias quare executionem non*, variance in ſetting out the judgment not amendable.

Holt chief juſtice. This is a good *ſcire facias*, but only it does not indeed come up to your caſe. In that caſe in *Ventris* the original was wrong, and therefore it was amended.

Paſch. 12 W. 3. Tomkin v. Crocker. *Ante*, 564.

Powell juſtice agreed; and that *non conſtat* to them, but there might be ſuch a judgment as was recited in the *ſcire facias*.

And for this reaſon they refuſed to amend it. Then Mr. *Williams* moved, that the writ might be quaſhed; but the court ſaid, there was no fault in the writ to quaſh it for, and that he muſt diſcontinue.

Note, in that caſe in *Ventris* the writ was a good writ, if the treſpaſs had been all done in one King's reign; and therefore all the fault was, that it did not fit the caſe, as it is here. And all the difference in the writs for ſeveral treſpaſſes, where they are done in one King's reign, or in more, is in the concluſion, *contra pacem* of one only, or *contra pacem* of both; which was the reaſon why the court, in *Ventris*, held it a matter of fact, and not a matter of law, as was objected, and amendable. See 2 *Ventr.* 49.

Afterwards at another day Mr. *Williams* came and prayed, that the *ſcire facias* might be amended, and cited 1 *Roll.* 199, and 797. *Barnes verſ. Worlich*, where the bail ſued an *audita querela*, and a *ſcire facias* upon it, in the time of King *James*, which recited the *audita querela*, and the *capias* againſt the principal, and the return of it; which *capias* was awarded in the time of *Elizabeth*, and the *ſcire facias* recited it to be *per breve dominae reginae Angliae vicecomiti noſtro de S. directum*, which is to the ſheriff of the King that now is; that was amended.

Holt chief juſtice. That was a bad writ, and a fault in the body of the writ.

Williams. I will next cite your Lordſhip ſome caſes of writs of *ſcire facias* amended, that were right writs conſidered in themſelves. 22 *Edw.* 4. 6. *b.* a *ſcire facias* was brought to have execution of a judgment recovered by *A.* and *B.* *Sulyarde* for the defendant prayed, that the writ may abate, becauſe the judgment was recovered by *A.* only; but the court amended the writ, becauſe it was but *vitium clerici*. 11 *Hen.* 7. 25. *a.* a *ſcire facias* upon a judgment in aſſiſe, where one of the plaintiffs was knighted after the judgment, the writ was brought by *A. B. mil.* and *B. C. mil.* and the recovery was recited to be by *A. B. mil.* and *B. C. modo mil.* whereas the record of the judgment was by *A. B. mil.* and *B. C.* without naming him *miles*; and the court held, that the writ was ill, becauſe it ought to have been, *cum A. B. miles, et B. C. modo miles, per nomen A. B. militis et B. C. recuperaverunt, &c.* but that it was but the miſtake of the clerk in miſreciting of the record, and therefore it ſhould be amended. 2 *Keb.* 175. *Williams v. Moore*, in a *ſcire fieri* inquiry, in the recital of the judgment, *curia domini regis* was miſtaken for *nuper Oliveri*, and was amended, becauſe it was a judicial writ, and the miſtake in the recital of the record, which the clerk had before him. 2 *Cro.* 372. *Wheadon verſ. Sugg,* in a writ of inquiry of damages the writ mentioned, that the plaintiff was nonſuited, *ideo ad inquirendum occaſione permiſſa,* whereas the judgment was upon demurrer; and yet, becauſe it was a judicial writ, it was amended in the King's Bench after error brought there upon the judgment. So the caſe in *Keb.* was after error brought. 3 *Cro.* 760. *Whalley verſ. Moſeley:* the writ of inquiry of damages was awarded by the roll returnable *Martis poſt tres Trin.* but the writ was made returnable *Mercurii poſt tres Trin.* and executed *Martis poſt tres Trin.* and it was amended by the roll, becauſe it was *vitium clerici* to make it returnable upon another day than was warranted by the roll; and it might be executed upon the day of the return. But otherwiſe it had been, if the writ had been executed upon the *Wedneſday,* the day the writ was returnable, 2 *Sid.* 7, 12. there the court refuſed to amend the return of a *capias ad ſatisfaciendum,* but here they take the difference between that, and a *venire facias,* becauſe (as it ſeems) that is to be made out by the award upon the roll, which reaſon rules this caſe.

The court refuſed to amend, becauſe the plaintiff in error had taken advantage of this miſtake in the writ, by pleading *nul tiel record*; and becauſe this writ was a good writ upon the face of it, and all that was amiſs in it was, that it did not fit the defendant's caſe. *Holt* chief juſtice ſaid, that if the defendant had appeared, and taken no advantage of this variance, the court might have amended it. But here *nul tiel record* is pleaded, and can we amend when they have taken advantage of it. He ſaid alſo, that this is not ſuch a miſtake as makes the writ erroneous, but is a miſtake in a matter of fact. He ſaid alſo, that the plaintiff in error might plead to this writ of *ſcire facias,* the writ of error depending, but then he muſt ſhew in his plea, that he has aſſigned his errors, or elſe the plea is naught. *Powell* ſaid, that at this rate you might amend all variances in writs. Now ſuppoſe a formedon were brought for ten acres, could it be mended and made twenty acres by the curſitor's inſtructions. *Powell* and *Holt* doubted of this.

Plea to a *ſcire facias* to enforce aſſignment of errors.

At another day the caſe was ſtirred again, and the chief juſtice ſaid, the caſes were many of them obſcure, and ſome of them for faults apparent in the writ itſelf, and that the caſe in 2 *Cro.* was the ſtrongeſt caſe for the amendment. But he ſaid Mr. *Williams* ſhould have cited his caſes at firſt. He ſaid, that here a man was warned, to ſhew why execution ſhould not be granted of one meſuage, and when he appears, you will make him anſwer for two meſuages. That it was hard to alter the writ in ſubſtance, and make it quite another thing; that they might ſue out a new writ, becauſe it was another record. *Powell* ſaid, that this plea of *nul tiel record* was a good plea when it was pleaded, and that all variances were not amendable.

Mr. *Williams* did not move any more, but took out a new *ſcire facias*, to which the plaintiff in error pleaded the former *ſcire facias* depending, for delay, it being no plea by reaſon of the variance.

Quaere of this caſe? becauſe the caſes cited by Mr. *Williams* ſeem to be ſtrong to the purpoſe, and the court (as I thought) ruled the matter *haeſitanter*.

Brewſter v. Wells, 6 Mod. 229.

The laſt day of the term upon a motion by Mr. *Salkeld* in the caſe between Mr. *Brewſter* and *Wells* for the curacy of *Aldgate* a *ſcire facias* out of the *Petty bag* returned in the Queen's Bench to repeal the Queen's letters patent granted to *Wells*, was amended, and *Sping* a man's name was amended and made *Spring*, by the inſtructions given to the clerk of the *Petty bag*; and the clerk of the *Petty bag*, who made out the writ, was ſent for to amend it, becauſe he who made it ought to amend it; and the court examined him touching the truth of the inſtructions.

The laſt day of *Hilary* term 3 *Ann.* (*abſente Holt* chief juſtice) upon the motion of Mr. *Pengelly* a *ſcire facias* was amended; and where the judgment was recited as a judgment of the third year of the Queen, that was amended, and made the firſt, agreeable to the record. But in both theſe caſes the amendments were made before plea pleaded, immediately upon the return of the *ſcire facias*.

Certainty. See now the ſtat. 4, 5. Ann. cap. 16. & ſtat. 5 Geo. 1. cap. 13.

Ante, 964. Tender and refuſal amounts to acceptance.

CASE, wherein the plaintiff declared, that in conſideration the plaintiff had promiſed the defendant, to buy up for him all the plums he could, and deliver them to him, the defendant promiſed to pay the plaintiff ſo much *per* hundred for the black and blue plums, and ſo much for the white, and avers that he bought and tendered the defendant ſo many black and blue plums, and he refuſed to accept them, to his damage. After verdict for the plaintiff Mr. *Page* moved in arreſt of judgment. Firſt, that it did not appear how many blue plums, and how many black plums there were, *id eſt*, how many of each ſort. But to that it was anſwered and reſolved, that the black and blue ones being to be both of the ſame price, it was not material; otherwiſe, if the white and black had been put together without difference. Secondly, that the plaintiff did not aver, that the plums he tendered were all he had bought, or could buy; and unleſs he had done ſo, he had not performed his part, and was not intitled to his action. But to that it was anſwered and reſolved, that that was now cured by the verdict; for unleſs the plaintiff had proved, that thoſe were all he had bought or could buy, it would have been againſt him, for want of proving the performance of the conſideration.

Averment aided by verdict.

Regina *verſ.* Tuchin.

S. C. Salk. 51, 699.
S. C. 6 Mod. 268.

S. C. State Tri: 2d. ed. v. 5. p. 532. MS. Rep. B. R. 131.

Venire facias returnable 23 *Octob.* and *diſtringas* teſted 24 in information, a diſcontinuance.

AN information was preferred by Mr. Attorney general againſt the defendant, for writing and publiſhing a libel called the *Obſervator*, and the *Obſervators* laid in the information were very ſcandalous. Iſſue was joined in the cauſe in *Trinity* term laſt, and the *venire facias* was returnable the 23d of *October*, which was the firſt day of the term; and the *diſtringas* was teſted the 24th of *October*, and it was moved in arreſt of judgment, the defendant being convicted upon the trial, that this was a diſcontinuance. This being a cauſe of great expectation, it being a proſecution directed by the Queen at the inſtance of the Houſe of Commons, it was very elaborately argued by Sir *Thomas Powys* the Queen's *primier* ſerjeant, and Mr. Attorney general; that it was amendable by the award upon the roll, which is *inſtanter*, *ideo praeceptum eſt*, &c. and which the clerk ought to have purſued. And after very ſolemn and long arguments on both ſides, the court this day argued the caſe *ſeriatim*.

Amendment in criminal caſes.

Gould juſtice held firſt, that it was amendable at common law, upon the authorities following. 2 *Bulſt.* 35. a caſe cited by *Yelverton* in the caſe of *Odington verſ. Darby*, where two men were indicted at the aſſiſes for felony, and found guilty, and the indictment was in the ſingular number. And *Yelverton* doubting whether it were good or no, reprieved the men, and put the caſe to nine of the judges at the table, who all agreed, that the indictment was amendable, and accordingly it was amended, and the men were hanged. *Raymond* 440. *Engleſield* and *Smith*'s caſe. There, 445. the book ſays, the ſecond exception was, that the indictment ſets forth a certificate from the commiſſioners under their hands, but not under their ſeals as the ſtatute requires; but the court reſolved, that in regard the certificate found *in haec verba* in the verdict appears to be under their ſeals, it ſhall be amended, and it was amended. 1 *Sid.* 243. *Rex verſ. Percivall et alios*: an indictment for a riot in the city of *Canterbury*, and the *venire fa-*

cias and other proceſs were directed *vicecomitibus de Canterbury*, where there was but one ſheriff, and the return of the proceſs was by one only; and the court upon examination of the ſheriff of *Canterbury* upon oath, that there was but one ſheriff, amended the proceſs; and that at common law, and not upon the ſtatutes of *jeofailes*. He ſaid, that there was but one caſe againſt this, and that was the caſe of *Theobalds verſ. Newton*, *Stiles* 307. where in an action upon the ſtatute of inmates, the *diſtringas* bore *teſte* on a *Sunday*, and out of term, and upon a queſtion whether it were helped by the ſtatute of *jeofails*, it was reſolved by *Rolle* chief juſtice to be excepted. [Note, *Holt* chief juſtice obſerved upon this caſe, that it was ſtrange, when the bar was ſo learned as it was in thoſe times, that no body thought of the ſtatutes of amendments, which they muſt needs have done, if it had not been taken for granted by all men, that the ſtatutes of amendments had not extended to criminal caſes; but they went upon the ſtatutes of *jeofailes*.] And in the caſe of the King *verſ. Sherington Talbot*, 1 *Cro.* 311. and 1 *Jones* 320. where in a *quo warranto* the *venire* was miſawarded, and a verdict for the defendant; the verdict was ſet aſide, and the court held, that the ſtatutes of *jeofailes* did not extend to *quo warrantos* or *informations* of intruſion, becauſe the King is not bound unleſs he is named.

Secondly, if it had not been for the authority of the caſe of *Bradley verſ. Baggs*, *Yelv.* 204. 2 *Cro.* 283. I ſhould think it well enough, becauſe it is a continuance from day to day, which no day intervening is a perfect continuance. [The caſe of *Yelv.* was thus: a writ of appeal was ſued out returnable *a die ſancti Michaelis in* 15 *dies*, which was the ſixteenth of *October*, and the *capias* upon it bore *teſte* the twenty-third of *October*, where it ought to have born *teſte* the ſixteenth of *October*, and was returnable *octabis Hilarii*, which was the twenty-third of *January*, and the exigent upon this *capias* bore *teſte* the twenty-fourth of *January*, where it ought to have born *teſte* the ſame day of the return of the *capias*, *viz.* the twenty-third, and the exigent was returnable *a die ſanctae Trinitatis in quindecim dies*, which is the twentieth of *June* following, and the *allocatis comitatibus*, that iſſued upon it, bore *teſte* the twenty-firſt of *June*, where it ought to have born *teſte* the twentieth, and for all theſe gaps in the proceſs the court held the appeal to be diſcontinued, becauſe every proceſs ought to iſſue inſtantly, and without any mean time the one before the other.] But however that may be, I hold it, if it be ill, to be amendable at common law.

Diſcontinuance in information amendable by 8Hen.6.c.12.

Powys juſtice. The words of the ſtatute of 8 *Hen.* 6. *c.* 12. are very general, " That the King's judges of the courts and places in “which any record, proceſs, plea, warrant of attorney, writ, panel, or return, which for the time being ſhall be, ſhall have power to examine ſuch records, proceſs, words, pleas, warrants of attorney, writs, panels, or returns, by them and their clerks, and to reform and amend (in affirmance of the judgments of ſuch records and proceſs) all that which to them in their diſcretion ſeemeth to be miſpriſion of the clerks, in ſuch records, proceſſes, words, plea, warrant of attorney, writ, panel, and return (except appeals, indictments of treaſon, and of felonies, and the outlawries of the ſame, and the ſubſtance of the proper names, ſurnames, and additions left out in original writs, and writs of *exigent* and other writs containing proclamation); ſo that by ſuch miſpriſion of the clerk no judgment ſhall be revers'd, or annull'd.” Now the words of the ſtatute being general, and the exception reſtrain'd to appeals and indictments of treaſon and felonies and outlawries of the ſame, it is ſtrange how this ſtatute came ever to receive ſuch a reſtrain'd conſtruction, as that it ſhould not extend to criminal caſes, againſt ſuch plain words. In my lord *Fitzwalter*'s caſe, which was an information in nature of a *quo warranto* for a fiſhery in the river of *Thames* in a place extending into ſeven pariſhes, the *venire facias* was out of one of the pariſhes only, where it ought to have been out of them all. And there my lord *Hale* was of opinion, that it was helped by the ſtatute of *jeofailes* of 21 *Jac.* 1. *c.* 12. where after a verdict the *viſne* coming out of more or fewer places than it ought to be, is helped. See 1 *Sid.* 66. 1 *Keb.* 191, 215. and that though it was in the caſe of the King, it being not included in the exception, which is only of any writ, declaration or ſuit of appeal of felony or murder, any indictment or preſentment of felony, murder, or treaſon, or any proceſs upon any of them, or any writ, bill, action, or information upon any popular or penal ſtatute. And *Hale* ſaid, that the exception was an excellent key to explain the ſtatute by, and a perfect argument that *in caſibus non exceptis* the ſtatute was to take place. The reſt of the court were indeed of another opinion, upon the caſe of the King and *Sherington Talbot*. 1 *Cro.* But however, I am tender of giving my opinion upon the ſtatute, but I take it to be well as it is, or if it be not, yet it is amendable by the common law. To prove it to be well as it is, he uſed the ſame argument as *Gould.* And as to the caſe of *Bradley verſ. Baggs*, he ſaid, as it was reported in *Yelv.* there was a gap of ſeven days, which was a great one, and by *Croke*'s report of the caſe, the court went upon that gap. And in *Yelv.* there are other faults. As to making the amendment he ſaid, that there had been much bolder amendments made; that this was only an error in proceſs, and was a mere miſtake of the clerk. That beſides thoſe caſes of amendments at common law in criminal caſes cited by Mr. juſtice *Gould*, there was

2 Lev. 139. 3 Keb. 465, 485, 519.

Plumme's caſe, *Palm.* 480. the defendant was outlawed upon an indictment of murder, and the *exactus* was *ad comitatum* without ſaying *meum*, and the attorney general prayed a *certiorari* to the coroners, to certify where the defendant was *exactus*, to the end that upon the return thereof they might amend the return of the *exigent*, according to a precedent cited in the time of *Edward* IV. where one *Stanley* was indicted, and it was in ſome places *Sanley*, and a *certiorari* was awarded accordingly. 1 *Sid.* 66. 1 *Keb.* 191, 215. *Rex verſ. Reed.* Upon iſſue joined in an information of perjury, one of the jurors return'd upon the *venire facias* was named *J. S.* and upon the *diſtringas* he was named *J. S. jun.* but he was not one of the twelve that tried the cauſe, and all the judges agreed it to be well as it was, and ſome of them held it was aided by the ſtatutes of *jeofailes*, informations at common law not being within the exception. And *Twiſden* denied that, but held it to be amendable upon 8 *Hen.* 6. the exception being only as before. He cited alſo 1 *Roll.* 201. *n.* 36. *Thorp verſ. Fanſhaw:* if the award of the *venire facias* upon the roll be well, and this writ of *venire facias* ill, yet it ſhall be amended by the roll; the roll being the act of the court, and the warrant of the writ, and the fault is only the miſpriſion of the clerk: this caſe is there ſaid to be cited *Trin.* 39 *Eliz.* which caſe is reported in 3 *Cr.* 572. *Rogers verſ. Bird*, and was alſo cited by him. Where upon iſſue joined in debt upon a bond, the *venire facias* was returnable *ſabbati poſt octabas Trinitatis*, and the *diſtringas* was teſted the day after *craſtinum Trinitatis*, and becauſe by the award upon the roll the *venire facias* was returnable *craſtino Trinitatis*, which was well, and was the warrant to make the *venire facias*, it was the default of the clerk to make it contrary to the roll, and it was therefore ordered to be amended according to the roll. He ſaid, that he admitted that theſe caſes were only civil caſes, but that the uſe he made of them was to ſhew, that theſe variances were only miſpriſions of the clerk, and were therefore amendable in this caſe, for the ſame reaſon that they were amendable in thoſe.

But note, that this was a day before the day of the *teſte* of the *diſtringas*.

Gould juſtice in his argument cited the caſe of Sir *John Curſon et ux.* 2 *Cr.* 529. an information upon the ſtatute of recuſancy for the recuſancy of the wife, the defendants appeared, and the record was, *et praedictus Johannes Curſon et Magdalena veniunt, et praedicta Magdalena dicit, quod ipſa non eſt inde culpabilis, et de hoc ponit ſe ſuper patriam, et attornatus domini regis ſimiliter*; and it was moved in arreſt of judgment for the defendant, that this plea was only the plea of a *feme covert*, which was void without her huſband joining with her, and conſequently no iſſue was joined: but it appearing to the court, that the docket was, *quod Johannes Curſon miles et Magdalena uxor ejus, &c. placitant non cul.* they held, that was the warrant to the clerk, who ought upon that to have drawn the plea in both their names, and when he omits the huſband's, it is but the miſpriſion of the clerk, which ſhall be amended, and it was amended accordingly. But otherwiſe, if the entry had been, that the *baron* and *feme* had pleaded, *quod ipſi non ſunt inde culpabiles*, becauſe that would have altered the iſſue.

Powell juſtice made three queſtions. Firſt, Whether this *teſte* of the writ the next day were a diſcontinuance. Secondly, If it were, whether it was amendable by the ſtatute of 14 *Ed.* 3. *c.* 6. or 8 *Hen.* 6. And, Thirdly, If it be not amendable by theſe ſtatutes, if it be amendable at common law. As to the firſt he ſaid, it was a diſcontinuance. All proceſs muſt be teſted the ſame time that it is awarded. So is the caſe of *Bradley verſ. Baggs*, and the reaſon of it is, that the award of the court only warrants taking out of the proceſs at that time, that it is awarded. And if any time intervene, it is a diſcontinuance in all caſes at common law, and conſequently the proceſs to the jury here is diſcontinued, and the *diſtringas* is without warrant 21 *Edw.* 4. 20. *Br. contin.* 82. at the return of the *venire facias* the defendant was eſſoined, and had day by his eſſoin to *Paſch.* and it was held, that the jury could not have an *idem dies*, as you do in caſe, where there are two defendants, and one of them is eſſoined; but that there muſt be a *habeas corpora* to the jury returnable at the ſame day. There muſt be a chain of proceſs. The *diſtringas* might as well be teſted the 25, as the 24, for they are both equally unwarranted by the award of the court, which is the reaſon why the *teſte* in the preſent caſe is wrong.

Diſcontinuance.

As to the ſecond he ſaid, the words of the ſtatute were very general, and might take in criminal caſes, and caſes where the Queen was a party; but he could not think, that the judges in all times could have been ſo miſtaken, as to take ſuch caſes to have been out of the ſtatutes, if the ſtatutes had extended to them; as it appeared plainly they had done, by reſorting always to the common law for amendments in theſe caſes, and not amending them upon the ſtatutes. [The words of the 14 *Edw.* 3. are: "It is aſſented, that by "the miſpriſion of a clerk in any place, whereſoever it be, no pro-"ceſs ſhall be annulled, or diſcontinued, by miſtaking in writing "one ſyllable or one letter too much or too little; but as ſoon as "the thing is perceived by the challenge of the party, or in other "manner, it ſhall be haſtily amended in due form, without giving "advantage to the party that challengeth the ſame, becauſe of ſuch "miſpriſion."] That which he took to be the reaſon, why the ſtatute of *Edw.* 3. did not extend to theſe caſes was, becauſe the amendment is to be made upon the challenge of the party, that there

14 Edw. 3. c. 6. does not extend to criminal proſecutions.

The Queen is never comprehended in a ſtatute by the word party.

there is a miſtake, and without giving advantage to the party that challenges the miſtake. And the Queen is never named in an act of parliament by the name of party. Now this act extends only to proceſs out of court, but the court by this ſtatute had no power to amend any miſtakes in entries upon the roll; and therefore the 8 *H.* 6. was made to enlarge the judges power of amendments, that it ſhould extend to other things beſides proceſs, but it was not intended to be extended to other ſorts of caſes. And the 8 *Hen.* 6. ſhall be expounded by the words, challenge of the party, in the 14 *Edw.* 3. and the exception was only put in *in majorem cautelam.* As for the ſtatutes of *jeofailes*, the firſt, which is 32 *Hen.* 8. *c.* 30. is tied up by the recital all through, and the body of the act, to the party demandant and plaintiff, and the party tenant and defendant; and though there is no exception in this act, yet it was made a great queſtion, if this act extended to the vouchee, where he entred into the warranty, and became tenant, and a verdict paſſed for him, the judges adhered ſo nicely to the very words of the ſtatute. In all the ſubſequent ſtatutes of *jeofailes* there are exceptions, which extend to except theſe caſes, though, if there were none, they ought all to be expounded upon the foot of this firſt ſtatute. *Hale* chief juſtice ſeemed indeed in my lord *Fitzwalter*'s caſe to think, that it was within the ſtatutes of *jeofailes*, but there was never any judgment given upon the foot of thoſe ſtatutes. But ſuppoſing it were a civil caſe, it may be a queſtion, whether this fault in the *teſte* of the writ would be amendable or no. Now the *teſte* of an original writ is not amendable. And ſo it was reſolved by the houſe of lords, with the concurrent opinion of all the judges, upon conſideration of *Gage*'s caſe, 5 *Co.* 45. *b.* in the caſe of my lord *Jeffreys*, [and a judgment given in *Wales* upon the authority of that caſe was reverſed. And upon that occaſion the record of that caſe was ſearched for, and found not to warrant the report. And *Holt* chief juſtice ſaid, that the record of the caſe is in *Co. intr. tit. err. p.* 9, 250. and the judgment of the court is contrary to the report, for the writ was not amended, but the fine was reverſed. And as I have heard *Twiſden* juſtice ſay, the eſtate is enjoyed under that judgment ever ſince.] But ſome think that a judicial writ differs, and that the *teſte* of that is amendable by the roll. This matter was made a queſtion in the caſe of *Carew verſ. Merler*, 3 *Cro.* 820. where in error of a judgment in debt, the *venire facias* appeared to be teſted after the judgment, and the court held, that this, though certified to be ſo, could not be taken to be the *venire facias* in this action, and that they would intend the cauſe was tried without any, which was helped by the ſtatutes of *jeofailes*. But as to amending it, they took this difference, that the return of a writ might be amended, becauſe that is warranted by the award upon the roll, and there-

Teſte of an original not amendable.

1 Lev. 2. The *teſte* of a writ of aſſiſe was *duodecno* for *duodecimo*, and not amendable, but the writ abated. Note, This was ſaid by the ſaid judges in the caſe of *Harvey v. Broad* this term, upon mention made of *Gage*'s caſe, Salk 626.

The *teſte* of a writ of entry was after the return and out of term, and the judgment was reverſed. Dier 129. n. 62.

A *ſcire facias in C. B.* was teſted on a *Sunday*, and the judgment was reverſed. Dier 168. n. 17.

fore being made different from that, might be amended. But the *teſte* of a writ can never be amended, becauſe the roll makes no mention of that. But he ſaid, it was the neſcience of the clerk to make the *teſte* of another day than the award of the court was, for he ought to know, that the writ ſhould be teſted, when the court awards it. The later books have gone contrary to this caſe in *Croke*, where the writ has been an ill writ, as if it were teſted out of term; but this was a good writ, and therefore it ſhould ſeem, that it were not amendable. But in *Yelv.* 64. *Nevill verſ. Bates*, the *venire facias* was returnable 15 *Hil.* and was teſted the 12 of *February*, which was after the return, and it was amended and made to iſſue before the return, becauſe it was but the default of the clerk. And a precedent was ſhewn, where a *venire facias* teſted out of term was amended and made to bear *teſte* in term; and in the principal caſe, the *diſtringas* was teſted the 12 of *February*, and amended, and made to agree with the return of the *venire facias*, becauſe but the miſpriſion of the clerk. And the caſe of *Lee verſ. Bacon*, *Yelv.* 64, 69. in treſpaſs in the county of *Salop*, and not guilty pleaded; the *venire facias* was *vicecomiti*, omitting *Salop*, and yet the ſheriff of *Salop* returned the jury; and it was amended, becauſe it was the fault of the clerk. He concluded, that if it had been a civil caſe, he ſhould have thought it amendable upon the ſtatute of *Hen.* 6. becauſe it was but the miſtake of the clerk, and appeared to them to be ſo upon the examination they had taken of the matter.

Teſte of a judicial writ amendable.

As to the third point he ſaid, that he admitted that there were amendments at common law. But the inſtances of what was done with relation to records in the ſame term, would conclude nothing, becauſe it is not a record, though the entry be made, till after the term, but is during all the term in the breaſts of the judges. And that ſaying of my lord *Coke*, that at common law miſpriſion of the clerks in another term in proceſs was not amendable by the court, for in another term the roll is the record; muſt be underſtood of the award of the proceſs by the court upon the roll. For the miſpriſion of the clerk in making out a writ with a wrong *teſte* is not in the breaſt of the court, and therefore that ſaying muſt be reſtrain'd to the award of the proceſs upon the roll. For proceſs is never any otherwiſe in the breaſt of the court, than as they award it; and therefore there will be no difference as to this amendment, whether it be done in the ſame term, or in another. There is no caſe of amendments at common law, where it has been extended ſo far as to amend proceſs, but only the acts of the court in entring continuances. There have been amendments made in criminal caſes as at common law, but never any that were founded upon the ſtatute of *Hen.* 6. But I cannot come up to theſe caſes: as *Harris*'s caſe,

8 Co. 157. a.

7 Hen. 6. 30.

2 *Cr*. 502. [The caſe there was, a record of an indictment of nuſance was removed into the King's Bench by *certiorari*, and in the joining the iſſue theſe words, *et Richardus Warer qui pro domino rege ſequitur ſimiliter*, *&c.* were left out; and it being moved in court, that there was no iſſue joined; the court, in regard it was but a matter of courſe, and the omiſſion of it was but the default of the clerk, ordered it to be amended, and it was ſo done, and thoſe words inſerted, though it was divers years before, and in the time of another clerk of the peace, yet the preſent clerk of the peace was ordered to amend it.] The reaſon of that was, becauſe it was looked upon to be a thing of courſe. But I cannot come up to it. That is not this caſe. I cannot come up to that caſe in *Palmer* neither, and there are multitudes of caſes contrary to it, where outlawries have been reverſed for that exception. That caſe cited by *Yelverton* does not appear certainly, what the miſtake was, and the ſingular number for the plural might be very material. As to the amendment in Sir *John Curſon*'s caſe, that might be, becauſe it was but a mere miſtake in the entry, and there was a docket to warrant the amendment. As to the caſe in *Keble*, there they thought it was well, becauſe that juryman was not one of them that tried the cauſe; and they thought it was the ſame man, and that *junior* was only a farther aſcertaining of him; and I do not find that it was amended. I think criminal caſes may be amended as far as civil caſes might by the common law. But then in order to know how far that is, you muſt look into the old books, and ſee what was done before the 14 *Edw*. 3. and where we cannot find any precedent of an amendment to warrant it, we muſt not extend our power of amending at common law indefinitely. And this being an error in proceſs, I think it is not amendable at common law.

Amendments in criminal caſes may be as far as they might in civil at common law.

Holt chief juſtice. This is an omiſſion in a point material. The *teſte* of the *diſtringas* ſhould have been the 23, and it is the 24; the *diſtringas* ſhould have iſſued the ſame day the *venire facias* was returnable. Suppoſe a man has day in court the 23, and no new day is given him till the 24, this will be a diſcontinuance, becauſe he, having no day given him on the 23, is at the expiration of the 23 out of court, and when you give him a day upon the 24, you give it him behind his back. The defendant indeed in this caſe had a day upon the roll, but then the writ of *diſtringas* is without any warrant by the roll, being different from that which was awarded by the court, and ſo the *diſtringas* iſſued without any authority. So there is a material variance between the writ iſſued, and the award of the court, and that will make it a different writ from that which was awarded. This is a good writ, and the ſtatute intended only to amend writs that were vicious by the miſtake of the clerk, in writing a letter or ſyllable wrong. But if you will amend this *diſtringas*, you muſt make it, as if it iſſued the 23 of *October*, when indeed it is a vicious writ, and iſſued ill. If this miſtake had been in proceſs in a civil caſe, it had been aided after verdict, and ſo in thoſe caſes ſuch miſtakes may be amended or not at pleaſure, which will anſwer all caſes of ſuch amendments in actions between party and party. But I would be glad to ſee ſuch an amendment between the ſtatute of *Hen*. 6. and 32 *Hen*. 8. Indeed a *teſte*, that is impoſſible, or upon a *Sunday*, or out of term, is amendable, becauſe it is a plain miſtake of the clerk. And that was the reaſon of the caſe of *Nevil verſ. Bates:* there the *teſte* of the *venire facias* was after the return and ill, being to diſtrain jurors not ſummoned. The caſe of *Bradley verſ. Baggs* proves that this is a diſcontinuance: and it is the conſtant courſe to *teſte* the ſucceeding writ the ſame day the former writ was returnable, and it is always ſo done in the Common Pleas, however it may be uſed here. But the clerks are not agreed it ſeems about this matter, and ſo it ſeems to be a matter of ſkill. I ſhould have thought this miſtake not amendable, if it had been in a civil action, and therefore *a fortiori* I think it not amendable in a criminal proceeding.

After the chief juſtice and *Powell* had delivered their opinions, that this miſtake was not amendable, *Powys* who had delivered his opinion with great dubiouſneſs, and concluded it only, that he rather thought it amendable than not; becauſe as he ſaid, it ſhould not go upon a court divided, came over to them, and held it not to be amendable.

Note, I was not preſent at the arguments, expecting it would have been printed, all the proceedings having been taken for the purpoſe in ſhort-hand, and was not for the ſame reaſon ſo exact in the taking the arguments of the judges, which therefore may not improbably have been miſtaken; and therefore I ſhall add ſome few caſes that were cited in this caſe, that are not cited before, but without any inference or application.

For the amendment 1 *Cr*. 144. Sir *Humphry Tufton* and Sir *John Aſhley*'s caſe, in a *quo warranto* againſt the corporation of *Maidſtone*, a judgment was entred by diſclaimer by conſent, of all liberties *virtute vel praetextu literarum patentium gerentium datum* 17 *Jac. Reg*. but the words *gerentium datum* 17 *Jac. Reg*. being in the margin of the paper book, and a ſtroke made croſs them, the clerk in ingroſſing the judgment had omitted them. And now it was moved, that they might be inſerted, having been omitted by the meer negligence of the clerk. And though it was oppoſed, becauſe none of the ſtatutes of amendments extend to caſes where the

King is party, and the amendment will alter the record in ſubſtance, and ſuch an amendment cannot be made in another term, much leſs in another year; yet it appearing to the court to have been the intent of the parties, to have thoſe words in, and Mr. Attorney certifying, that they were inſerted in the paper book by his own hand, according to their intent, and it not appearing, when or to what intent that ſtroke was made croſs them; it was held by all the judges to be amendable by the courſe of the common law, and as well in another term, as in the ſame term, and as well in the caſe of the King as of a common perſon; it being a meer miſpriſion of the clerk.

1 Roll. 196. A. 1.

Againſt the amendment 34 *Hen.* 6. 20. upon an iſſue joined in an action of debt, upon the *venire facias* 24 jurors were returned, and upon the *habeas corpora*, and all the proceſs after, only 23. And for this all the proceſs after the *habeas corpora* was held void, and that it could not be amended, and a new *habeas corpora* was granted. 2 *Roll.* 3. 11. Upon an iſſue joined in an action of debt, the *diſtringas* was awarded upon the roll returnable *in tres Paſch.* but the writ was made out returnable *quindena Paſch.* and a trial was had on that day, and judgment for the plaintiff; and reverſed, becauſe the writ was not warranted by the award upon the roll; and though the docket was, that the *diſtringas* ſhould be returnable *quindena Paſch.* and that the parties ſhould have that day, yet they would not amend the award, the roll being the act of the court in another term. *Dier* 211, in error to reverſe an outlawry, the writ of *exigent* was awarded upon the roll returnable *octab. Mich.* and the writ of *exigent* was made returnable *menſe Mich.* and *ad quintum comitatum tentum inter octabas et menſem* the party was outlawed; and erroneous, becauſe the writ ought to be warranted by the roll. *Yelv.* 60. *Brigs verſ. Thompſon:* an information upon the ſtatute of 21 *Hen.* 8. againſt a ſpiritual man for taking land to farm, upon iſſue joined the *venire facias* was awarded upon the roll returnable *coram nobis ubicunque, &c.* but the writ of *venire facias* was made returnable *coram nobis*, leaving out the words *ubicunque, &c.* not anſwering to the roll, and utterly uncertain, the King's Bench being removeable; and for this the judgment was arreſted. 8 *Co.* 162. *b. Blackmore*'s caſe. The ſtatute of *Henry* VI. does not extend to appeals, nor to pleas of the crown, or to any proceedings upon them, for they are excepted, nor to the amendment of any *exigent*, to cauſe any one to be outlawed, *&c.* 2 *Sid.* 7, 12. An attorney gave inſtructions to his clerk, to make a *capias ad ſatisfaciendum* returnable in *Trinity* term; and he ſeeing that the laſt day of that term was the twenty-fifth of *June*, by miſtake in writing *July* for *June*, made it returnable the twenty-fifth of *July:* and upon motion refuſed to be amended. That the ſtatutes of *jeofailes* do not extend to this caſe, 8 *Co.* 163. *a. Blackmore*'s caſe, when a verdict upon an iſſue tried is given. So miſpriſions are not remedied by 32 *Hen.* 8. 18 *Eliz.* or any other ſtatute, but remain yet not amendable, in appeals or pleas of the crown, as indictments, *&c.* or any proceedings upon them; for they are excepted in the act 8 *Hen.* 6. and the ſtatute 32 *Hen.* 8. and 18 *Eliz.* does not extend to them. 1 *Ventr.* 17, 35. *Perry*'s caſe: In an information of forgery, the forging was laid at *S.* and the publication at *D.* and upon iſſue joined the *venue* was from *D.* only, and it was held to be a miſtrial, and not aided by the ſtatutes of *jeofailes*, neither within the words, nor intention of them; though it was urged for the King, that it was an information at common law, and ſo not within the exception.

Slater *verſ.* May.

S. C. Salk. 42.
S. C. 6 Mod. 304.
3 Danv. Abr. 351. p. 4.
3 Salk. 23.
If an adminiſtrator *durante abſentia* of an executor muſt aver the executor is *in partibus tranſmarinis.*

AN adminiſtrator *cum teſtamento annexo*, *durante abſentia* of an executor, brought an action: and upon demurrer to the declaration Mr. *Broderick* took exception, that it was ſaid in the declaration only that the executor was abſent, and not ſaid where, for it might be only from this court, and it ought to have been averred, that the executor was abſent *in partibus tranſmarinis.* That in all caſes of a temporary adminiſtrator, if he will bring an action, he muſt aver that the adminiſtration has continuance. So it is of adminiſtrator *durante minori aetate*, he muſt aver, that the perſon during whoſe minority, *&c.* is under the age of ſeventeen. So 3 *Keb.* 212. *Buckley verſ. Welch*; if an adminiſtrator *pendente lite* brings an action, it was agreed by the court, that he muſt aver, that the conteſt continues. And there is no authority in the law againſt it. As to the caſe in 4 *Mod.* 14. *Hodge verſ. Clare*, where in a *ſcire facias* brought by an adminiſtrator *durante abſentia* upon a judgment, and upon demurrer to the *ſcire facias* this exception is ſaid to have been taken, and that the court reſolved, that the defendant ought to plead it; upon ſearch of the roll in that caſe, there is a full averment, that the perſon, during whoſe abſence, was *in partibus tranſmarinis*, and no ground for the objection.

5 Co. 29. a.

The chief juſtice and *Powell* ſaid, that the adminiſtration *durante abſentia* muſt be intended of an abſence out of the realm, and therefore the adminiſtrator plaintiff in his declaration ought to aver, that the executor is out of the realm. And the chief juſtice ſaid, that it was reaſonable there ſhould be ſuch an adminiſtrator, and that this adminiſtration ſtood upon the ſame reaſon as an adminiſtration *durante minori aetate* of an executor, *viz.* that there ſhould be a perſon to manage the eſtate of the teſtator, till the perſon

See 1 Lut. 342.

perſon appointed by him is able. And he ſaid, upon the obſervation upon 4 *Mod.* ſee the inconveniences of theſe ſcambling reports, they will make us appear to poſterity for a parcel of blockheads.

Judgment was given for the defendant.

Clerk *verſ.* Withers.

S. C. Salk. 322. S. C. 6 Mod. 290. 11 Mod 34. Noy 73. 1 Bulſt. 79. 2 Ro. Abr. 291. Barnard. 81. An adminiſtrator recovers a judgment, and ſues out a *fieri facias*; on which the ſheriff returned, that he had ſeiſed goods, &c. *ſed remanſerunt in manibus pro defectu emptorum*; before the goods were ſold, the adminiſtrator died, the defendant brought *ſcire facias* againſt the ſheriff to have reſtitution.

A Writ of error of a judgment in the Common Pleas upon a *ſcire facias* by *Clerk* againſt the defendants, ſheriff of *Middleſex.* The caſe appeared to be, that one *Dives* as adminiſtratrix of *J. S.* had recovered a judgment for 304 *l.* againſt *Clerk*, and ſued out a *fieri facias* upon that judgment, directed to the defendants, ſheriff of *Middleſex.* And upon that writ the defendants returned, that he had ſeiſed goods to the value of the debt, and that they remained in his hands *pro defectu emptorum.* Afterwards and before the goods were ſold, *Dives* died, and *Clerk* ſued out this *ſcire facias* to the defendant, to ſhew cauſe why the goods ſhould not be reſtored to him; as ſuppoſing that now *Dives* is dead, there is no body can have the fruits of the execution. And upon demurrer to the writ, judgment was given for the defendant in the Common Pleas.

This caſe was argued *ſeriatim* by all the judges; and by their unanimous opinion judgment was affirmed. Note, the matter was not debated in the Common Pleas.

When the defendant's goods are ſeiſed on a *fieri facias*, the debt is diſcharged.

Gould juſtice. I am of opinion, that judgment ought to be affirmed, for theſe reaſons: firſt, becauſe *Clerk* is by this ſeiſing of his goods in execution diſcharged of the judgment; and therefore where upon a *fieri facias* the defendant paid the debt to the ſheriff, this was held to be a good plea to an action of debt upon the judgment, 3 *Cro.* 208, 390. 1 *Lut.* 588. So in a *ſcire facias* upon a judgment the defendant pleaded, that his goods were taken in execution by the ſheriff upon a *fieri facias* upon that judgment, and well, 3 *Cro.* 237. So in *Dike*'s caſe, *Trin.* 36 *Car.* 2. *B. R. rot.* 504. (ſee the caſe by the name of *Dike verſ. Mercer*, 2 *Show.* 394.) where two men were bound jointly and ſeverally, and judgment and execution had againſt one of them, and his goods ſeiſed, but the ſheriff had not ſatisfied the plaintiff, nor ſold the goods: and in an action of debt againſt the other obligee, he pleaded this matter; and it was held, it was no plea for him, becauſe it was not ſatisfaction; but it was held, that it would have been a good plea for that defendant, againſt whom the judgment and execution was obtained, if he had been ſued again. Secondly, the ſheriff may ſell the goods by authority of law, without a writ of *venditioni exponas*, and after his year is expired, and he is out of his office. And ſo is 2 *Cro.* 73. The caſe of *Thoroughgood* in *Noy* 73. is, that if the plaintiff dies after a *fieri facias* awarded, yet the ſheriff may levy the money. And if the plaintiff makes no executors, nor adminiſtration is as yet committed, the money ſhall be brought into court, and there depoſited, until, &c. And where a *fieri facias* goes to the ſheriff, he cannot return, that the plaintiff is dead, and therefore he did not execute it, 1 *Cro.* 459. or if he execute it, and levy the money, and the plaintiff dies after that, and before the return of the writ, the executor or adminiſtrator ſhall have the benefit, and ſhall have the money, 1 *Cro.* 459. 1 *Sid.* 29. Where the executor ſues an *elegit* upon a judgment recovered by himſelf, and before the debt is levied dies inteſtate, the adminiſtrator *de bonis non* ſhall take advantage of this execution: otherwiſe, if he had died before execution ſued out. The ſubſtantial part of the execution in this caſe is executed in the life-time of the executor, and there is nothing wanting to compleat it, but the formal part. For as ſoon as the ſheriff ſeiſes the goods by virtue of the writ of *fieri facias*, he gains a ſpecial property in them, and may maintain treſpaſs againſt the defendant, if he takes them away. So is 3 *Cro.* 635. So he may maintain *trover* againſt a ſtranger, that takes them away. *Wilbraham verſ. Snowe*, 2 *Saund.* 47. 1 *Lev.* 282. And in that book *Kelynge* holds, that the property is diveſted out of the owner, and veſted in the party at whoſe ſuit the writ iſſued. When the ſheriff has returned, that he has levied 100*l.* an action of debt lies for the adminiſtrator *de bonis non* againſt the ſheriff. This is not like the caſe of *Cleeve* and *Veer*, 1 *Cro.* 450, 457. 1 *Jones* 385. where an executor ſued out an *extendi facias* upon a ſtatute, and before the inquiſition taken died, and the adminiſtrator *de bonis non* ſued out a *liberate*, and the execution was held to be void, becauſe by the death of the executor the writ of *extendi facias* abated; for there was a farther act to be done, which is not in this caſe, *viz.* the awarding a *liberate*, which is an act of the court; and till that is awarded, the execution is not compleat.

The ſheriff may ſell the goods ſeiſed on a *fieri facias*, without a *venditioni exponas*, after he is out of his office.

Plaintiff dies after goods ſeiſed.

Powys juſtice ſaid nothing new, as I obſerved, but only that the caſe in *Sid.* 29. was a ſtronger caſe than this.

Powell juſtice. I am of opinion, that this *ſcire facias* does not lie. The queſtion is, what ſhall become of the goods, whether *Clerk* ſhall have them again? He ſuppoſes that no body has a title to them but him, becauſe he has the general property. I ſhall not determine how it would have been, if execution had not been in part executed. As my brother *Gould* obſerves, it is a good plea by the defendant, that the ſheriff has taken his goods in execution, and ſtill detains them. An execution is an intire thing, and that ſheriff that takes the goods in execution, ſhall go on, and ſell, though he is out of his office, and not the new ſheriff. And ſo is 34 *Hen.* 6. 36. *n.* 5. the reaſon of which caſe is, becauſe an execution is once begun before a writ of error allowed, and a writ of error that comes after is no *ſuperſedeas* to the execution. For the officer in that caſe is only to go on to compleat it. This caſe differs from the caſe of *Cleeve* and *Veer*, becauſe in that caſe there muſt be a *liberate*, which muſt be awarded in the court; and that is the reaſon of that caſe; becauſe there is ſomething farther to be done, and therefore the death of the executor plaintiff abates the writ. But in this caſe a *venditioni exponas* is not awarded by the court. But then it is objected, what ſhall become of the money, when here is no plaintiff in court to receive it? As to that the money muſt be brought here, and ſhall be kept in court, as money recovered in the executor's life-time, till the perſon that has title applies to the court for it, and upon producing to the court his title, *viz.* his letters of adminiſtration *de bonis non*, the court will deliver him the money.

Holt chief juſtice. The queſtion is, whether the defendant in the action ſhall have a *ſcire facias* againſt the ſheriff or no? And I am of opinion, that the judgment ought to be affirmed.

Upon a *fieri facias* the ſheriff may pay the money to the plaintiff.

1. Becauſe, after ſeiſure of the goods, there is nothing to be done by the ſheriff, but to bring the money into court, though indeed if the ſheriff pay the money to the plaintiff, that is well. For the writ is, *quod fieri facias de bonis, &c. et denarios illos habeas coram nobis, &c.* ſo that when he has ſeiſed the goods, he has nothing to do but to bring the money into court. And the death of the plaintiff after the ſeiſing of the goods, does not hinder the ſheriff from executing the reſidue of the writ, which is to bring the money into court.

2. Though the ſheriff is out of his office, yet he is bound to ſell the goods. For when he has returned, that he has ſeiſed the goods, and that they remain in his hands *pro defectu emptorum*, that is no diſcharge to the ſheriff, but only an excuſe to the court. But he muſt ſtill ſell the goods even without a *venditioni exponas*, and he is compellable to do it, though he is out of his office. And for that purpoſe a *diſtringas nuper vicecomitem* lies againſt him, of which writ there are two ſorts. The firſt the old ſort, which is mentioned in the book of 34 *Hen.* 6. 36. *n.* 5. to diſtrain *nuper vice-*

Diſtringas nuper vic. two ſorts.

vicecomitem, ita quod bona illa venditioni exponat, et denarios provenientes liberari faciat praefato nunc vicecomiti, ut ipſe vicecomes denarios illos coram juſticiariis hic habere poſſit tiel jour, ad reddendum praefato querenti. And if this writ lies, it proves that he has an authority to ſell the goods; or elſe it would be unreaſonable, that the party ſhould have ſuch a writ. For conſider what is to be done on this writ, for the ſheriff muſt return iſſues againſt the old ſheriff upon it, and ſo *in infinitum*; which would be ſtrange, to compel a man to ſell goods, that has no authority. The other ſort is indeed new. You have it in *Raſt. Intr.* 164. *Theſ. brev.* 90. and is to diſtrain the old ſheriff, to ſell the goods, and have the money himſelf in court at the return of the writ. Then ſince the ſheriff is compellable to ſell the goods, what hinders him from doing it, though the plaintiff is dead. The ſheriff is anſwerable for the value of the goods after he has ſeiſed them, and he is bound to ſell them at all events, and he is bound to the value he has returned them to be of. And though the goods are loſt or reſcued from him, he is bound, not to that value they may after appear, or be found to be of, but to the value he returned them to be of; that is the value he is bound to, and an action of debt lies againſt him for that value. And that is the caſe in *Saunders's Reports* (*2d part* 343. *Mildmay verſ. Smith*) and by the ſame reaſon he is compellable to ſell them according to that value.

3. The plaintiff has no farther remedy againſt the defendant, againſt whom he recovered his judgment, but muſt go on againſt the ſheriff. For the defendant having loſt his goods, may plead, levied by *fieri facias*, in bar to an action of debt or *ſcire facias* upon the judgment. And to this purpoſe is the caſe of *Atkinſon and Atkinſon*, 3 *Cro.* 390. where in a *ſcire facias* on a judgment in detinue, the defendant pleaded, that upon a *diſtringas* upon that judgment to the ſheriff, he delivered the goods to the ſheriff; and that was held to be a good plea. And the ſeiſing the goods upon the *diſtringas* is the ſame thing in that action, as levying the money upon a *fieri facias* in other caſes. And as my brothers ſay, it has been held to be a good plea, that the defendant's goods were ſeiſed upon a *fieri facias*.

4. This caſe differs from the caſe of *Cleeve verſ. Veer.* The judges held there, that the extent was void, becauſe the writ was abated. But why? Becauſe no right was veſted by the extent. For the purport of that writ is to extend and ſeiſe into the King's hands, that he may deliver to the plaintiff; which is to be done upon the award of the *liberate*, which could not be awarded in that caſe, becauſe the executor, who was plaintiff, was dead; any

more than where an executor ſues a *ſcire facias* upon a judgment, and has a judgment, *quod habeat executionem*, and then dies, the adminiſtrator *de bonis non* cannot ſue execution. But here is no neceſſity to have any thing more done, or any act of the court, to enable the ſheriff to ſell the goods; but in that caſe the plaintiff could not enter without a *liberate*. And this difference ſeems to be intimated, though not ſo clearly, in the caſe cited out of 1 *Sid.* 29. Here the ſheriff is become reſponſible to the executor for the value he has returned the goods at, and he is chargeable to the executor in the right of the teſtator. And when that right is come to the adminiſtrator *de bonis non*, the ſheriff ſhall bring the money into court, and upon the adminiſtrator *de bonis non* coming in and ſhewing his letters of adminiſtration, he ſhall take it out. Here is no further act to be done to impower the ſheriff; for though the return of the reſidue *in cuſtodia pro defectu emptorum* is a good excuſe, ſo as the ſheriff ſhall not be amerced, though he has not brought the money into court; yet he muſt ſell the goods in convenient time: for if a *diſtringas* is taken out, he muſt ſell the goods before the return of the writ, or elſe he forfeits iſſues.

Armit *verſ.* Breame.

Intr. *Hil.* 2 *Ann.* Rot. 243.

S C. Salk. 76, 498.
S. C. 6 Mod. 244.
Debt on a bond to perform an award.
3 Bulſt. 311.
Kelw. 34.
Noy 21.
2 Ro. Rep. 274.
Plowd. 231.
Hob. 148.

DEBT upon a bond conditioned to perform the award of *John Olley*, *&c.* of and concerning all ſuits, *&c.* now depending between the ſaid *Charles Breame* and *Theophilus Armitt*, for or by reaſon or means or on the account of any erection, edifices, piles of wood, pipes, water-courſes, balconies, back-doors, ways and paſſages, or other act, matter, cauſe or thing whatſoever, by the ſaid parties, or either of them, in or to the detriment, damage, annoyance and impediment, or by infringing on the right of the one or the other of them reſpectively, erected, placed, built, committed, done or ſuffered in, upon or about all and every or any the meſuages or tenements and wharfes, with their appurtenances, ſituate and being within the precinct of the hoſpital of *Bridewell*, *London*, which they and each of them reſpectively claim, hold and enjoy by, from and under the mayor, commonalty and citizens of the city of *London*, governors of the ſaid hoſpital, or any of them, by virtue of any leaſe or aſſignment of leaſe, or other power whatſoever: and do and ſhall produce and ſhew to the ſaid arbitrators, or ſuch of them as ſhall require the ſame, the leaſe, aſſignment of leaſe, or other power, whereby the ſaid defendant holds his part of the premiſſes, or a true copy thereof, to be peruſed by the ſaid arbitrators, as they ſhall think fit, *&c.* The defendant pleads, that before the time limited by the arbitrators to make their award in, *ſcilicet, tiel jour, ipſe produxit et oſtendebat* to the arbitrators at their requeſt *dimiſſionem et poteſtatem, per quam idem* the defendant *tenuit ejus partem praemiſſorum, ſcilicet, omnes evidentias ſuas, et totum titulum ſuum adinde per eos perutend. prout aptum putabant*; and the arbitrators made no award. The plaintiff replies and ſets out an award, which replication, as far as concerns the objections taken and debated, was this: That the arbitrators the 9th of *October* 1702 did make their award in writing *de et ſuper praemiſſis in conditione praedicta ſuperius ſpecificatis,* and thereby did award, that the ſcaffolds and deals of the *ſouth* part of the houſe of the plaintiff ſhould be taken down within 58 pays, *a datu ſcripti arbitrii, &c.* and no more ſcaffolds ſhould be erected, or built, nor deals piled, between the river *Thames*, and the aforeſaid houſe of the plaintiff, within the breadth of the then lights of the ſaid houſe, yet the ground to be uſed for any goods as a wharfe by the defendant, ſo that the windows of the *ſouth* part of the ſaid houſe of the plaintiff ſhould not be darkened or obſtructed: and the arbitrators did further award, that the balcony of the *ſouth* part of the houſe of the plaintiff ſhould be taken down, if the defendant ſhould deſire it, within three months next after the execution of the aforeſaid award: and the arbitrators did further award, that the drain and water-pipe which *tunc venerunt ſubter wharfam praedictam* of the defendant *ad auſtralem partem praedictae domus praedicti* the plaintiff, ſhould remain as the ſame then were, and that the defendant *licentiam daret ad tempus conveniens pro emendatione et reparatione inde ſi occaſio foret:* and farther, that the wall of the *weſt* ſide of the plaintiff's houſe is a party-wall, and that if the defendant ſhould at any time hereafter build againſt it, he ſhould pay ſo much of the charges, and half the charges of a party-gutter; and that the water ſhould be brought down from thence *ſuper dictam wharfam praedicti* the defendant, *&c.* And although the plaintiff has always kept and performed all things in the ſaid award, which were of his part, to be kept and performed, and *proteſtando* that the defendant has not done ſo on his part: the plaintiff *in facto dicit,* that the ſcaffolds on the *ſouth* part of the houſe of the plaintiff in the writing of award aforeſaid mentioned at any time within 58 days *a datu ſcripti arbitrii praedicti* were not taken down *ſecundum formam et effectum arbitrii praedicti,* but the defendant the ſame ſcaffolds on the *ſouth* part of the houſe of the plaintiff in the writing of award aforeſaid mentioned *a datu ſcripti arbitrii praedicti* by the ſpace of 58 days *et ultra ibidem continuavit, et hucuſque continuare permiſit, contra formam et effectum arbitrii praedicti, et hoc, &c.* To this the defendant demurred. And the

That the ſcaffolds ſhould took down within 58 days *a datu ſcripti arbitrii praedicti.*

plaintiff joined in demurrer. This caſe was argued by Mr. *Mountague* and Mr. *Raymond* for the defendant; and by Mr. *Broderick* and Mr. *Eyre* for the plaintiff.

Uncertain.

And the exceptions inſiſted on were, that the award was uncertain, both as to the time when it ſhould be performed, the ſcaffolds by the award being to be pulled down within 58 days from the date of the award, and it does not appear any where in the plaintiff's replication, that the award had any date, neither indeed had it any: and alſo the award does not appoint who ſhall take the ſcaffolds down.

No date.
Brownl. 30, 31.
Plowd. 491.
3 Bulſt. 312.
Dier 307.
5 Rep. 1.
2 Salk. 463.

And this is as uncertain as *Salmon*'s caſe, 5 *Co*. 77. *b*. 3 *Cro*. 432. *Moor* 359. where the award was naught, for not appointing in what ſum the perſon ſhould be bound. And yet Mr. *Raymond* ſaid, a covenant or promiſe to enter into a bond, that the obligee ſhall enjoy certain land (which was to have been the condition in *Salmon*'s caſe) or for payment of money to the obligee, without mentioning in what ſum the bond ſhall be, is good; and it ſhall be underſtood according to common intendment; and in the one caſe ſhall be to the value of the land, and in the other double the money to be paid.

2 Cro. 116.

But it is otherwiſe in caſes of awards, which muſt be final, and where no averment or intendment can be admitted to ſupply the defect of certainty, and make it good, as may be done in thoſe other caſes: and this is the ſtanding difference. And ſo is 5 *Co*. 78. *a*. *Salmon*'s caſe. And awards have been held to be naught for the like uncertainties, as the caſe of *Maſſey* and *Awbrey*, 1 *Roll. Abr*. 264. *Styles* 365. where in an award between landlord and tenant, the arbitrators awarded among other things, that the tenant ſhould pay the landlord the arrears of rent ſince the landlord's purchaſe, and becauſe it was uncertain what that was, and the tenant could not come to the knowledge of it, but at the curteſy of the landlord or the vendor, the award was held to be naught. So the caſe in 2 *Cro*. 314. an award that *A*. ſhall give ſecurity to *B*. for payment of 16 *l*. at two days, was held to be void for the uncertainty what ſecurity it ſhould be, whether by bond or otherwiſe. And though it is true, that an award may be good in part, and void in part, yet the breach being aſſigned in the non-performance of this part of the award, if this be void he can never have his judgment. Another objection was, that the arbitrators had made their award of a matter that was not ſubmitted to them, and ſo had exceeded their authority.

Does not appear, that the matter was within the ſubmiſſion.

For it did not appear, that the plaintiff's houſe, &c. were within the precinct of the hoſpital of *Bridewell*, *London*; and though the award was pleaded to be made *de et ſuper praemiſſis*, yet that would not help it. And to this purpoſe the caſe in *Dyer* 242. was cited: where a ſubmiſſion to an award was for and concerning the right, &c. of a certain parcel of land containing by eſtimation 200 acres *vocatae Helſtorne linge*, &c. the arbitrators awarded, that in the waſte lands of the vill of *Helſtorne*, the defendant ſhould have the brakes there growing during his life, *&c.* and in the replication, ſetting out the award, there was an averment, that the parcel of land, where the brakes grew, is the ſaid parcel of land called *Helſtorne linge*, for the right, *&c.* of which the parties ſubmitted to the award; and the award was held to be naught, for this among other reaſons, becauſe it was not of the matter in ſubmiſſion, nor of any generality that comprehended it; but of another matter. And the averment of the party cannot expound the intent of the arbitrators. Another objection was, that the award was not mutual, for that every thing, that was awarded to be done, was for the benefit of the plaintiff, and there was nothing awarded to be done for the defendant. There was another objection by Mr. *Mountague*, that the award was uncertain, becauſe it did not appear, how many deals there were, nor whoſe they were; and that the arbitrators had exceeded their authority, by awarding, that no more ſcaffolds ſhould be erected, nor deals piled, between the river *Thames* and the houſe of the plaintiff, *&c.* for the future; it being only paſt differences upon occaſion of nuſances by paſt erections, which were ſubmitted to them; and that what was awarded for the defendant's benefit, *viz.* that the plaintiff's balcony ſhould be taken down, was not awarded poſitively, but conditionally, if the defendant think fit. And in another part of the award, where it was awarded, that the defendant *permitteret et toleraret* the plaintiff *habere liberam viam ſive tranſitum*, *Anglice* a paſſage, *ad et ab* a ſtable and hay-loft, *&c.* it was uncertain; becauſe it was not ſaid, what ſort of a way, whether with carts and carriages, or on foot. To theſe objections it was anſwered, that if the award had no date, then the words within 58 days *a datu* muſt be from the delivery, and ſo the time will be certain enough. For there is an averment in the replication, that the award was delivered, one part to each of the parties, on the 9th of *October* 1702. Beſides the award is pleaded to have been made the ſame day, and that muſt be taken to be the date, and that it bore date that day. As to the uncertainty of the perſon, who is to take them down, that is not a ſufficient uncertainty to vitiate the award. And as for thoſe caſes cited by Mr. *Raymond*, they are uncertainties in the thing that is to be done; this is an uncertainty only of the perſon that is to do the thing, and not of the matter to be done as thoſe. But if the uncertainty would vitiate the award, here is no uncertainty; for taking the whole award into conſideration, it appears plainly, that it was the defendant *Breame*'s ground. And that appears firſt from that clauſe of the award, whereby it is awarded, that the defendant ſhall uſe the ground between the *Thames* and the *ſouth* ſide of the plaintiff's houſe, as a wharfe: ſecondly, by that clauſe about the drain and water-pipe, wherein it

Not mutual.

Authority exceeded.

Conditionally awarded.

5 Co. 1. b. Claiton's caſe.

is expreſly ſaid, that the wharfe of the *ſouth* ſide of the plaintiff's houſe is the defendant's wharfe; and the wharfe being the defendant's, he muſt be taken to be the perſon who did the nuſance, by erecting the ſcaffolds and piling up the deals upon the wharfe. And then the caſe is no more than if a debtor, or a creditor, ſhould ſubmit to an award, and the arbitrators ſhould award, that the debt ſhould be releaſed, or that it ſhould be paid, that would be an expreſs award that the creditor ſhould releaſe in the one caſe, and the debtor pay in the other. So here the defendant appearing to be the perſon that had done the nuſance, the award, that it ſhall be taken down, is an expreſs award, that he ſhall take it down. Alſo no body elſe can do it, becauſe by coming on the defendant's ground the plaintiff would be a treſpaſſer. As to the objection, that it does not appear, that the houſe is within the precincts of *Bridewell* hoſpital, the averment that the award was made *de et ſuper praemiſſis*, will help that. As to the caſe in *Dyer*, that was a plain variance appearing upon the face of the award; but otherwiſe, if there be nothing appearing upon the award itſelf, which ſhews it to be a matter out of the ſubmiſſion, the court will take the award to be of the matters in difference. *Baſpole's* caſe 8 *Co.* 97. *Hob.* 191. 2 *Saund.* 184. 2 *Ventr.* 242. As to that objection, that nothing is awarded for the defendant, there is that, that he ſhall uſe the ground as a wharfe, and that the balcony ſhall be taken down, if he pleaſes. And the addition of it, if the defendant pleaſes, makes no difference, becauſe that is no more than the law ſays; as if an award were to pay money, if the other pleaſed to receive it, that would be well. Then an exception was taken to the plea, that the defendant pleaded generally, that he *produxit*, &c. to the arbitrators, &c. *dimiſſionem et poteſtatem per quas idem* the defendant *tenuit ejus partem praemiſſorum, ſcilicet omnes evidentias ſuas et totum titulum ſuum adinde*, &c. whereas he ſhould have ſet out the leaſe particularly and certainly, that the court might have adjudged, whether it were a good leaſe or no.

De et ſuper praemiſſis.

Leaſe ought to be ſhewed ſpecifically in pleading.

It was replied of the part of the defendant, that there could be no difference between an uncertainty in the thing to be done, which was admitted by the counſel for the plaintiff to be naught, and an uncertainty in the perſon, who was to do the thing; for the thing could not do itſelf. And that the wharfe did not appear to be the ſame wharfe, but might be another: and as to the fault in the plea, that was now out of the caſe, by the plaintiff's replying and aſſigning an inſufficient breach. And it was compared to *Turner's* caſe, 8 *Co.* 133. *b.* if the defendant pleads an inſufficient bar, yet if by the plaintiff's replication it appears, that he has no cauſe of action, the plaintiff ſhall never have judgment; as in debt upon a bond to perform covenants, the defendant pleads an ill bar, and the plaintiff replies, and aſſigns a breach, which of his own ſhewing appears to be no breach, the defendant ſhall have judgment. So here the plaintiff having aſſign'd his breach in a part of the award which is void, he ſhall never have judgment, though the plea were admitted to be inſufficient, becauſe he has no cauſe of action.

As to the main objection, which was that it was not awarded, who ſhould remove the deals and ſcaffolds, the three juſtices were againſt the chief juſtice. The chief juſtice was of opinion, Firſt, That it did not appear, that the wharfe was the defendant's ground; all that appeared was, that the defendant was to uſe the ground as a wharfe, which did by no means imply, that he was to have the ground, being but a liberty; but rather the contrary. And beſides, if it had appeared, that would not have been ſufficient, becauſe it ought to have been averred in the replication, and which was the ſecond reaſon the chief juſtice gave, becauſe it did not follow, tho' it were the defendant's ground, yet that he was bound to remove the deals, unleſs he had been awarded to do it. For the deals lying there being a nuſance to the plaintiff, he might lawfully remove them.

An award good to a common intent.

Powell juſtice held, that as a plea in bar ſhould be taken to a common intent, ſo *a fortiori* ſhould an award; and that one part of an award might explain another. That it appeared here plainly upon this award, that here were ſeveral nuſances done by one neighbour upon his ground to the prejudice of another; and that theſe differences were ſubmitted by them to arbitrators, to be determined in an amicable way. And therefore when the arbitrators come to award, that the nuſance ſhall be removed, it muſt be underſtood, that it ſhall be done by him that is owner of the ground, and did the nuſance; for though any perſon, or the plaintiff, might remove the nuſance, yet that ſhall never be intended to be the deſign of the arbitrators, who intended to make an amicable end of this difference. And he reſembled this to the caſe of 9 *Edw.* 4. 3. *b.* where the condition of an obligation was, that the great bell of *Milden hall* ſhould be carried to the houſe of the obligee in *N.* at the coſts of the men of *M.* and there weighed and melted down in the preſence of the men of *M.* and the obligee ſhould make of it a tenor, *&c.* though it was not ſaid who ſhould weigh the bell, yet it was adjudg'd that the braſier, who was the obligee, ſhould do it, becauſe it belonged to his occupation to do it. So here the owner of the land is the propereſt perſon to remove the ſcaffolding. Beſides, if a man were bound in a bond, conditioned that ſuch ſcaffolding in his ground to the nuſance of the obligee's houſe ſhould be taken down by ſuch a day; the obligor would be bound to take it down. So here in the ſame manner, the condition of the bond being for performance of an award, and the award being that the ſcaffolding ſhall be taken down, the award is parcel of the condition of the bond, and will have the ſame effect as if it had been inſerted in the condition. The other juſtices were of the ſame opinion, that it did appear, that the wharfe was the defendant's, and therefore he ought to take down the ſcaffolds, *&c.*

Datus ſignifies delivery.

As to the exception of the uncertainty of the time when the ſcaffolds were to be taken down, the court held, that that was certain enough; for if the award had no date, the time muſt be computed from the delivery, and that was one ſenſe of *datus*: they held alſo, that the award was mutual, and that the defendant's plea was well enough; for he was only to produce ſuch a leaſe as he had. They held alſo, that the number of deals was not material; and that the awarding, that no more deals ſhould be erected for the time to come, would do no harm, for it did not bind the inheritance, but was void as to that. And if any of the other exceptions were material, yet an award might be good in part and void in part, and the breach being aſſign'd in a part of the award which was good, the plaintiff ought to have judgment. And judgment was given for him by three judges againſt the chief juſtice. Afterwards error was brought on the judgment in the Exchequer Chamber, but before argument the parties agreed.

Queen *verſ.* Sir Jacob Banks.

S. C. Salk. 652.
1 Salk. 380.
S. C. 6 Mod. 245.

An indictment found at the ſeſſions was removed by the proſecutor into the King's Bench by *certiorari*; the defendant pleaded the laſt day of *Trinity* term, and carried down the cauſe, and for want of proſecution was acquitted. New trial granted.

THE defendant was indicted before the juſtices of peace in their ſeſſions, for aſſaulting *Colepepper cum baculo* in the Queen's palace *prope regiam perſonam, eadem domina regina exiſtente in concilio circa ardua regni.* This indictment was removed into the King's Bench by *certiorari* by the proſecutor, and the defendant pleaded the laſt day of the laſt term, and carried the record down to trial, and at the aſſiſes the proſecutor would not proceed, and the defendant was acquitted for want of proſecution. And now this term the proſecutor moved the court for a new trial, becauſe no *niſi prius* with a *proviſo* can be where the Queen is ſole party, 1 *Keb.* 195. That a trial cannot be by *proviſo* againſt the King. And though a cauſe where the King is party may be carried down to trial by either party by conſent, as is 1 *Keb.* 195. yet without ſuch conſent, it cannot be carried down till after a default made by the King, and not then neither without leave of the court, or the conſent of Mr. Attorney, and ſo is 1 *Keb.* 525. Of the other ſide it was urged for the defendant, that the courſe of the court was, in caſe the defendant removed the indictment by *certiorari*, he was bound to carry it down to trial at the next aſſiſes. If the proſecutor removed, the defendant might carry it down to trial at the next aſſiſes at his election; that he was not bound by recogniſance to do it, as in caſe where he removed the indictment himſelf, but yet he had his election to do it; and that the reaſon of this was, becauſe his not proceeding below was in nature of a default, and ſo within the ſame reaſon, as where a proſecutor ſlips an aſſiſes: that an indictment being found upon the oaths of the county, was a heavy charge upon a man, and therefore the law indulged the defendant, that he might have a ſpeedy trial, to acquit himſelf of it. That this could be no inconvenience to the Queen, becauſe the defendant could not have a *niſi prius* and a *tales* without Mr. Attorney's conſent, who would not grant it unleſs he were ready; and that in caſe it were to be tried at the bar, there would be time to apply to the court for the Queen to put off the trial, in caſe ſhe were not ready. It was ſaid, they had ſearched for precedents, and that there could not be any ancient ones, becauſe before the late ſtatute it never appeared who brought the *certiorari*; but ſince that ſtatute they had ſome (as I think four or five) where the defendant had carried it down to trial the firſt aſſiſes, and no exception had been taken. That all the practiſers agreed that to have been the practice, and that upon their having been ſo informed by them they had carried the cauſe down to trial.

As to the precedents it was ſaid for the proſecutor, that they were late, and all ſince the late act of parliament, and that it might have been by conſent, and that they differ from this caſe, becauſe the defendants pleaded early in the term.

This cauſe was ſtirred three times, and much laboured of both ſides, and at laſt all the court agreed, that there ſhould be a new trial, becauſe there was no reaſon, why the Queen ſhould be more haſtened in her proſecutions than every private plaintiff. And as to the precedents, they paſs'd *ſub ſilentio*, and therefore were of no weight. And they made a rule for the ſettling this matter for the future, that the defendant ſhould not carry down the cauſe to trial in ſuch a caſe as this, without the leave of the court, upon motion in court; and that they to be ſure would never grant leave, till after a default by the Queen.

The defendant in an indictment removed by the proſecutor ſhall not carry it down to trial without leave of the court by motion.

There were many things ſaid in the argument of this caſe by the chief juſtice, and *Powell*; as that a trial by *proviſo* could not be againſt the Queen, and *Powell* gave the reaſon, becauſe a *proviſo* implies a *laches*, which cannot be in the Queen; and the chief juſtice ſaid, that it was not a trial by *proviſo* no more than a trial brought

A trial by *proviſo* not againſt the Queen.

brought on by the defendant in a replevin, *quare impedit*, attachment *ſur prohibition*, where both parties have a liberty of carrying the cauſe down to trial. The chief juſtice ſaid alſo, that if an indictment be found in the King's Bench, the defendant by the courſe of the court is bound in a recogniſance to carry the cauſe down to trial. And ſo if an indictment be found in the country, and the defendant pleads, and tries it there, they bind him by recogniſance to bring it on to trial at his own charges. But where an indictment is removed by *certiorari* by the proſecutor, the defendant is *ſine die*, and need not come in till proceſs goes out againſt him (though he may come in if he will) and he is not bound by recogniſance to carry the cauſe down to trial. And it was all one before the ſtatute, where an indictment was remov'd by *certiorari* by the defendant out of a foreign county; for the defendant was *ſine die*, and the common courſe was to outlaw him if he did not come in: but that was found inconvenient, and therefore the act was made. But before the act, in *London* and *Middleſex* in caſes of indictments found there, if the defendant brought a *certiorari*, he was bound in a recogniſance to carry it down to trial the next term, or the ſitting after the term; and the ſame rule was made after the revolution, and before the act, in relation to a *certiorari* granted into foreign counties. And therefore the difference between a *certiorari* by the defendant and the proſecutor (which is given as a reaſon why there can be no ancient precedents) is of no weight, becauſe it was all one which party brought the *certiorari*, becauſe the defendant was not bound to carry it down. And as to the default, that is not ſo, for indictments cannot be found any where but in the county; and therefore probably this indictment might be found on purpoſe to be removed. As to the precedents they all paſs'd *ſub ſilentio*, and are all of late date, ſince *Hil.* 9 *Will.* 3. *Powell* ſeem'd to think at firſt, that Mr. Attorney's granting a *niſi prius*, was a conſent to the trial, and that that would make it good. But the chief juſtice and he agreed, that it was only a conſent to the manner of the trial. And Mr. Attorney declared to the ſame effect in court.

The courſe of the King's Bench of carrying indictments to trial removed thither by *certiorari*.

After this rule made in his favour, the proſecutor moved for a trial at bar, becauſe the fact was done in the Queen's palace, whilſt her Majeſty was in council; and that was oppos'd, becauſe the Queen had given no direction for the proſecution, but the proſecutor carried it on meerly on his own account. And when upon his petition her Majeſty had referred the matter to the board of *Green Cloth*, the proſecutor had declined procuring their report, and had proceeded in this manner. And after this matter had been twice moved, and Mr. Attorney being preſent in court and declared that he had no directions to proſecute, the matter was compromiſed by conſent, that the trial ſhould be at the aſſiſes, but that the high ſheriff ſhould return forty-eight jurors in the preſence of the proſecutor and the defendant, and they to ſtrike out twelve a-piece, &c. The laſt day of *Trin.* term the proſecutor moved the court to ſet aſide the rule, pretending he did not hear the judges; but *Holt* chief juſtice reprehended him for the ſingularity of his proceedings (which were very reprehenſible) and told him he would not ſet aſide the rule. Then he ſaid, that he muſt have a trial at bar. But the chief juſtice ſaid, there was no reaſon for it, it appearing to them to be a private proſecution. And at length the firſt rule ſtood.

Note, At the aſſiſes the defendant was acquitted, as were alſo Mr. *Knatchbull* and Mr. *Scott*, upon an indictment preferred againſt them by the ſame proſecutor for another branch of this quarrel, the proſecutor being as it ſeems ſo unfortunate, as by his indiſcreet warmth and violence of temper to have loſt the good opinion of, if not all credit with, the ſober part of mankind.

Buckmyr *verſ.* Darnall.

AN action upon the caſe wherein the plaintiff declared, that the defendant, in conſideration the plaintiff at his requeſt *locaret et deliberaret cuidem Joſepho Engliſh* a gelding of the plaintiff's, and *cuidem Carolo Reymer* another gelding of the plaintiff's, *ad equitandum et itinerandum uſque ad Reading in comitatu Berks, aſſumpſit et promiſit* the plaintiff, *quod* the ſaid *Joſeph* and *Charles* the ſaid geldings to the plaintiff *redeliberarent*, &c. Upon *non aſſumpſit* pleaded this cauſe came to trial before *Holt* chief juſtice at *Weſtminſter hall*; and the counſel for the defendant inſiſting, that the plaintiff ought to produce a note in writing of this promiſe within the ſtatute of frauds, and the chief juſtice doubting of it; a caſe was made of it, and ordered to be moved in court, to have the opinion of the other judges. And now it was argued this term by ſerjeant *Darnall* for the defendant, and by Mr. *Raymond* for the plaintiff. And it was inſiſted for the defendant, that this caſe was within the ſtatute of frauds, for it was a promiſe to anſwer for the default and miſcarriage of the perſon the horſe was lent to. The very letting out and delivery of the horſe to *Engliſh* implies a contract by *Engliſh* to redeliver him, and he is bound by law ſo to do, and conſequently the defendant is to anſwer for the default of another. In a caſe 2 *Will.* & *Mar.* your lordſhip ſettled this rule, that where an action will lie againſt the party himſelf, there an undertaking by *J. S.* is within the ſtatute; but where no action will lie againſt the party himſelf, there it is otherwiſe. And therefore I agree

S. C. 6 Mod. 248.
1 Salk. 27.
3 Salk. 15.
2 Saund. 66.
5 Mod. 13.
Ante 224, 538.
1 Vent. 43.

Promiſe within 29 *Car.* 2. *c.* 3. to anſwer for the neglect, &c. of another.

Where an action will lie againſt the party himſelf, an undertaking by *J. S.* for his performance is within the ſtatute; but where no action lies againſt him it is otherwiſe.

I agree this caſe, that if a man ſhould ſay to another, do you build a houſe for *J. S.* and I will pay you, that caſe is not within the ſtatute, becauſe there *J. S.* is not liable. But this caſe is not more than this, if a man ſhould ſay, do you let *J. S.* have goods, and if he does not pay you I will, that is within the ſtatute, becauſe an action will lie againſt *J. S.* for the money for the goods. Or if a man ſhould ſay, take *J. S.* into your ſervice, and if he does not ſerve you faithfully, or if he wrongs you, I will be reſponſable, that is alſo within the ſtatute.

To this it was anſwered for the plaintiff, that here the credit was wholly given to the defendant; that that rule of the ſerjeant's muſt be underſtood, where an action does not lie againſt the party himſelf on the contract, and not where an action does or does not lie againſt him upon collateral reſpects. And therefore in this caſe for an actual converſion, or for refuſing to re-deliver the horſe, *Engliſh* may be charged in *trover* or detinue; yet he being not chargeable upon the contract, the caſe is not within the ſtatute. This contract cannot be ſaid properly to be a promiſe to anſwer for the default or miſcarriage of another, unleſs *Engliſh* were liable by the firſt contract.

Upon the firſt motion and arguing this caſe, the three judges againſt *Powys* ſeemed to be of opinion, that this caſe was not within the ſtatute, becauſe *Engliſh* was not liable upon the contract; but if any action could be maintained againſt him, it muſt be for a ſubſequent wrong in detaining the horſe, or actually converting it to his own uſe. And *Powell* juſtice ſaid, that that rule, of what things ſhall be within the ſtatute, is not confined to thoſe caſes only, where there is no remedy at all againſt the other, but where there is not any remedy againſt him on the ſame contract. This caſe is juſt like the caſe where a man ſays, "ſend goods to ſuch "a one, and I will pay you;" that is not within the ſtatute, for the ſeller does not truſt the perſon he ſends the goods to. So here, the ſtable-keeper only truſted the defendant, and an action on the contract will not lie againſt *Engliſh*, but for a *tort* ſubſequent he may be charged in detinue, or *trover* and converſion, which is a collateral action.

Powys juſtice ſaid, that there was a truſt to *Engliſh*, for the very lending of the horſe neceſſarily implies a truſt to the perſon he is lent to, and conſequently the defendant in this caſe is to anſwer for the default of another, and is within the ſtatute.

Powell juſtice agreed, that if a man ſhould ſay, lend *J. S.* a horſe, and I will undertake he ſhall pay the hire of it; or ſend

J. S. goods, and I will undertake he ſhall pay you; that thoſe caſes would be within the ſtatute: and agreed with *Powys*, that if any truſt were given to *Engliſh*, then the caſe would be within the ſtatute. But he and the chief juſtice and *Gould* held, that here was no credit given to *Engliſh*; and the chief juſtice agreed with him, that if there had, this promiſe would have been but an additional ſecurity, and within the ſtatute. And the chief juſtice ſaid, that if a man ſhould ſay, “ let *J. S.* ride your horſe to *Reading*, “ and I will pay you the hire,” that is not within the ſtatute, no more than if a man ſhould ſay, “ deliver cloth to *J. S.* and I will “ pay you.” He ſaid alſo, that a bailee of an horſe for hire is not bound to re-deliver him at all events, but if he be robbed of him without fraud in him, he is excuſed. And ſo it was ruled in the caſe of *Coggs verſ. Bernard.*

The laſt day of the term the chief juſtice delivered the opinion of the court. He ſaid, that the queſtion had been propoſed at a meeting of judges, and that there had been great variety of opinions between them, becauſe the horſe was lent wholly upon the credit of the defendant; but that the judges of this court were all of opinion, that the caſe was within the ſtatute. The objection that was made was, that if *Engliſh* did not re-deliver the horſe, he was not chargeable in an action upon the promiſe, but in *trover* or detinue, which are founded upon the *tort*, and are for a matter ſubſequent to the agreement. But I anſwered, that *Engliſh* may be charged on the bailment in detinue on the original delivery, and a detinue is the adequate remedy, and upon the delivery *Engliſh* is liable in detinue, and conſequently this promiſe by the defendant is collateral, and is within the reaſon, and the very words of the ſtatute; and is as much ſo, as if where a man was indebted, *J. S.* in conſideration that the debtee would forbear the man, ſhould promiſe to pay him the debt, ſuch a promiſe is void, unleſs it be in writing. Suppoſe a man comes with another to a ſhop to buy, and the ſhopkeeper ſhould ſay, “ I will not ſell him the goods, “ unleſs you will undertake he ſhall pay me for them,” ſuch a promiſe is within the ſtatute: otherwiſe, if a man had been the perſon to pay for the goods originally. So here, detinue lies againſt *Engliſh* the principal; and the plaintiff having this remedy againſt *Engliſh* the principal, cannot have an action againſt the defendant the undertaker, unleſs there had been a note in writing.

Cracker *verſ.* Glover.

If *A.* being a poor priſoner is diſcharged by the juſtices at the ſuit of perſons for leſs than 100*l.* according to 2 *Ann.* yet this ſhall not diſcharge him as to his creditors for above 100*l.* See the ſeveral ſubſequent ſtatutes for relief of inſolvent debtors.

THE defendant being in cuſtody at the ſuit of a man, to whom he was indebted under 100*l.* was diſcharged upon the act of 2 & 3 *Ann. c.* 16. and after he was ſo diſcharged was arreſted at the plaintiff's ſuit, to whom he was indebted before the eighth of *November* in above 100*l.* And the queſtion was, whether he ſhould be diſcharged upon common bail? And the queſtion aroſe upon this *proviſo* in the act of parliament: provided, &c. that no perſon, &c. by virtue of this act ſhall be diſcharged out of priſon, who ſhall ſtand charged and indebted in more than the ſum of 100*l.* to any one perſon, principal money and damages. All the judges of *England* had a meeting to conſider of this act of parliament, and it was reſolved by them all, that the defendant was not within the act to be diſcharged upon common bail. The chief juſtice ſaid, that it might ſeem a doubtful queſtion on theſe words of the act, "that if any perſon, &c. diſcharged by virtue of this act, ſhall, &c. "after his, &c. diſcharge, &c. be again arreſted or detained for "any debt or debts, action, &c. upon the caſe, duty, ſum or "ſums of money whatſoever, contracted or due before the ſaid "eighth of *November*, that then upon doing ſo and ſo they ſhall "again be diſcharged, &c. by any two or more of the ſaid juſtices "of the peace, &c. upon filing common bail;" but then the *proviſo* muſt be conſidered: that ſays, "no perſon by virtue of this act "ſhall be diſcharged out of priſon, &c." but common bail is a diſcharge by virtue of that act, and therefore the defendant cannot be diſcharged upon common bail, for that is one diſcharge by the juſtices. And it is a reaſonable conſtruction, to apply the word diſcharged in the act to the ſecond diſcharge as well as the firſt. And the reaſon of the thing makes for this conſtruction, for the intent of the act was, that no body ſhould have the benefit of the act originally, that was in cuſtody for above 100*l.* And the ſame reaſon holds when you come to a ſecond diſcharge, for that is a diſcharge by virtue of the act; and the *proviſo* is, that no body ſhall be diſcharged by that act, that owes above 100*l.* And this is the moſt reaſonable conſtruction of the act.

Judges of the King's Bench, &c. may diſcharge on common bail.

There was another queſtion ſtirred in this and ſeveral other caſes this term, upon the words of the clauſe for diſcharging, that appoints it to be done by two or more of the ſaid juſtices of the peace; whether the court of King's Bench, and the other ſuperior courts, could diſcharge the priſoners upon common bail; or whether they muſt reſort to the juſtices of the peace? And it was at the ſame time reſolved, that where the priſoners were intituled to be diſcharged on common bail, the courts of *Weſtminſter* could diſcharge them, and they were under no neceſſity of applying to juſtices of peace.

The judges took notice, that it was an obſcure act of parliament. They ſaid, that the faireſt conſtruction was, that the diſcharge ſhould be good againſt all perſons, to whom the priſoner was indebted under the ſum of 100 *l.* and void to all above. For it would be a ridiculous conſtruction, to make the diſcharge in the principal caſe good againſt all. For it is ridiculous, that if a man is in priſon charged with above 100 *l.* he ſhall be kept in priſon; and yet if his creditor happen not to have arreſted him, he ſhall be diſcharged againſt him, though he owes him above 100 *l.* And of the other ſide, to make the diſcharge totally void, would be very inconvenient; for that would make the juſtices liable to an eſcape, if they happen to diſcharge a man, who owes any body above 100 *l.* and yet it is impoſſible for them to come to the notice of it, becauſe the creditors are not directed to be ſummoned. And *Powell* juſtice ſaid, that the word [and] muſt be conſtrued [or]; and ſo the *proviſo* will be, charged or indebted.

Tenant *verſ.* Goldwin.

S. C. Salk. 21, 360. S. C. 6 Mod. 311. Saund. 322. 11 Mod. 8. That the plaintiff was poſſeſſed of a houſe, in which was a cellar, where he uſed to lay coals, which cellar adjoined to the defendant's houſe, and was parted from the *forica* of the defendant's houſe by a wall, which the defendant uſed to repair: that the defendant permitted the wall to be out of repair, whereby the filth of the *forica* came into the plaintiff's cellar, &c.

AN action upon the caſe, wherein the plaintiff declared, *quod cum* the plaintiff 1 *Octob. primo, et abinde ſemper hucuſque, poſſeſſionatus fuit, et adhuc poſſeſſionatus exiſtit, de uno meſuagio jacente et exiſtente in Fiſhſtreet, in parochia ſanctae Annae, infra libertatem Weſtmonaſterii et comitatum Middleſexiae, pro quodam termino nondum finito, ac in cellario ſuo parcella meſuagii ſui praedicti reponere et conſervare ſolebat carbonum et illupulatae cerviſiae copias pro uſu familiae ſuae, necnon ad vendendum et merchandizandum diverſis perſonis, quae de ipſo commoditates praedictas emere ſolebant in meſuagio ſuo praedicto, ad ipſius* the plaintiff's *non modicum proficuum et utilitatem: quod quidem cellarium contigue adjacet, et per totum tempus praedictum contigue adjacebat, meſuagio praedicto* of the defendant *in parochia praedicta, et de forica parcella praedicti meſuagii praedicti* the defendant *ſeparari et vallari ſolebat per murum craſſum et compactum, qui ad dictum meſuagium praefati* the defendant *pertinet, et per praefatum* the defendant *per totum tempus praedictum jure debuit reparari: praedictus tamen* the defendant *praemiſſorum non ignarus, ſed machinans et fraudulenter intendens ipſum* the plaintiff *in hac parte minus rite gravare, et ipſum* the plaintiff *de uſu et commoditate cellarii meſuagii ſui praedicti totaliter deprivare, et de proficuo commercii ſui praedicti impedire, eodem* 1 *Octob. primo, et ab inde hucuſque, murum praedictum, licet ſaepius* *requiſitus eundem reparare, ſcilicet per ipſum* the plaintiff *eodem* 1 *October primo in parochia praedicta, tam negligenter cuſtodivit et reparavit, quod ob defectum debitae curae et reparationis ejuſdem muri foeditates et ſordida foricae praedictae de eadem forica per decaſum et fractionem muri praedicti in cellarium praedictum ejuſdem* the plaintiff *fluebant, et cellarium praedictum inundabant, ſcilicet in parochia praedicta per totum tempus praedictum, per quod ipſe idem* the plaintiff *uſum cellarii ſui et proficuum commercii ſui praedicti per totum tempus praedictum perdidit et amiſit: unde idem* the plaintiff *dicit, quod deterioratus eſt, et damnum habet ad valentiam* 100 *l. et inde producit, &c.* The defendant let judgment go by default, and a writ of inquiry of damages was awarded, and damages aſſeſſed to 6 *l.*

Mr. *Salkeld.* The objection that has been made in arreſt of judgment is, that here the defendant being terretenant, and this declaration being to put a charge upon him, the plaintiff ought to ſhew a title to charge him, and this general way of declaring with a *ſeparari ſolebat*, and a *jure debuit reparari*, is ill. In anſwer to this I ſhall firſt ſhew, that there have been caſes, where the plaintiff has by his declaration put a charge upon the terretenant in as general manner as this, without ſhewing any title: ſecondly, that we have no need to carry the matter ſo far, but are within the ſtated rule, that where the charge is with common right, there needs be no title ſhewn: and thirdly, that this is a treſpaſs to the plaintiff. As to the firſt, he cited the caſe of *Sands* and *Trefuſis*, 1 *Cro.* 575. where the plaintiff declares, that he was ſeiſed in fee of a mill, and had a water-courſe running in the defendant's land to the ſaid mill, and that the defendant had ſtopped it. And this was held well upon demurrer without ſhewing any title to the water-courſe. And 3 *Lev.* 266. where the plaintiff declares, that he was for four years laſt paſt ſeiſed in fee of a parcel of land adjoining to the meadow of the defendant, *et ſic inde ſeiſitus per totum tempus praedictum habere frui et uti debuit quandam viam per quandam januam* of the defendant, in the meadow of the defendant *uſque* a cloſe of the plaintiff, and that the defendant ſtopped the gate *cum ſera et catena*; and upon a judgment by default, and writ of inquiry of damages, and motion in arreſt of judgment, this declaration was held to be good, though no title was ſhewn to the way, and though the defendant was terretenant, and though the charge was againſt common right, and ſuch a charge as could not commence but by grant. And the ſame was ruled upon demurrer between *Warren* and *Saunthill*, the ſame book cited in the caſe before, which was the caſe of *Winford verſ. Woollaſton.* (Note, there is alſo another caſe in 1 *Lutw.* 119. *Blockley verſ. Slater*, where the plaintiff in his declaration claims a way through the defendant's cloſe, and yet declares only generally, *quod habuit et per totum tempus praedictum habere debuit*; and adjudged good upon ſpecial demurrer, and that matter ſhewn for cauſe; which was held alſo in the caſe of 3 *Lev.* before.) Secondly, he ſaid, that where the charge was with common right, there the plaintiff in his declaration need never ſhew any title. And therefore in an aſſiſe for a rent-ſervice againſt the terretenant the plaintiff in the aſſiſe need not make any title to the rent; otherwiſe in an aſſiſe for a rent-charge, or any thing elſe which is againſt common right. So is 32 *Hen.* 6. 15. *a.* 35 *Hen.* 6. 7. *b.* And the ſame difference is between an aſſiſe for a common appendant, and in groſs; and ſo of all charges by act of law. But where the aſſiſe for the rent is brought againſt the *pernor* of the profits, though it be for a rent-charge, there need be no title ſhewed, as muſt if the defendant be terretenant. So an indictment againſt the hundred for ſuch a matter as they are chargeable with of common right, generally is good; but if you would indict a private perſon for ſuch a matter, you muſt ſhew ſpecially in the indictment, how he comes to be chargeable to do it. So if you would charge a private perſon for not repairing a highway, or a church wall, &c. you muſt ſhew ſome ſpecial matter to charge him. But here the defendant is bound of common right to repair his own houſe, ſo far as that it ſhall not prejudice his neighbour, or the publick. And in the *Ante,* 856. caſe of the Queen *verſ. Watſon*, the indictment was againſt the defendant, that he did not repair his own houſe. And hence it is, that at common law, if two jointenants are of a wood or arable land, one cannot compel the other to repair the fenſes. But if two jointenants are of a houſe, and the one will not repair it, the other ſhall have a writ *de reparatione facienda* againſt him, and the writ ſuppoſes, that *ad reparationem et ſuſtentationem ejuſdem domus tenetur*. *Moor* 374. 11 *Co.* 82. *b.* 2 *Inſt.* 403. *Reg.* 153. *b. n.* 6. 127. *a. b.* So if a man have a houſe near to the houſe of another, and he ſuffers his houſe to be ſoruinous, as it is like to fall upon the houſe of the other, he may have a writ *de domo reparanda*, and compel him to repair his houſe. And the writ ſays, *quae reparari debet et ſolet.* *Reg.* 153. *b. n.* 6. 127. *c. d.* C. L. 56. *b.* and though the word *ſolet* be in, the *Regiſter* ſays, that may be left out, *quando caſus requirit.* (Note, in my *Regiſter* this note follows another writ.) *Reg.* 153. *b.* So if a leſſee for years build a new houſe, where there was none before, it is waſte; but if he lets it fall down, it is waſte too. And if one C L. 53. a. man have the upper part of a houſe, and the other the lower, they may each compel the other to repair his part, in preſervation of the other's. And if either of them neglect ſo to do, an action upon the caſe lies againſt him. *Keilw.* 98. *b.* It may be, if a man ſhould build a new houſe near an old one, or a new cellar under an old wall, the other might not be bound to maintain his old houſe or wall. He ſaid, that the *ſordes* coming out of the defendant's *forica* into the plaintiff's cellar was an actual treſpaſs. And for that he compared it to the caſe of 6 *Edw.* 4. 7. *Fitz. Treſp.* 110. where in treſpaſs the defendant pleaded, that he was ſeiſed of an acre of land, upon which a hedge of thorns is growing, which joins to the place where, *&c.* and the defendant came, and at the time of the treſpaſs cut the thorns, and they *ipſo invito ceciderunt* in the place where, *&c.* and the defendant came recently, and took them away, *&c.* and upon demurrer *Choke* held, that the thorns falling into the cloſe of the plaintiff was a treſpaſs; and to ſay they did ſo *ipſo invito* was no plea, unleſs he had ſaid alſo, that he could not have cut them in any other manner, or that he did all that was in him to have kept them from falling in; for otherwiſe, the firſt act being a wrong, the defendant could not juſtify entring into the plaintiff's cloſe to take the thorns out. Otherwiſe if a tree of the defendant's had by the act of God, by a ſtorm, been blown into the cloſe of the plaintiff.

The laſt day of the term *Holt* chief juſtice delivered the opinion of the court, that the declaration was ſufficient. He ſaid, that upon the face of this declaration there appeared a ſufficient cauſe of action, to intitle the plaintiff to have his judgment: that they did not go on the word *ſolebat*, or the *jure debuit reparari*, as if it were enough to ſay, that the plaintiff had a houſe, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a houſe of office, and the wall which ſeparates the houſe of office from the plaintiff's houſe is all the defendant's, he is of common right bound to repair it. And this caſe differs from the caſe of a *curia claudenda*, in which it is neceſſary to lay a preſcription, becauſe there the fenſe is for the uſe of both parties. But the reaſon of this caſe is upon this account, that every one muſt ſo uſe his own, as not to do damage to another. And as every man is bound ſo to look to his cattle, as to keep them out of his neighbour's ground, that ſo he may receive no damage; ſo he muſt keep in the filth of his houſe of office, that it may not flow in upon and damnify his neighbour. If a man has two houſes contiguous, and one has a houſe of office, which is ſeparated from the cellar of the other by the wall, which keeps in the filth of the houſe of office, and he ſells that houſe, the vendee muſt keep in the filth of the houſe of office, ſo as it ſhall not run in upon the other houſe. So if a man has two pieces of paſture, which lie open to one another, and ſells one piece, the vendee muſt keep in his cattle ſo as they ſhall not treſpaſs upon the vendor. So a man ſhall not lay his dung ſo high as to damage his neighbour, and the reaſon of theſe caſes is, becauſe every man muſt ſo uſe his own, as

If the defendant has a *forica*, and the wall, which ſeparates it from the houſe of, *&c.* is all the defendant's, he is of common right bound to repair it.

So is the vendee of that houſe.

as not to damnify another. And it would have been all one if the vendor had ſold the houſe with the cellar, then he muſt have kept the wall of the houſe of office ſo as to have kept the filth in; for every man muſt take care to do his neighbour no damage. If a man erects a houſe and a houſe of office, and the houſe of office adjoins to a vacant piece of ground, which keeps in the filth of the houſe of office, if the owner of the vacant piece of ground will dig a cellar there, he muſt make a wall to the houſe of office. And ſo if the waſte piece of ground belonged to the ſame perſon that built the houſe, and he ſold the vacant piece of ground; his vendee, if he would dig a cellar by the houſe of office, muſt build a wall to it. But that is matter of which the defendant may have advantage upon the trial, and if that ſhould appear to be the caſe upon the evidence, the defendant ought to be acquitted. As to the caſe of *Palmer* and *Fletcher*, if indeed the builder of the houſe ſells the houſe with the lights and appurtenances, he cannot build upon the remainder of the ground ſo near as to ſtop the lights of the houſe; and as he cannot do it, ſo neither can his vendee. But if he had ſold the vacant piece of ground, and kept the houſe, without reſerving the benefit of the lights, the vendee might build againſt his houſe. But in the other caſe, where he ſells the houſe, the vacant piece of ground is by that grant charged with the lights. I do not approve of the caſe in *Keilway*, and the law ſeems to be doubtful in that point. In *Fitzh. N. B.* 127. *l.* there is a writ to that purpoſe, but that writ is grounded upon the cuſtom of the place, and not upon the common law. And there is ſuch a cuſtom in many places, and there is no other authority for it. But this caſe differs from that, for here the defendant by uſing his own, does a damage to the plaintiff.

1 Lev. 122. Sid. 167, 227.

Lights ſtopped.

De domo reparanda.

Afterwards towards night Mr. *Southouſe* moved the court, that they would not give judgment for the plaintiff in this caſe, there being an irregularity in making up the writ of inquiry; for whereas the declaration delivered was *jure debuit repari*, which was nonſenſe, they had made it in the writ *reparari*. But the court refuſed the motion, for they ſaid, it was not material, that being only a conſequence of law upon the matter appearing in the declaration, and conſequently not material, whether it were in or out. And the ſame was held by *Powell* of the *ſolebat*. Upon the argument of this caſe the chief juſtice ſaid, that where a man has a way, or any other incorporeal right, in an action for diſturbance it is enough to ſay, *habuit et habere debuit*. The firſt caſe of this ſort was before chief juſtice *Hale:* and he held, that it might be good upon demurrer, if the defendant did not appear to be terretenant. But ſince, it has been held to be good both ways. But there is

Ante, 751,

no caſe where that has been held well, where the plaintiff has no hereditary right, but does merely put a charge upon another.

Powell ſaid, that *currere conſuevit* had been held well enough in caſe of a water-courſe, becauſe that muſt be time immemorial. The chief juſtice and *Powell* held, that a man cannot build ſo near another man's houſe as to throw it down.

Regina *verſ.* Saxfield.

Indictment againſt a ſcold

* Which ſignifies a quarrel, diſpute, or a ſcolding, and not a ſcold.

A Writ of error of a judgment upon an indictment againſt the defendant for being a common ſcold: the word in the indictment was *rixa*, * which was objected by the counſel for the defendant, not to ſignify a ſcold, but *rixatrix*. And for this exception the judgment was reverſed. Now the law being in Engliſh, the like blunder can hardly happen again.

Fitzhugh *verſ.* Dennington.

Intr. *Trin.* 3 *Ann.* B. R. Rot. 185.

S. C. Salk. 585.
S. C. 6 Mod. 227, 259.
3 Salk. 309.
Kel. 374.
Mo. 241, 246.
1 Leo. 68, 69.
Time for making a requeſt, that a thing ſhould be done.

A Writ of error out of the *Marſhalſea* court of a judgment in an action of debt upon a bond of 20 *l.* by the plaintiff as adminiſtrator of one *Bennet*. The defendant prays *oyer* of the bond, and of the condition, and that appears to be, reciting, that whereas *Bennet* had put one *John Dennington* ſon of *John Dennington* to be an apprentice to the defendant for the term of ſeven years, if the defendant, his executors or adminiſtrators do or ſhall at the end of the ſeven or eight years next enſuing the date hereof in due form of law, and according to the uſe and cuſtom of the city of *London*, make or cauſe or procure to be made the ſaid *John Dennington* a freeman, or to be made free of the company of joiners in *London*, if it ſhall be deſired, that then, &c. and pleads in bar, that the defendant *ad vel poſt finem ſeptem annorum proxime ſequentium datum ſcripti obligatorii praedicti, et ante levationem querelae* of the plaintiff, *nunquam requiſitus fuit ad faciendum, vel procurandum praedictum Johannem in conditione praedicta ſuperius nominatum fore factum liberum habitatorem, Anglice* a freeman, *vel liberum, Anglice* free, *de ſocietate, Anglice* company, *junctorum, Anglice* joiners, *civitatis Londinenſis, ſecundum formam et affectum conditionis praedictae,* &c. The plaintiff demurred, and judgment was given below for the plaintiff. And the plaintiff in error aſſigned the general errors. It was urged for the defendant in error, that the plea was ill, for not ſaying, that he was not requeſted before the end of the ſeven years; for the obligee might requeſt him before the end of the ſeven years, becauſe the obligor was by the law to have a convenient time to do the thing in; and therefore unleſs the obligee gave the obligor notice before the day, by making his requeſt before the end of the term, he could not be made free at the end of the ſeven years according to the condition. And he cited the caſe 1 *Roll.* 443. that where by the condition of a bond a thing is to be done immediately or upon requeſt, yet the obligor ſhall have a convenient time to do it in. And another exception was taken, that the plea was, that he was never requeſted to make *praedictum Johannem in conditione praedicta ſuperius nominatum* free, and there were two *Johns* mentioned in the condition, the father and the ſon; and therefore this being pleaded without any addition, muſt be taken for the father, and ſo no plea, becauſe it was the ſon was to be made free. But *per curiam*, *Johannem praedictum* muſt be intended *John* the ſon, that was to be made free.

To the other exception it was anſwered for the plaintiff in error, that it was ridiculous to ſay, a requeſt was to be made before the time for doing the thing was come; and therefore the time for making him free by the condition of the bond being at the end of ſeven or eight years, the requeſt ought to be then too. That the plea purſued the words of the condition of the bond, and therefore was good to a common intent; and that the plaintiff, if he had made a requeſt before, ought to have replied that matter: which *Powys* and the chief juſtice agreed. That the ſerving ſeven years intitled the party to his freedom, and therefore the condition ſhould be underſtood according to the nature of the thing at the end of ſeven years, *i. e.* that it ſhould be done as ſoon as conveniently it could be after the end of ſeven years, for till the end of ſeven years the apprentice could not be made free. (Note, this obſervation ſeems to be ill founded, for the ſeven years begin from the date of the bond, and the indenture of apprenticeſhip does not appear to be of the ſame date with the bond; but by the condition the apprenticeſhip ſeems to be begun.)

The judgment in this caſe was reverſed. And *Holt* chief juſtice and *Powell* juſtice held, that there being a time appointed for doing the act, the requeſt to do it muſt be at that time. And *Powell* ſaid, it was like the caſe of a demand of rent to enter for a condition broken, it muſt be ſuch a time of the day, that the party might have time afterwards to do the thing. And the chief juſtice ſaid, that the end of ſeven years was the laſt day of the ſeven years, for there is no fraction of a day; and after twelve a clock at night is after the ſeven years, for the day after is not the end of the ſeven years, but *poſt expirationem.* For the beginning and end of a thing

Ante, 480.

is part of the thing. So if a man were born the firſt of *February*, and lived to the thirty-firſt of *January* twenty-one years after five a-clock in the morning, and then makes his will and dies by ſix at night, that will is good, and the deviſor is of age. Then the obligee muſt make his election the laſt day of the ſeven years, whether he will have *J. D.* made free then, or ſtay till the end of eight years, and make his requeſt accordingly; for the obligee is not to make his requeſt, but at that time when the thing is appointed to be done. He ſaid alſo, that when a time is appointed, when a thing ſhall be done upon requeſt, it muſt be done immediately upon the requeſt (which differs this caſe from thoſe cited by the council for the defendant in error) as if a condition of a bond be to make a feoffment at ſuch a time upon requeſt, there the obligor muſt do it immediately upon the requeſt. But as to this *Powell* ſaid, that if it appeared to them, that the thing was of ſuch a nature, as that it could not be performed at the time limited for the thing to be done upon requeſt, there the obligor ſhould have a convenient time after to do the thing in. Otherwiſe, if it can be done then, it muſt.

When a thing is appointed to be done on requeſt, it ought to be done immediately on requeſt.

Powys and *Gould* juſtices held, that at the end of ſeven years might be underſtood a reaſonable time after, ſufficient to do the thing in.

Cholmondeley *verſ.* Bealing.

Intr. *Trin.* 3 *Ann.* B. R. Rot. 429.

S. C. 6 Mod. 256, 304. Holt 90. *Scire facias* againſt bail: the defendant pleaded *nullum capias ad ſatisfaciendum*: the plaintiff replies, and ſhews a *capias ad ſatisfaciendum* ſued out two years after judgment againſt the principal, and good. Vide 2 Salk. 599, 600, 602. Hob. 195. Alleyn 12. 2 Saund. 299.

A *Scire facias* againſt the defendant, reciting a judgment in the time of the late King againſt *Lilly*, and how the defendant in *Michaelmas* term the thirteenth of the late King became bail for the defendant *Lilly*; and *conceſſit*, that if *Lilly* was convicted in the ſaid plea, that then the debt and damages, *&c.* recovered ſhould be levied of the lands, goods and chattels of the defendant *Bealing*, if the defendant *Lilly* did not pay the debt and damages, *&c.* or render himſelf to the *Marſhalſea*; and that *Lilly* had not yet paid the debt and damages, *&c.* nor rendered himſelf to the priſon of the *Marſhalſea* of the late King or the preſent Queen, *&c.* The plea in bar, that after the judgment, and before the iſſuing of the *ſcire facias*, no writ of *capias ad ſatisfaciendum debite proſecutum, retornatum, et affilatum fuiſſet de recordo* at the ſuit of the plaintiff againſt the defendant *Lilly*, *&c.* The plaintiff replies, a writ of *capias ad ſatisfaciendum* iſſued the twenty-ninth of *May* in the third year of the Queen, to which there was a *non eſt inventus* returned, *prout*, *&c.* And to this replication the defendant demurred.

The exception that ſerjeant *Pengelly* took was, that it appears in this caſe that the bail was put in of *Michaelmas* term 13 *Will.* 3. and that judgment was recovered againſt the principal *in curia domini Willielmi tertii nuper regis, &c.* but the writ of *capias ad ſatiſfaciendum*, ſet forth in the plea, was not ſued forth until the twenty-ninth of *May* 3 *Ann.* which is a void writ, ſince an execution cannot be ſued forth after the year. And it does not appear here, that any writ of *ſcire facias* was ſued out, or any writ of *capias ad ſatisfaciendum* ſued out within the year and continued on the roll, as it might be, and no ſuch thing ſhall be intended; and then the *ſcire facias* againſt the bail is without warrant, and againſt law: for there is no default in the bail, until a *capias ad ſatisfaciendum* be ſued out againſt the principal, whereby the plaintiff makes election of one ſort of execution, and *non eſt inventus* returned. So that here the plaintiff of his own ſhewing has no right to bring the *ſcire facias* againſt the bail, and therefore the judgment ought to be given againſt him. As in the common caſe, where by the replication it appears, that the plaintiff has no cauſe of action, he ſhall never have judgment. This was taken out of Mr. ſerjeant *Pengelly*'s paper-book.

1 Roll. 333. n. 1.
563. n. 14.
779. n. 4.
2 Roll. 560. n. 2.
2 Cro, 98.
1 Cro 481.
1 Jones 139.
1 Lev. 225.
Co. Inſt. 304, 305
1 Keb 759.
3 Keb. 190, 209, 220, 668, 671.
8 Co. 133. b.
9 Co. 110. b.

Holt chief juſtice ſaid, that the plaintiff had no need to ſet out the *ſcire facias* in his replication, but there might be one for all that. For it is all one to the bail, whether there was a *ſcire facias* or no. For they cannot have a a writ of error upon the judgment againſt the principal, or the judgment in the *ſcire facias*. Beſides, if there were no *ſcire facias*, yet the execution might be well, for there might have been a *capias ad ſatisfaciendum* taken out within the year, and continued down by a *vicecomes non miſit breve*. As to the matter of the replication he ſaid, that the plaintiff's writ was his title: that that only ſaid, that the defendant had not paid the money, nor rendered his body to priſon; but made no mention, whether any *capias ad ſatisfaciendum* was ſued out by the plaintiff or no. And yet without ſhewing any thing of that, the writ contains a good title to the action, and a ſufficient breach. Then when you come, and by your plea admit that, and only plead by way of excuſe, that no *capias ad ſatisfaciendum* iſſued againſt the defendant, you have put the cauſe upon that ſingle point; and the only matter is, whether there was any *capias ad ſatisfaciendum* ſued out or not? and therefore then it is enough for the plaintiff to ſhew, that there was a *capias ad ſatisfaciendum* ſued out againſt the principal defendant.

Lutw. 1273.
Vide Rules in B. R. fol. Edit. 1740. *Eaſter* 5 Geo. 2. Note (e).

In anſwer to this, and that the plaintiff ought to ſhew a ſufficient writ, Mr. *Pengelly* cited the caſe, *Vere verſ. Holyoke*, 3 *Keb.* 671.

in a *ſcire facias* againſt bail, the defendant pleaded, that no *capias ad ſatisfaciendum* was iſſued againſt the principal on the ſaid judgment; the plaintiff replied, that the 23d of *October* a *capias ad ſatisfaciendum* iſſued and was returned; the defendant rejoined, that the judgment was had but on the 3d of *November* after; and on demurrer judgment was given for the defendant, and a difference taken between a judgment upon a writ of inquiry, as this was, which is at a day certain, and a general judgment; in the laſt caſe, the rejoinder had been ill, becauſe the judgment relates to the firſt day of the term; otherwiſe in the firſt. He ſaid alſo, that the plea was *debite proſecutum, &c.*

Holt chief juſtice ſaid, that the *debite proſecutum* was nothing, that this plea was only an excuſe, and that the plaintiff's writ was his title. And as to the caſe in *Keble,* he ſaid, that that writ was a void writ, and was not *ſuper judicium praedictum.*

Powell juſtice ſaid, firſt, that if the writ were ill taken out, it was only an erroneous execution, and the bail that are ſtrangers cannot take advantage of that error in a collateral action. Secondly, that this *capias ad ſatisfaciendum* might have been well and regularly ſued out, and they would intend it was ſo; otherwiſe if the *capias ad ſatisfaciendum* had appeared to have been ſued out, out of term, that had been ill. Judgment was given for the plaintiff.

Hilary Term

3 Annae Reginae, B. R. 1704.

Blackmore *verſ.* Tidderley.

Intr. *Trin.* 3 *Ann.* Rot. 231.

IN an action of treſpaſs, aſſault and falſe impriſonment, the defendant pleaded not guilty *infra* 6 *annos*; and the plaintiff demurred. And Mr. ſerjeant *Darnall* for the plaintiff argued, that the court upon this plea, as it was pleaded, would not take any notice of the ſtatute of limitations, that if this plea were a good plea, it would be a good replication for the plaintiff to ſay, that he took out a writ within ſix years, which is abſurd: that no iſſue could be taken upon this plea, or if any iſſue could be taken upon it, yet if a verdict were found for the plaintiff, no judgment could be given for him, becauſe though the defendant were guilty within ſix years, yet he might not be guilty within four. He ſaid that this plea was a negative pregnant, and though, where a verdict is found upon iſſue joined upon ſuch a plea, that may in ſome caſes make the plea good; yet it is certainly naught upon demurrer. And for that he cited 12 *Ed.* 4. 6. *Br. Negative pregnant* 48. *Br. ſame title* 42.

S. C. Salk. 423.
S. C. 6 Mod. 240.
In aſſault and impriſonment not guilty *infra* 6 *annos* pleaded, ill.
Comb. 26.
2 Show. 493.
3 Mod. 110.
11 Mod. 38.

Mr. *Raymond* for the defendant argued, that the ſtatute of limitations is a general law, and that thoſe pleas of the ſtatute of limitations are never framed upon the ſtatute, but are pleaded generally, without tying them up to, or taking any notice of the act of parliament. He ſaid, that the plaintiff might have taken iſſue upon this plea, that the defendant was guilty within ſix years; and that the largeneſs of the plea taking in two years more than it needed, was for the benefit of the plaintiff: that if upon that iſſue the jury had found for the defendant, he muſt have had his judgment, becauſe if he was not guilty within ſix years, it was a neceſſary conſequence, that he was not guilty within four years,

years. And he ſaid, he took it, that if the verdict had been found for the plaintiff, he muſt have had his judgment too, becauſe the plea of the defendant was falſified: like the caſe of debt upon a ſingle bill, the defendant pleads payment, if upon iſſue joined the verdict be found for the defendant, he cannot have judgment; but otherwiſe if it be found for the plaintiff.

Holt chief juſtice. The verdict's helping of ſuch a plea as this will not make it a good plea now upon demurrer. This muſt be a good plea either at common law, or upon the ſtatute; it is not a good plea at common law, becauſe at common law a man might bring his action at any time; neither is it a good plea upon the ſtatute, becauſe it does not diſcloſe the matter, that the ſtatute makes a bar.

Powell juſtice. This plea at beſt is but argumentative, and ſuch pleas are never good, eſpecially where the matter that makes the bar is made ſuch by an act of parliament, you ought to plead it in the words of the ſtatute. Beſides, if iſſue had been taken upon this plea, and there had been a verdict for the plaintiff, it would have been a *jeofaile*.

Holt. How can the plaintiff reply?

Diſcontinuance by an anſwer in part.

The court held that this matter needed not to be ſhewn for cauſe of demurrer, and were juſt going to give judgment for the plaintiff; when Mr. *Raymond* took an exception, *viz.* that the plea was diſcontinued, for the declaration was of an aſſault, taking, arreſting, and impriſoning the plaintiff; and the defendant pleaded to the treſpaſs, aſſault, and impriſonment, but ſaid nothing to the arreſt. *Darnall* ſaid, that the treſpaſs included all.

1 Lev. 31. 2 Lev 111, 221. 3 Lev. 405, acc.

Holt ſaid, that the impriſonment included the arreſt; for impriſoning could not be without an arreſt, nor an arreſt without impriſonment; for an arreſt is an actual impriſonment.

Judgment was given for the plaintiff.

Note, When this caſe was firſt ſtirred in *Michaelmas* term laſt, the court ſeemed all to be of opinion, that the plea was good, becauſe it gave the plaintiff an advantage. The record is, action by huſband and wife, for that the defendant, *&c.* upon the wife *apud, &c. inſultum fecit*, and the wife, *&c. cepit, arreſtavit, impriſonavit, et maletractavit*, and the wife *in priſona ibidem per ſpatium, &c. detinuit, &c.* After imparlance the defendant pleads thus: *et idem* the defendant *defendit vim et injuriam quando, &c. et dicit quod actio*

actio non, quia dicit quod ipſe in nullo eſt culpabilis de tranſgreſſione, inſultu, impriſonamento praedictis, ad aliquod tempus infra 6 *annos proxime ante diem exhibitionis billae* of huſband and wife *modo et forma prout, &c.* Note, nothing was pleaded to the *vi et armis,* as is uſual.

Evans *verſ.* Brown.

THERE was a ſuit in the Eccleſiaſtical Court for theſe words, "You are known by the name of bawdy *Nell,* and do live "with another woman's huſband." Mr. *Raymond* moved for a prohibition upon a ſuggeſtion, that the plaintiff below had brought an action at law for theſe words, grounded upon ſpecial damage ſhe had ſuſtained by the defendant's ſpeaking of them. And he compared this to the caſe, where one calls a woman whore and thief, 2 *Roll.* 297. *n.* 25. in that caſe ſhe ſhall not have an action in the Eccleſiaſtical Court for thoſe words, though ſhe might for the word whore; becauſe it being joined with the word thief, an action lies at common law for the words. Neither can the words be ſplit, and an action brought at law for the word thief, and a ſuit in the Eccleſiaſtical Court for the word whore. So here, tho' the words are properly ſuable for in the Eccleſiaſtical Court, yet a ſpecial damage attending the ſpeaking them, by which means an action lies at common law for ſpeaking the words, they ſhall not proceed for the ſpeaking them in the Eccleſiaſtical Court. But the court denied to grant a prohibition.

You are known by the name of bawdy *Nell,* and do live with another woman's huſband.
Poſt. 1136.
1 Vent. 10.

2 R. 295. n. 4.

The party ſuſtains ſpecial damage by words ſpoke, of which the Spiritual Court has conuſance.

Green *verſ.* Crane.

IN an *aſſumpſit* by an executor upon a promiſe to his teſtator, the defendant pleaded *non aſſumpſit infra* 6 *annos* to the teſtator. And upon evidence it appeared, that after the death of the teſtator and after 6 years elapſed from the time of the contract, the defendant owned the debt to the executor, and promiſed to pay it. And whether this evidence would maintain the iſſue was the queſtion. Serjeant *Darnall* for the plaintiff ſaid, that it was agreed in the caſe of *Hyleing verſ. Haſtings,* that a bare owning of the debt after the ſix years was ſufficient to revive it; but here was a promiſe as well as an owning. But after the caſe had been ſtirred twice, and the court had taken farther time to adviſe, *Holt* chief juſtice delivered the reſolution of the court, and ſaid, that they were all of opinion, that the action could not be maintained, the promiſe being made to the executor, and ſo out of the iſſue. But it would have been otherwiſe, if the promiſe had been made to the teſtator within ſix years.

S. C. Rep. Q. *A.* 37.
11 Mod. 37.
6 Mod. 309.
1 Salk. 28.
2 Show. 126.
Cha. Prec. 385, 386.
12 Mod. 557.
Carth. 471.
12 Mod. 224, 577, 578.

Aſſumpſit by executor on *aſſumpſit* to the teſtator, *non aſſumpſit infra* 6 *annos* pleaded, evidence of promiſe after 6 years to the executors.
Ante, 421.

years. Note, This caſe was tried before *Holt* at *niſi prius* at *Guildhall.* And he permitted the parties to move it after in court.

Seers *verſ.* Turner.

Plea in abatement of a plaint for the ſame cauſe in the *Marſhalſea*, and removed into the King's Bench by *habeas corpus*, where it ſtill depends. Bro. Brief p. 107. 5 Rep. 62. cited S. C.

IN an action of treſpaſs the plaintiff declared of an aſſault, battery, and wounding, upon the 6 of *June*, and of an aſſault, battery, wounding, and falſe impriſonment by the ſpace of four hours upon the 1 of *Auguſt* after, *ad damnum* the plaintiff 30*l.* The defendant pleads as to the treſpaſs, aſſault, battery, wounding, and falſe impriſonment in the plaintiff's declaration ſecondly mentioned, Not guilty; and as to the treſpaſs, aſſault, battery, and wounding in the plaintiff's declaration firſt mentioned, he prays judgment of the bill, becauſe before the exhibiting of the bill, *ſcilicet*, ſuch a day, the plaintiff levied a plaint in the *Marſhalſea* againſt the defendant of a plea of treſpaſs and aſſault *ad damnum* of the plaintiff 99*s.* *quae quidem querela* afterwards, *viz.* ſuch a day, was *debito modo* removed by writ of *habeas corpus* iſſuing out of the King's Bench, returnable *immediate* before the chief juſtice, into the King's Bench: and thereupon the defendant by his attorney in the King's Bench at the ſuit of the plaintiff, of the plea of treſpaſs and aſſault aforeſaid, appeared, and put in bail according to the cuſtom of the ſaid court, *prout, &c.* which plea in the King's Bench *remanens adhuc pendet minime diſcontinuatum ſive determinatum:* and avers that the plaint levied, *&c.* in the *Marſhalſea*; and the plaintiff's bill for the firſt mentioned treſpaſs, aſſault, battery, and wounding in the King's Bench exhibited, were levied and proſecuted *pro una et eadem materia et cauſa actionis, et non alia neque diverſa*; *et hoc* the defendant *paratus, &c. unde petit judicium de billa praedicta* of the plaintiff againſt the defendant, *de una et eadem materia ſuperius modo exhibita, pendente praedicto priori placito, ut praefertur, indeterminato, et quod billa illa, quoad eandem tranſgreſſionem, inſultum, verberationem, et vulnerationem* firſt mentioned *caſſetur, &c.* To this plea the plaintiff demurred.

Mr. *Ward* took ſeveral exceptions to the plea, which I ſhall not report, becauſe they did not receive the reſolution of the court upon them, they going upon another matter, which Mr. *Ward* took no notice of.

Habeas corpus does not remove the cauſe out of the inferior court. 12 Mod 204. *Recordari* and *certiorari.*

Holt chief juſtice. A *habeas corpus* does not remove the cauſe out of the inferior court, the cauſe is ſtayed below; but a plaint pending in an inferior court is no plea to an action brought in the courts at *Weſtminſter*. There is a great deal of difference between a *recordari*, or a *certiorari*, and a *habeas corpus*. In the caſe of a *recordari*, the proceedings are upon that; and the *recordari* is entred upon the roll, and the return of it which is the plaint, and the plaintiff declares upon that, and the parties have day in court upon the *recordari:* and ſo it is of a *certiorari*. But upon a *habeas corpus* the parties have no day in court, but the proceedings below are ſuperſeded, and the plaintiff has liberty to declare againſt the defendant, as *in cuſtodia Mareſchalli*.

Powell juſtice. Upon a *habeas corpus* the cauſe is not removed out of the inferior court, ſo as to be pending here, and conſequently it cannot be pleaded to another declaration for the ſame thing; but when the defendant is brought here by *habeas corpus*, we make him put in bail to anſwer a declaration to be delivered within two terms, and if he does not put in ſuch bail we grant a *procedendo*; but a *recordari* is quite different, for upon that the proceedings are removed.

Holt ſaid, that this declaration was upon the *habeas corpus*, and though an impriſonment was added, that was no more than the plaintiff might do. *Powell* ſeemed to think it a variance, but then he ſaid, it would be a declaration by the by, which the plaintiff had by law liberty to charge the defendant with, and that would juſtify this declaration. The court gave judgment, that the defendant ſhould anſwer over.

This which follows is taken out of the notes of Mr. *Pengelly*, who was counſel with the defendant upon the demurrer.

By *Holt* and the court it was reſolved, that the defendant ſhould anſwer over. For this declaration may be in purſuance of the firſt *habeas corpus*, and the plaintiff may declare on an impriſonment, and when the defendant is in cuſtody, the plaintiff may declare againſt him for any matter, and the variance of the damages is allowable, and is the courſe of the court. But indeed in that caſe the bail cannot be charged. A *habeas corpus* does not remove the plaint, but it is only certified, and the proceedings below are by this writ ſuſpended, and there is no proceeding here upon that plaint. But the plaintiff declares againſt the defendant *de novo* as a privileged perſon *in cuſtodia Mareſchalli*, and there is no day given to the plaintiff upon the return of the *habeas corpus*, as in caſe of a *recordari* or *pone*, ſo that the plaintiff is not in court.

1 Ventr. 252.
3 Keb. 263.
1 Jones 313.
1 Cr. 294.
Sty. 395, 440.

But it is a *quaere*, if there be not a cauſe pending; for if he eſcapes, it ſeems the plaintiff may have an action againſt the marſhal, for the defendant comes with a charge upon him, which cannot be without an action or writ.

It ſeems that the ſheriff, marſhal, *&c.* was anſwerable for the eſcape of a man taken by a bill of *Middleſex* or *latitat* before the ſtatute that introduced the *acetiams*, and that this anſwers Mr. *Pengelly*'s *quaere*.

Regina *verſ.* Harman.

An indictment for an offenſe contrary to a ſtatute, ought to conclude, *contra formam ſtatuti.*

1 Salk. 370. pl. 3.
Allen 50.
4 Rep. 48. a.
1 Saund. 250.

THE defendant was indicted upon the 9 & 10 *Will.* 3. *c.* 41. for preventing imbezilment of the Queen's ſtores, upon the clauſe, that ſuch perſon or perſons, in whoſe cuſtody, poſſeſſion, or keeping, ſuch goods or ſtores marked as aforeſaid ſhall be found, not being imployed as aforeſaid; and ſuch perſon or perſons, who ſhall conceal ſuch goods or ſtores marked as aforeſaid; being indicted and convicted of ſuch concealment, or of the having ſuch goods, or ſtores found in his cuſtody, poſſeſſion, or keeping, ſhall forfeit ſuch goods, and the ſum of 200*l.* together with coſts, *&c.* the one moiety to his majeſty, and the other to the informer. And the indictment ſet forth, that the defendant after the 24 of *June* 1698, *viz.* ſuch a day, *adtunc vel ad aliquod tempus antea vel poſtea non exiſtens pactor*, *Anglice* a contractor, *cum principalibus officiariis vel commiſſionariis claſſis*, *Anglice* navy, *ſeu bombardarum*, *Anglice* ordnance, *ipſius dictae dominae reginae*, *ſeu victualariis*, *Anglice* victuallers, *pro uſu dictae dominae reginae*, *neque negotiator exiſtens ad inde per aliquem talem pactorem*, *&c.* as before, *apud B. praedictum habuit in cuſtodia*, *Anglice* cuſtody, *poſſeſſione et cuſtodia ſuis*, *Anglice* keeping, *quatuor*, *&c.* *ſeparaliter impreſſat.* *Anglice* marked, *cum ſigno vocato*, the broad arrow, *exiſtente ſigno cum quo res bellicoſae et navales dictae dominae reginae adtunc et diu antea uſualiter impreſſatae fuere*, *et adhuc impreſſatae ſunt*, *Anglice* marked, *contra formam ſtatuti in hujuſmodi caſu nuper editi*, *et proviſi*; *quodque praedict.* *quatuor*, *&c.* *ſic ut praefertur*, *impreſſat.* *adtunc et ibidem invent.* *fuere in cuſtodia et poſſeſſione* of the defendant, the defendant *adtunc non exiſtente negotiatore*, *ut praefertur*, *prout per ſtatutum praedictum in hujuſmodi caſu editum et proviſum requiritur*, *in diminutionem praedictarum rerum bellicoſarum et navalium dictae dominae reginae*, *ac contra pacem dictae dominae reginae*, *coronam*, *et dignitatem ſuas*, *&c.* Two exceptions were taken to this indictment in arreſt of judgment: Firſt, That no indictment lay, becauſe it was a new offenſe, and a particular penalty inflicted of forfeiture of the goods and 200 *l.* *prout* in the act. But this exception is contrary to the words of the act, and was overruled by the chief juſtice, becauſe the forfeiture accrues by the conviction in an indictment for the offenſe. The ſecond exception was, that the indictment did not conclude *contra formam ſtatuti.*

2 Cro. 643
2 R Rep. 247
1 Mod. 2.
1 Sid 439.
2 Keb 614.
1 Mod. 34.

And it was ſaid for the defendant, that where an offenſe is created by act of parliament, you muſt deſcribe the fact ſo in the indictment, as it may appear to be within the ſtatute, and you muſt alſo conclude your indictment *contra formam ſtatuti*; for it is your concluding the indictment in that manner, that declares your proceeding for the offenſe to be upon the ſtatute; and where that is wanting, the indictment is an indictment at common law, and that in this caſe muſt be ill; becauſe a man may come to the poſſeſſion of ſuch goods by bailment, and then the having them found in one's cuſtody is no crime at common law, but only becauſe it is made ſuch by act of parliament: and this is an eſſential form. It was inſiſted for the Queen, that the *contra formam ſtatuti*, and the *non exiſtente negotiatore, prout per ſtatutum praedictum in hujuſmodi caſu editum et proviſum requiritur*, which concluded the two facts, that were charg'd in the indictment, would ſupply the want of the *contra formam ſtatuti* in the concluſion of the indictment. But to this it was anſwered for the defendant, that in caſe the firſt fact was that which was made criminal by the act of parliament, that would have been well; which the chief juſtice agreed, ſaying that the reſt would be ſurpluſage, and would not hurt; but that it was the goods being found in the defendant's cuſtody, which was the offenſe, and not the having the goods in his cuſtody; for though he had ſuch goods in his cuſtody, yet if they were not found in his cuſtody, that was no offenſe: and therefore it was the latter part of the indictment that contained the offenſe, which the chief juſtice agreed alſo; and that not being concluded *contra formam ſtatuti* was ill.

Powell juſtice. In all caſes of indictments for offenſes againſt a ſtatute, the indictment muſt conclude *contra formam ſtatuti*, which all the court agreed, and ordered the *poſtea* to ſtay till it was further moved.

Regina *verſ.* Paty et alios.

See Compl. Coll. Hist. of Europe vol. 10. p. 27. to 41. 166. to 140.

Case of others under like circumstances with [illegible] of [illegible] for 8 ch. j. of C. B. &c. in Brevi. Mss. 12.

PATY and four others were committed by the Speaker of the houſe of Commons, by virtue of an order of that houſe; and upon a *habeas corpus* to bring them before this court, the warrant was returned, which follows *in haec verba: Martis 5 die Decembris* 1704. By virtue of an order of the houſe of Commons of *England* in parliament aſſembled this day made, theſe are to require you forthwith upon ſight hereof to receive into your cuſtody the body of *John Paty*, who, as it appears to the houſe of Commons, is guilty of commencing and proſecuting an action at common law againſt the late conſtables of *Ayleſbury*, for not allowing his vote in

S.C. Holt 526. & Salk. 503. & 504.
S. C. Mss. Rep. B. R. 155. But it seems to be same report as here.

Commitment by the Speaker of the houſe of Commons, by order of the houſe, for proſecuting actions for refuſing votes in elections.

See the complete case of Ashby v. White ant. p. 308. & the references there.

in the election of members to ſerve in parliament, contrary to the declaration, in high contempt of the juriſdiction, and in breach of the known privileges, of this houſe; and him in ſafe cuſtody to keep, during the pleaſure of the ſaid houſe of Commons; for which this ſhall be your warrant. Given under my hand this fifth of *December anno Domini* 1704. To the keeper of her Majeſty's gaol of *Newgate*, or his deputy. The warrant was ſigned *Robert Harley*. This *habeas corpus* was moved for on the laſt *Monday* but one in the term, and the court granted the writ returnable the *Saturday* after. Some perſons thought the return too long, and the court were much preſſed to make it ſhorter; but the court would not, but ſaid, that in a caſe of this conſequence, they ought to give the parties concerned time to conſider what return to make, and if there were any delay, the parties were the cauſe of it themſelves, by not moving ſooner. The defendants were brought up upon the *Saturday*, and Mr. *Mountague*, Mr. *Page*, Mr. *Lechmere*, and Mr. *Denton*, argued that they ought to be diſcharged. I was not preſent at the argument. There were no council to maintain the commitment. The court put off delivering their opinion till *Monday*, which was the laſt day of the term, and then all *ſeriatim* delivered their opinions. I did not hear very well, but the ſubſtance of what was ſaid, as I apprehended, was to the following effect.

If a perſon committed by the houſe of Commons is brought up into the King's Bench by *habeas corpus*, he ſhall be remanded. Co. Li. 81. 4 Inſt. 15, 17.

The King's Bench cannot judge of the privileges of the houſe of Commons.

+ See ~~[illegible]~~ Streater's case in 2 State Trials, being a case before the Revolution.

Goald juſtice. The priſoners ought to be remanded. He ſaid, that this was the firſt *habeas corpus* that was ever brought by perſons committed by the houſe of Commons,+ that he ever heard or read of; and therefore no ſuch writ having ever been brought before, that is an argument, that no ſuch writ lies. He ſaid, if this had been a return of a commitment by an inferior court, it had been naught, becauſe it did not ſet out a ſufficient cauſe of commitment: but this return being of a commitment by the houſe of Commons, which is ſuperior to this court, it is not reverſible for form. And that anſwers the objections to the form of the commitment. We cannot judge of the privileges of the houſe of Commons, but they are to debate them among themſelves. He ſaid, it was objected, that by *Mag. Chart. c.* 29. no man ought to be taken or impriſoned but by the law of the land. But that the anſwer to this was, that there were ſeveral laws in this kingdom, among which was the *lex parliamenti*, which law, as it is ſaid in the 4 *Inſt.* 15. *ab omnibus eſt quaerenda, a multis ignorata, a paucis cognita*; and that it was uncertain, that thoſe words in the ſtatute of *Mag. Chart.* were to be reſtrained to the common law. He ſaid, the parliament had laws and cuſtoms peculiar to itſelf, and that this was declared to be *ſecundum legem parliamenti*; and that the judges ought not to give any anſwer to queſtions propoſed to them about matters of privilege, becauſe the privileges of parliament are not to be determined by the common law. He ſaid, there had been an objection made, that this warrant was only ſigned by the Speaker. But he ſaid, that was the way the houſe of Commons acted. As to the objection, that if this proceeding here were not allowed, it would make the people of *England* bondmen; I anſwer, that this commitment is a puniſhment uſed by them, and that it determines with the ſeſſions. He ſaid, there was no difference between this and my lord *Shafteſbury*'s caſe, 1 *Mod.* 144. That that was the firſt inſtance of a *habeas corpus* granted upon a commitment by the houſe of lords. That according to that caſe, if the return had been general, without expreſſing what the particular matter of contempt was, it had been good; and though here the ſpecial matter were expreſſed, that would not alter the caſe, becauſe this court had nothing to do with it, nor could gainſay the houſe of Commons. That the houſe of Commons were to be intruſted with the liberty of the people, and that no body could ſuppoſe they would make any invaſions upon it. The judgment in the caſe of Sir *John Elliot* was reverſed in the houſe of Lords, becauſe matters tranſacted in parliament are only cogniſable there. And ſo it appears by *Prynne's Animad.* on 4 *Inſt.* 12. He ſaid, the houſe of Commons were the repreſentatives of the people, and concluded, that no *habeas corpus* would lie.

Tempore Car. 1.

1 Cro. 604, 605, *&c.*

Powys juſtice. I am of the ſame opinion. He ſaid, he would conſider the objections that had been made to the return, and give an anſwer to them; not that he thought they had juriſdiction of the cauſe, but that the commitment might not be taken ſo totally naught, as it had been repreſented to be. He ſaid, it had been objected, that this caſe differs from my lord *Shafteſbury*'s caſe, becauſe that was a commitment by order of the houſe of Lords, this only by the Speaker's warrant. To that he anſwered, that this warrant, as was recited in the warrant, was by order of the houſe of Commons. The ſecond objection was, that the warrant was not under ſeal; and 2 *Inſt.* 52. is, that warrants of commitment muſt be in writing under hand and ſeal. But to this I anſwer, that the houſe of Commons is a court; and ſo my lord *Coke* ſays, in his 4 *Inſt.* 28, 23. and commitments by a court need not be under hand and ſeal. And beſides, the *conſuetudo parliamenti* will juſtify this commitment. Thirdly, this caſe is objected to differ from my lord *Shafteſbury*'s caſe, becauſe he was a member of the houſe of Lords. But if this objection ſhould take place, it would deſtroy all their power of committing for breach of privilege, for theſe are moſt commonly by perſons not of the houſe. Fourthly, this commitment is for a matter done out of the houſe. That muſt receive the ſame anſwer with the laſt, that ſo are moſt breaches of privilege.

Commitment by a court need not be under ſeal.

privilege. Fifthly, it is objected, that the commitment is, during the pleaſure of the houſe of Commons, whereas it ought to be, till 2 Inſt. 52. they ſhall be diſcharged by due courſe of law. To this I anſwer, that this commitment is more favourable for the priſoner, and more for his benefit, than a commitment for a certain time; for this commitment determines with the ſeſſion, and it leaves the houſe a power to diſcharge the priſoners upon their ſubmiſſion. Beſides, this is agreeable to the conſtant forms of commitments by the houſe of Commons; and it is agreeable to our commitments here, which are implied to be during the pleaſure of the court. And though the houſe of Commons expreſs that in their commitments, yet that is only expreſſing what we imply. Sixthly, the cauſe of commitment is for bringing an action at common law, and ſhall the Commons hinder a man from proceeding at law? Now in general ſpeaking, that is the only uſe of privilege; and the meaning of privilege is, that it is a privilege againſt the courſe of law: ſuch is the privilege of members againſt ſuits at law to be brought againſt them. This objection has been farther enforced by remembring the reſolutions in the caſe of *Aſhby* and *White*, where it was determined by the houſe of Lords, that an action would lie againſt the conſtables of *Ayleſbury* for refuſing a man his vote at an election of members to ſerve in parliament. But in anſwer to that, this does not appear to us to be the ſame caſe. The parties are different, and it may be the caſes may be different, and all theſe priſoners may have been guilty of a breach of privilege. If all commitments for contempts, even thoſe by this court, ſhould come to be ſcanned, they would not hold water. Our warrants here in ſuch caſes are ſhort, as for a contempt, or for a contempt in ſuch a cauſe. So in Chancery the commitments for contempts are for a contempt in not fully anſwering, *&c.* and would not this commitment be ſufficient? If a commitment be for a contempt in not paying money according to an order of court, without reciting the order, yet ſuch a commitment is good. The houſe of Commons is a great court, and all things done by them are to be intended to have been *rite acta*, and the matter need not be ſo ſpecially recited in their warrants; by the ſame reaſon as we commit people by a rule of court of two lines, and ſuch commitments are held good, becauſe it is to be intended, that we underſtand what we do. Seventhly, it is ob- 4 Inſt. 15. jected, that by *Mag. Chart. c.* 29. no man ought to be taken or impriſoned, but by the law of the land. But to this I anſwer, that *lex terrae* is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law, *&c.* and among the reſt, the *lex parliamenti.* By the 28 *Ed.* 3. *c.* 3. there the words *lex terrae*, which are uſed in *Mag. Char.* are explained by the words, due proceſs of law; and the meaning of the ſtatute is, that all commitments muſt be by a legal authority. And the law of parliament is as much a law as any; nay, if there be any ſuperiority, this is a ſuperior law.

He ſaid, there were two things, which were moſt materially objected. Firſt, that this court, which is the ſupreme ordinary court of law, and has a very ample authority, authority to diſcharge a man committed *per mandatum domini regis*, has *a fortiori* authority to do it where the commitment is by ſubjects. But the inſtance put is of no weight, becauſe ſuch a commitment is not good. For the King is to act by his officers, and when the King ſat here, it was only *pro pompa*; but the judges gave the rule. And it is one of the grievances mentioned in the petition of right, 3 *Car.* 1. that men were detained in priſon by the King's ſpecial command. A commitment by a court is of greater authority than a commitment by the King in perſon, and is accounted in law a commitment by the King. So where ſome ſtatutes ſay, the offenders ſhall be fined at the King's pleaſure, that pleaſure muſt be declared in the courts proper for the conuſance of the offenſes. The ſecond objection is, that if this court cannot judge of the commitments of the houſe of Commons, and ſuch a commitment as this is good, they may ſtop the whole courſe of law, and take upon them a deſpotic power. But this is a very foreign ſuppoſition, and what ought not to be ſaid by any *Engliſhman*. The houſe of Commons are a great branch of the conſtitution, and are choſe by ourſelves, and are our truſtees; and it cannot be ſuppoſed, nor ought to be preſumed, that they will exceed their bounds, or do any thing amiſs. It does not appear to us, what theſe actions were, and the houſe of Commons have examined into that; and we know, they have a juriſdiction with relation to breaches of privilege, and contempts done to them, and the right of perſons to vote for members of parliament; and we muſt take it, that what they have done is warranted by that their juriſdiction, and is well done. He ſaid, this was a commitment in execution, and not *pro ſalva cuſtodia*. He ſaid, the court were to determine the bounds of juriſdictions, as they do the bounds of pariſhes, by uſage: that of the ſide of the houſe of Commons, there was immemorial uſage: and that he expected ſome precedents would have been brought to ſhew, that this court might inquire into the proceedings of the houſe of Commons, and diſcharge perſons committed by them; but that the council for the priſoners had not brought one precedent, nor one book caſe, nor one opinion in print, to warrant any ſuch power in this court: and that *non uſer* in this caſe was a very great argument, that the court had no ſuch power. But he ſaid, the reaſon why there were no precedents of that kind, was very obvious, *viz.* that it would be unreaſonable to put the judges upon determining the privileges of the houſe of Commons, of which privileges they have no account, nor any footſteps in their books: that the houſe of Commons have the records of them, and as occaſion requires, ſearch them to find them: that the judges cannot reſort to thoſe records, and therefore it is indeed impoſſible for them to judge matters of privilege. And my lord *Coke* in his 4 *Inſt. fol.* 15. ſays, that it is *lex ab omnibus quaerenda, a multis ignorata, a paucis cognita.* He ſaid, my lord *Shafteſbury*'s caſe was the only caſe wherever a *habeas corpus* was brought upon a commitment by either houſe of parliament; but that he could not ſay a *habeas corpus* would not lie, becauſe, till the return of the *habeas corpus*, the cauſe of commitment does not appear; and it is one of the great privileges of the ſubject, to have the cauſe of his impriſonment inquired into in this court: but when it appears to be a commitment by the houſe of Commons, he muſt be remanded. The judges in my lord *Shafteſbury*'s caſe went upon their having no juriſdiction in the cauſe.

Powell juſtice of the ſame opinion. He ſaid, he had had but a ſhort time to conſider of a cauſe of this conſequence: that it was the firſt cauſe of this nature, that had ever been before this court; for my lord *Shafteſbury*'s caſe differed, becauſe he was a member of the houſe of peers, and they might have other powers over their own members, than they had over their fellow ſubjects without doors. He ſaid, the court could not judge of the return: Firſt, Becauſe they were committed by another law, and conſequently we cannot diſcharge them by that law, by which they were not committed. There is a *lex parliamenti*, for the common law is not the only law in this kingdom; and the houſe of Commons do not commit men by the common law, but by the law of parliament. Conſider the judicature of parliament. The houſe of Lords have a power of judicature by the common law upon writs of error, but they cannot proceed originally in any cauſe. But they proceed too in another manner in caſe of their own privileges, and therein the judges do not aſſiſt, as they do upon writs of error; and their proceeding in that caſe is by the *lex parliamenti*. So the Commons have alſo a power of judicature, and ſo is 4 *Inſt.* 23. but that is not by the common law, but by the law of parliament, to determine their own privileges; and it is by this law that theſe perſons are committed. He ſaid, this court might judge of privilege, dut not contrary to the judgment of the houſe of Commons, which yet we muſt do in this caſe, if we diſcharge theſe priſoners from their impriſonment, which is the only judgment the houſe of Commons can give, upon their determination, that theſe perſons have been guilty of a breach of their privileges. This is drawing the plea *ad aliud examen*, and yet the houſe of commons are the ſupreme judges of

Lords no judges of original cauſes.

The King's Bench may judge of privilege, but not contrary to the judgment of the Commons.

of their own privileges. This court judges of privilege only incidentally, and ſo they did in *Binyon*'s caſe X and in the caſe of *Aſhby verſ. White*; for when an action is brought in this court, judgment muſt be given one way or other. So they do in eccleſiaſtical matters, when a queſtion of that nature ariſes in an action brought before them; as in the caſe of the Quaker's marriage depending in the Common Pleas; but their judgment will not bind the eccleſiaſtical court. And therefore, if ſuch a marriage ſhould be adjudged at law to be a good marriage, and yet afterwards the parties ſhould be cited into the eccleſiaſtical court for living in fornication, and excommunicated, and taken upon the *capias excommunicatum*, this court could not diſcharge them upon a *habeas corpus*. So here, the court of Parliament he ſaid was a ſuperior court to this court, and though the King's Bench have a power to prevent exceſſes of juriſdiction in courts, yet they cannot prevent ſuch exceſſes in parliament, becauſe that is a ſuperior court to them, and a prohibition was never moved for to the parliament. If the houſe of Lords ſhould take upon them to determine freeholds, this court could not prohibit them, there are writs in the *Regiſter ad regia jura conſervanda*, which may be ſent to the Eccleſiaſtical Court, but they cannot go to the houſe of Lords. There was a caſe lately, wherein the Lords made an order originally in a cauſe, but the parties grieved could not have come here for relief. So *Skinner*'s caſe was brought originally in the houſe of Lords, and this court could not have helped them. He cited 4 *Inſt.* 50, 51. and 13 *Co.* 63, 64. that the privilege, order, or cuſtom of parliament, either of the upper houſe, or houſe of Commons, belongs to the determination or deciſion only of the Court of Parliament; the judges being aſked by the Lords concerning privilege of parliament, anſwered, that they ought not to anſwer to this queſtion, for it hath not been uſed aforetime, that the judges ſhould in any wiſe determine the privilege of this high Court of Parliament; for it is ſo high and mighty in its nature, that it may make laws, and that what is law, it may make no law, and the determination and knowledge of that privilege belongeth to the Lords of parliament, and not to the judges. The privilege in queſtion in that caſe was concerning the Speaker of the houſe of Commons being taken in execution. But if they ſhould diſcharge theſe perſons, that are committed by the houſe of Commons for a breach of privilege, this would be to take upon themſelves directly to judge of the privileges of parliament. This want of juriſdiction in the court cures all the faults in the commitment; though if that were to be debated, there ought to be a difference taken between a commitment for a crime, and for a contempt. And as to that objection to the warrant, that it was to detain the priſoners during the pleaſure of the houſe of Commons, that he ſaid was the conſtant form of warrants by the houſe. It is objected, that in bringing

ſee Benyon's caſe 2. Bridgm. MSS. Rep. penes me.

The Common Pleas determining a Quaker's marriage good, does not bind the Eccleſiaſtical Court; and therefore, if they excommunicate them, this court cannot diſcharge them upon *habeas corpus*.

Moor 57. *Ferrer*'s caſe.

31 Hen. 6. n. 25, &c. See Prynn's 4 Inſt. 16.

Want of juriſdiction in the court cures all faults in the commitment.

ing theſe actions the priſoners have done nothing but what the Lords have adjudged they may do, and the Houſe of Lords is the ſupreme judicature of the kingdom. As to that he ſaid, that if this commitment were for that reaſon an exceſs of juriſdiction, this court could not remedy it, but it ought to be remedied by conference, and that was the proper remedy, where the parliament aſſumes an exceſſive juriſdiction: that where the Lords in *Skinner*'s caſe aſſumed an original juriſdiction, upon a conference the Lords were ſatisfied and receded. Upon conferences the reaſons upon which the houſes act will appear, and if the Commons have no reaſon for what they do, it is to be preſumed they will never be choſen again; and if the Lords are in the wrong, the other houſe will not reſt till all is ſet right again. In my lord *Shafteſbury*'s caſe the judges were all of opinion, that the cauſe of commitment was not examinable here, which is an authority in point that we have nothing to do with this caſe. As to the priſoners not being members, there are many inſtances that the Commons can commit perſons not members of the houſe; and there are many inſtances of ſuch commitments in 4 *Inſt.* 23. So in *Ferrer*'s caſe in *Dier* 61. the ſheriff was committed for detaining a member of parliament in execution. And though, as *More* 57. is, a man in execution cannot have privilege of parliament, and ſo the execution was good, yet it was irregularly executed. But beſides, the houſe of Commons having a power to examine matters of privilege, muſt alſo of conſequence have a power to puniſh the breach of it. As for my lord *Danby*'s caſe, he was under a criminal proſecution by way of impeachment, and upon that was committed, and lay four months in gaol, and for that reaſon was bailed; and the houſe was not then ſitting. He ſaid, the houſe of Commons had the power to determine elections, and that any voices given, or an election, before the precept read and publiſhed, are void, as my lord *Coke* ſays, 4 *Inſt.* 49. *ſecundum legem et conſuetudinem parliamenti.* There have been many ſtatutes made relating to theſe matters, and ſo far they are ſubject to the common law, but no farther.

Commons may commit perſons, that are not members.

Bailed on impeachment.

Holt chief juſtice ſaid, that the legality of the commitment depended upon the vote recited in the warrant; and for his part he thought the priſoners ought to be diſcharged, though in this his opinion he was ſo unfortunate as to go contrary to the act of the Houſe of Commons, and the opinion of all the reſt of the judges of *England*, whoſe aſſiſtance they had deſired, and there had been a meeting for that purpoſe. He ſaid, this was not ſuch an impriſonment as the freemen of *England* ought to be bound by; for that this, which was only doing a legal act, could not be made illegal by the vote of the houſe of Commons; for that neither houſe of Parliament, nor both houſes jointly, could diſpoſe of the liberty or property of the ſubject; for to this purpoſe the Queen muſt join: and that it was in the neceſſity of their ſeveral concurrences to ſuch acts, that the great ſecurity of the liberty of the ſubject conſiſted. He ſaid, that the firſt matter, which was laid as a breach of privilege, was none: and to that purpoſe he cited *Binyon*'s caſe, where in an *aſſumpſit* the defendant pleaded the ſtatute of limitations, and the plaintiff replied, that the defendant was a parliament man, *&c.* and the plea was over-ruled, because one might file an original againſt a parliament man, and continue it down, without breach of privilege. And that it ſhould be ſo is of abſolute neceſſity, in order to ſave the ſtatute of limitations; for otherwiſe, as is held in that caſe in 1 *Lev.* 111. that caſe not being provided for by an exception, the plaintiff would be barred of his action, notwithſtanding that he could not file an original. So a man whilſt member of parliament may alien his eſtate by fine with proclamations, and a perſon that has right may be neceſſitated to commence an action to ſave the bar that would incur againſt him by the ſtatute of 4 *Hen.* 7. So one may commence an action againſt a member of parliament, that is executor; and conſequently the commencing an action againſt the conſtables of *Aylesbury* is no breach of privilege. As to proſecuting the action, which was the ſecond matter; he ſaid, it was uncertain what ſort of proſecuting they meant. For proſecuting might be only continuing the original, which, as was ſaid before, would be no breach of privilege, though taking out a *capias*, or a *diſtringas* would. The third thing is, the perſons the action is brought againſt, *viz.* the conſtables of *Aylesbury*; now it does not appear, that the conſtables of *Aylesbury* have any privilege, and if they have any, it ought to have been ſet out, becauſe *qua* conſtables of *Aylesbury*, they have no more privilege than the conſtables of *St. Martins in the Fields.* The fourth matter he ſaid was for bringing an action at common law for not allowing his vote in the election of members to ſerve in parliament. Now to bring an action againſt a perſon, who is not privileged, he ſaid was no offenſe, though no action would lie in this caſe, or though the matter upon which the action was grounded was falſe. And ſo is 2 *R.* 3. *p.* 9. And if a peer be charged with any falſe and ſcandalous matter, yet if it be by way of action, he cannot have *ſcandalum magnatum.* A man who brings an action againſt another, who is not a privileged perſon, is not to have his action ſtopped, eſpecially if he has a good cauſe of action, which that the plaintiffs in this caſe have, appears by the reverſal of the judgment of this court *in domo procerum* in the caſe of *Aſhby verſ. White.* And this action, which was brought in this caſe, appears by the deſcription of it in the vote of the houſe of Commons, to be for the ſame cauſe of action that that was. I will ſuppoſe, that the bringing ſuch actions was declared by the houſe of Commons to be a

1ſt Matter. Commencing actions againſt parliament men.

See post. 1114.

2d Matter.

3d Matter.

4th Matter.

He ſaid, when multiplicity of ſuits aroſe, coſts were given to determen from vexatious ſuits. Stat. 23 H. 8. Keil. 26. Dier 285.

Declaration of the Houſe of Commons.

breach of their privilege; but that declaration will not make that a breach of privilege that was not ſo before. But if they have any ſuch privilege, they ought to ſhew precedents of it. The privileges of the houſe of Commons are well known, and are founded upon the law of the land, and are nothing but the law. As we all know they have no privilege in caſes of breaches of the peace. And if they declare themſelves to have privileges, which they have no legal claim to, the people of *England* will not be eſtopped by that declaration. This privilege of theirs concerns the liberty of the people in a high degree, by ſubjecting them to impriſonment for the infringement of them, which is what the people cannot be ſubjected to without an act of parliament. As to what was ſaid, that the houſe of Commons are judges of their own privileges, he ſaid, they were ſo, when it comes before them. And as to the inſtances cited, where the judges have been cautious in giving any anſwer in parliament in matters of privilege of parliament; he ſaid, the reaſon of that was, becauſe the members know probably their own privileges better than the judges. But when a matter of privilege comes in queſtion in *Weſtminſter hall*, the judges muſt determine it, as they did in *Binyon*'s caſe. Suppoſe theſe actions againſt the conſtables of *Aylesbury* had gone on, and the defendants had pleaded this privilege; we muſt have determined, whether there were any ſuch privilege or no. And we may as well determine it upon the return of this *habeas corpus*, for the defendants are here in a proper courſe of law, and the matter appears to us upon record as well this way, as if it were pleaded to an action. We muſt take notice of the *lex parliamenti:* my lord *Coke* in his 1 *Inſt.* 11. *b.* enumerates the ſeveral laws that are within this realm, and the *lex parliamenti* is one of them, and the *lex parliamenti* is the law of the land. As to what my lord *Coke* ſays in the ſame place, that the *lex parliamenti eſt a multis ignorata*, that is, becauſe they will not apply themſelves to underſtand it. He gave a great *encomium* of my lord *Clarendon*, and cited a paſſage out of his hiſtory, relating to the ſame doctrine with this, that was then ſet up, that the houſe of Commons were the only judges of their own privileges, and therefore whatever they ſaid was their privilege, was ſuch: it is in his firſt part, *fol.* 310, *&c.* and is very applicable to the preſent caſe, but too long to be tranſcribed. He ſaid, he would cite a greater author than he, King *Charles* the firſt, in his anſwer to the declaration and votes of the two houſes concerning *Hull*, *Clarendon*, 1 *part*, 400, and *Ruſhworth's Collections*, wherein among other things he ſays, he very well knew the great and unlimited power of a parliament, but he knew as well, it was only in that ſenſe, as he was a part of that parliament; without him and againſt his conſent the votes of either or both houſes together muſt not, could not, ſhould not (if he could help it, for his ſubject's ſake as well as his own) forbid any thing that was enjoined by the law, or enjoin any thing that

He ſaid, the *lex terræ* is the genus, and comprehends all the laws of the land; the admiralty law and others are ſpecies of this grand law; ſo is the *lex parliamenti*; and if it be, the judges either do or ought to know what it is.

Clerk's caſe, 5 Co. 64.

See Lord Bridgman's ~~[illegible]~~ Judgmt. in Benyon v. Evelyn in vol. 2 of [illegible] Rep. penes me. See also what Lord Ch. J. Willes obſerves in his report ~~of~~ ~~in~~ of Myddelton v. Wynn. It is in page 606. of Willes's Rep.

He ſaid, as to the high contempt of the juriſdiction of the Houſe of Commons, neither houſe can hold plea in any action, not the Houſe of Lords originally, therefore how can they have any juriſdiction in this caſe? From Banbury's MS.

Ruſhw. 3 vol. 728, 730, 731.

that was forbidden by the law. And the chief juſtice ſaid, if the votes of both houſes could not make a law, by parity of reaſon they could not declare law. That the bringing this action is no breach of the privilege of the houſe of Commons, appears by the judgment in the caſe of *Aſhby* and and *White*, in the argument of which caſe before the houſe of Lords, this argument of the privilege of the houſe of Commons was inſiſted on. Beſides if the bringing this action was a breach of the privilege of the houſe of Commons, why was not *Aſhby* committed, when he firſt brought the action; but the ſuffering him to go on with his action is an argument, that this pretenſe of privilege is a new thing. *Aſhby* recovered in his action, and theſe men have followed his ſteps, and yet they are here ſaid to have acted in breach of the privilege of the houſe of Commons. I ſhall ſay nothing to the caſe of *Aſhby* and *White*, becauſe the reaſons upon which that judgment was given are printed. He ſaid, the bringing this action is ſaid to be in high contempt of the juriſdiction of the houſe of Commons; but that he ſaid could not be, becauſe neither houſe of parliament could hold plea in any action; and beſides, the defendants might wave their privilege. He ſaid, he made no queſtion of the power of the houſe of Commons to commit; they might commit any man for offering an affront to a member, or for a breach of privilege; nay they might commit for a crime, becauſe they might impeach. He ſaid my lord *Shafteſbury*'s caſe differed from this, becauſe the commitment there was for a contempt done in the houſe. He ſaid, the cauſe of the priſoners commitment being expreſſed in the warrant, excluded any intendment, that they might be committed for any other cauſe, than that expreſſed in the warrant. He ſaid, both houſes of parliament were bound by the law of the land, and in their actions were obliged to purſue it. He cited my lord *Banbury*'s caſe, which was thus: My lord *Banbury* was indicted of murder by the name of *Charles Knollys*, Eſq; and he pleaded in abatement, that by letters patent King *Charles* I. created his grandfather earl of *Banbury*, and ſo ſhewed the deſcent to him, and prayed judgment of the indictment, becauſe he was not named earl; the attorney general replied, that upon his petition to the houſe of lords to be tried by his peers, the lords diſmiſſed his petition, and diſallowed his peerage, &c. And upon demurrer the replication was held to be naught, and the plea good, and the indictment was abated: and ſaid, that caſe would go a great way in this caſe. See *Latch* 48, 150. *Hodges verſ. Moor.* *Stiles* 415. Captain *Streeter*'s caſe, and *Stiles* 90.

He ſaid, a houſe of Commons can no more declare anything to be law by their reſolutions than they can make a law by themſelves, and who (ſays he) can ſhew me how an houſe of Commons can ſtop a lawful proſecution? No man has privilege againſt the law of the land. And nothing but an act of parliament can ſubject any man's perſon to impriſonment. It is true the judges do not interpoſe in the houſe of Lords in matters of privilege, becauſe the Lords are well acquainted with that themſelves; but when a queſtion regularly ariſes in the Queen's Bench concerning privilege, there the judges *muſt* concern themſelves. Suppoſe the action had gone on without the interpoſition of the houſe of Commons, and the defendant had pleaded privilege to the juriſdiction of the court, and to this it had been demurred, muſt not the judges then have determined privilege? From Bunbury's MS.

After this reſolution of the court given, the court were moved, that a record might be made up of the caſe: and upon attendance of

Judgment on the *habeas corpus.*

see P. Parl. Hist. 3. 1018.

of the judges in vacation, a form of entry was ſettled and agreed on; which begun with the award of the writ, returnable as aforeſaid, and then that upon the day the keeper of *Newgate* brought up the priſoners and made the return aforeſaid, and then a *curia adviſare* till *Monday*, and then the bringing them up again, and then the following entry; *et ſuper matura deliberatione per curiam hic habita, pro eo quod videtur curiae hic, quod cognitio cauſae captionis et detentionis praedicti Johannis Paty non pertinet ad curiam dictae dominae reginae coram ipſa regina, ideo idem Johannes remittitur praefato cuſtodi goalae dictae dominae reginae de Newgate, remanere in ſtatu quo fuit tempore emanationis brevis praedicti.*

Regina *verſ.* Callingwood.

S. C. 3 Salk. 42. 6 Mod. 99, 182, 288. 1 Salk. 380. Indictment for inticing an apprentice to take goods from his maſter.

INdictment, that the defendant 20 *Martii, &c. et diverſis diebus antea tam nocte quam in die apud, &c. quendam Carolum Scrivener ſervum et apprenticium cujuſdam Richardi Croft illicite injuſte et nequiter movit ſeduxit et allexit* 600 yards of *calamanca valoris, &c. de bonis et catallis praefati Richardi extra praedictam domum et ſhopam ipſius Richardi illicite injuſte et nequiter capere et aſportare, et quod eodem die et diverſis diebus, &c.* the defendant *bona et catalla praedicta a praefato Carolo Scrivener ſervo et apprenticio praefati Richardi Croft adtunc apud, &c. illicite injuſte et nequiter cepit recepit habuit, et ad uſum ſuum proprium convertit, bene ſciens praedictum Carolum Scrivener fore ſervum et apprenticium praefati Richardi Croft, ad grave damnum ipſius Richardi, et in malum exemplum omnium aliorum, &c.* Judgment was given for the defendant in this caſe, upon the authority of the caſe of the Queen *verſ. Daniell*, which indictment was, *quod tali die et diverſis diebus, &c. quendam Carolum Scott ſervum et apprenticium cujuſdam Joſephi Biſhop extra domum ſhopam et ſervitium praedicti Joſephi magiſtri ſui decedere et ſeipſum abſentare illicite et injuſte allexit procuravit et cauſavit, et quod praedictus Johannes Daniell adtunc et diverſis diebus, &c. antea, illicite injuſte et nequiter movit ſeduxit et allexit praedictum Carolum Scott* 200 *Carolina* hats *valoris, &c. de bonis et catallis praefati Joſephi extra domum ex ſhopam ipſius Joſephi illicite injuſte et nequiter capiendum et aſportandum; et quod Johannes Daniell eodem die et diverſis diebus, &c. praedicta bona et catalla praefati Joſephi adtunc et ibidem illicite injuſte et nequiter cepit recepit habuit, et ad uſum ipſius Johannis proprium convertit, ipſe idem Johannes dictis diebus, &c. bene ſciens praedictum Carolum Scott fore ſervum et apprenticium ipſius Joſephi, &c.* In this caſe of the Queen *verſ. Daniell*, after ſeveral motions, and debate of the matters moved in arreſt of judgment, judgment was given for the defendant. *Holt* chief juſtice gave the

Regina verſ. Daniell.

An indictment does not lie againſt another, for inticing away his apprentice.

reaſon of their judgment, for the indictment was naught. For he ſaid, this was a private injury, for which an action upon the caſe would lie, but it was not an injury of ſuch a publick nature, as to maintain an indictment. Indeed an action of treſpaſs will lie for taking a man's ſervant out of his actual ſervice. So is 21 *Hen.* 6. 31. but for enticing away a man's ſervant, which is the caſe here, treſpaſs will not lie, but only an action upon the caſe. Secondly, he ſaid, it did not appear whether this *Charles Scott* was a ſervant or an apprentice, for the indictment is *ſervum ſive apprenticium.* Now a ſervant and an apprentice are diſtinct things; an apprentice muſt be by deed, a ſervant may be by *parol*, and the diſcharge of an apprentice muſt be by deed, of a ſervant by *parol*: ſo is the book before cited. But however, it is but a private injury, and actionable, were this *Scott* ſervant or apprentice. He ſaid, there was another matter laid in the indictment, beſides enticing away the ſervant; but he ſaid there was no *venue* laid for it, and ſo that would not help.

Note, it is there ſaid, that if in treſpaſs *quare, &c.* the writ be *ſervum* for *apprenticium*, or *vice verſa*, it may be pleaded in abatement of the writ.

Gould juſtice ſaid, in *Noy* 105. there was an action upon the caſe for enticing away an apprentice.

Powell juſtice ſaid, he doubted at firſt. But beſides he ſaid, it ought to have been laid in the indictment, that *Scott* did depart.

In the caſe of the Queen *verſ. Callingwood*, after verdict for the Queen, it was moved in arreſt of judgment, that there was no place laid where the *domus et ſhopa* were, it was ſaid, *domus et ſhopa praedict.* and there was no *domus et ſhopa* mentioned before. And it was urged, that this was the ſame exception that was allowed by the court in the caſe of the Queen *verſ. Daniell.* The court agreed, that the indictment in the caſe of *Daniell* was held to be ill, becauſe there was no *venue* where the goods were taken away, and ſo all that part of the indictment being diſcharged, the queſtion came to be upon what remained, whether the bare enticing an apprentice away from his maſter were a ſufficient matter to maintain an indictment, which was reſolved, that it was not.

Mr. *Mountague* took an exception, that it was not averred, that the apprentice took away the *calamanca*, and it is not enough to lay, that the defendant received it, without laying, that the other took it away.

Holt chief juſtice ſaid, that it ſhould have been laid, that the defendant ſeduced the apprentice, and that the apprentice *vi et armis* took away the goods. The indictment might have been general againſt the defendant for taking away the *calamanca vi et armis*, for he is a taker.

Judgment was given for the defendant upon the firſt exception, becauſe it was the ſame caſe with that of *Daniell.*

There was an exception taken to the caption, that it was *ad ſeſſionem pacis dominae reginae, &c. coram, &c. juſticiariis dictae dominae ad pacem, &c.* omitting *reginae*; but that was held to be well, and that *dictae dominae* ſhould relate to *reginae* before.

Lyſney *verſ.* Selby.

Caſe for affirming the rent of houſes ſold by the defendant to the plaintiff to be more than it really was. Keb. 510, 518, 522.

AN action upon the caſe *pro eo quod cum quaedam converſatio habita et mota fuit inter* the defendant and plaintiff, *de et concernens perquiſitionem* 14 *meſuagiorum cum pertinentiis* of the defendant's by the plaintiff of the defendant, to which or to the equity of redemption *eorundem* the defendant had *titulum et remanere cujuſdam termini* 61 *annorum* commencing *in craſtino Lady-day* 1683 then to come and unexpired; and upon that communication the defendant affirmed falſly and fraudulently to the plaintiff, that the aforeſaid 14 houſes *cum pertinentiis* were then demiſed at the yearly rent of 68*l.* to which aſſertion and affirmation of the defendant's then and there ſo made the plaintiff giving credit, the ſame plaintiff afterwards, *viz.* the ſame day and year and place bought of the aforeſaid defendant the ſaid 14 meſuages *cum pertinentiis* for a great ſum of money, *viz.* for 5*l.* in hand paid, and for 200*l.* then before owing to the plaintiff by the defendant for money lent by the plaintiff to the defendant, and thereupon the defendant by an indenture of aſſignment between the ſaid plaintiff and defendant bargained and ſold and aſſigned to the plaintiff the ſaid 14 meſuages *cum pertinentiis*, and the equity of redemption of the ſame, to hold to the plaintiff for the reſidue of the ſaid term of 61 years then to come and unexpired, *ubi revera et in facto*, the ſaid 14 houſes at the time of the affirmation of the defendant aforeſaid, and at the ſaid time of the buying and aſſignment aforeſaid, were demiſed for 52*l.* 10*s.* only, and no more; *et ſic idem* the plaintiff ſays, that the defendant then and there falſly and fraudulently deceived and defrauded the plaintiff, to the damage of the plaintiff of 200*l.* Upon not guilty pleaded, there was a verdict for the plaintiff. Mr. *Eyre* moved in arreſt of judgment; firſt, that it did not appear that the defendant was in poſſeſſion of theſe houſes at the time of the ſale, though it was neceſſary he ſhould be ſo, to the maintaining of the action, the reaſon and ground of the action being, that the defendant had a better means of knowing the yearly rent than the plaintiff. It is only laid in the declaration, that the defendant was intitled to the houſes, or the equity of redemption *eorundem*, which makes it more probable he was out of poſſeſſion, and conſequently having no better means of knowledge than the plaintiff, though he did affirm the houſes to be demiſed at ſuch a yearly rent, yet that affirmation will not be ſufficient to ground an action upon. Secondly, it does not appear, that this affirmation was made at the time of the ſale, the declaration ſays, that ſuch a day there was a communication, *&c.* and upon that this affirmation was made by the defendant, to which affirmation the plaintiff giving credit, afterwards he bought. To warrant this exception he relied on the caſe in 2 *Cr.* 196. *Roſwell verſ. Vaughan:* where in caſe in nature of deceit, the plaintiff declared, that Queen *Elizabeth* was ſeiſed in fee of the advowſon of the vicarage of *S.* to which the tithes in *S.* appertained: to which vicarage the 9th of *June* 35th of *Elizabeth* the defendant affirmed, that he was lawful incumbent, and had right to the tithes from the death of *T. V.* the laſt incumbent: whereupon the plaintiff 16 *June* 35 *Eliz.* having communication with the defendant about his buying of the defendant the tithes appertaining to the ſaid vicarage from the death of *T. V.* the incumbent, which was 16 *April* 35 *Eliz.* until *Michaelmas* following, the defendant *adtunc ſciens*, that he had not any right or intereſt to the tithes, whereas he never was inſtituted and inducted, but that they appertained to *E. T.* ſold them to the plaintiff for 30 *l. falſe et deceptive*, and avers, that *E. T.* was preſented, admitted, *&c.* to that vicarage the laſt day of *Auguſt* 35 *Eliz.* and took the tithes, and ſo the plaintiff loſt them: in which caſe it is held, that the warranty, which is neceſſary in theſe actions, ought to be at the time of the ſale. And by the ſame reaſon the affirmation, which in theſe actions comes in lieu of the warranty in thoſe, ought to be alſo at the time of the ſale. It appears upon the declaration in this caſe, that the affirmation and the ſale were the ſame day; but it is *poſtea* that ſame day; ſo that the affirmation was not at the very time of the bargain. The chief juſtice ſaid, the reaſon of the caſe in *Croke* was, becauſe the thing that was ſold being in the realty, the plaintiff who was buyer might have looked into the title. Which *Powell* agreed, and ſaid it was like ſelling another's lands, for which the buyer ſhall never have any action.

Caſe does not lie for ſelling the lands of another man as his own.

Serjeant *Darnall.* The firſt objection, that it does not appear, that he was in poſſeſſion, is nothing; for it is not material whether he were or no. We have ſhewed, that the defendant was intitled to 14 meſuages, and being ſo intitled, treated with us for the ſale, and we not knowing the value of them, nor what they were let for, the defendant affirmed they were let for ſo much; and that we giving credit to his affirmation bought them; whereas at the time of the affirmation, and at the time of the ſale, they were let only for ſo much. So that our action is grounded on the ſale, and therefore, unleſs the defendant has not power to ſell them, nothing elſe is material. The rents the houſes were let for was in his notice, not in ours.

Warranty before the ſale is good to maintain an action, not after.

Holt chief juſtice ſaid, as to the *warrantizando vendidit*, that will be ſo, though the warranty be before the ſale; as if upon a treaty about the buying of certain goods, the buyer ſhould aſk the ſeller, if he would warrant them to be of ſuch a value, and to be his own goods, and the ſeller ſhould warrant them, and then the buyer ſhould demand the price, and the ſeller ſhould ſet the price, and then the buyer ſhould take time to conſider for two or three days, and then ſhould come and give the ſeller his price; though the warranty here was before the ſale, yet this will be well, becauſe the warranty is the ground of the treaty, and this is *warrantizando vendidit*. But it is otherwiſe, if the warranty be after the ſale; as if a man ſells goods, and afterwards warrants them, ſuch a warranty is not good. But in the other caſe the warranty is part of the contract. Secondly, as to the defendant's not being in poſſeſſion; ſuppoſe a man has houſes in leaſe in the poſſeſſion of his tenants, which is this caſe, and upon ſale of them affirms, that they are let at ſo much *per annum* rent. The caſe of *Eakins verſ. Treſham*, 1 *Lev.* 102. 1 *Sid.* 146. is, that an action will lie for ſuch a falſe affirmation. If it were not for that reſolution, I ſhould think it a hard action to maintain. The difference is there taken between the annual value and the value in groſs: if the vendee does not depend upon the affirmation of the vendor, but ſends to inquire into the value of the houſes, *&c.* what they let for, as it appeared the plaintiff did in this caſe, there it is not reaſonable he ſhould recover. And therefore this was not a good verdict, but I believe the jury had compaſſion upon the defendant upon this conſideration, becauſe it was not ſo clear, that the plaintiff relied upon his affirmation, and therefore gave ſuch ſmall damages as 20 *l.* If the vendor gives in a particular of the rents, and the vendee ſays, he will truſt him and inquire no farther, but rely upon his particular; there if the particular be falſe, an action will lie: but if the vendee will go and inquire farther what the rents are, there it ſeems unreaſonable he ſhould have any action, though the particular be falſe, becauſe he did not rely upon the particular.

Powell juſtice. The plaintiff did not make out his title to his action ſo clearly upon the trial. Where the action is grounded upon the warranty, there you muſt ſay in your declaration, that the defendant *warrantizando vendidit*; but in theſe actions upon the caſe in nature of deceipt for a falſe affirmation, you need not lay, that the defendant *affirmando vendidit*. And if in thoſe actions founded upon a warranty, the warranty were given before the ſale, or whilſt the contract was depending, that evidence will ſupport well enough the *warrantizando vendidit* in the declaration. This declaration would not have been good upon a warranty, becauſe the warranty muſt be before the ſale. But there are actions upon the caſe in nature of deceipt, which will lie upon a falſe affirmation, without a warranty; but the matter that ſticks with me is, that the vendee might have inquired into the rents. But then to that it may be anſwered, that the tenants might have combined with the landlord, under whoſe power they frequently are, and have miſinformed and ſo cheated him. The caſe of *Eakins* and *Treſham* is this very caſe in point, and the difference is there taken between the value of land or a leaſe in groſs, and the value of the rent, or what it is let at; an action will not lie for a falſe affirmation in the firſt caſe, without a warranty, according to the caſe in *Yelv.* 20. otherwiſe in the ſecond. As to the defendant's not being in poſſeſſion, he ſaid that was all one, for the equity of redemption was ſaleable: and if upon ſuch a ſale ſuch an affirmation be made, that is a ſufficient cauſe of action. He ſaid the *poſtea* here is not after the contract, but after the communication. *Quaere*.

Gould juſtice ſaid, the value of the rents was a thing hard to be known, and ſecret, known to none but the landlord and the tenants, and they might be in confederacy together.

Powys juſtice ſaid, that it was a hard action, becauſe the vendee might come to the knowledge of the value of the rents. And he took notice of the difference in *Eakins* and *Treſham*'s caſe.

This paſt in *Michaelmas* term laſt, and the court took time to conſider and look into the record of *Eakins* and *Treſham*'s caſe; and after long conſidering, and upon the view of that record, the laſt day of *Hilary* term the chief juſtice returned the *poſtea* to ſerjeant *Darnall* and bid him enter his judgment.

Markett *verſ.* Johnſon.

S. C. Salk. 180.
Farr. 24.
Cart. 51.
11 Mod. 34.
Diſcontinuance.

IN an action of debt upon a bond of 500*l.* the defendant pleaded, *quoad* 225*l.* *parcellam de praedictis* 500*l.* that he had paid it, and the plaintiff demurred. And it was moved on the part of the defendant, that by the demurrer the action was diſcontinued, the plea being only to part; and therefore the plaintiff ought to have taken judgment by *nil dicit* for the reſidue. And the caſe of *verſ. Maſon* was cited, in which ſerjeant *Hall* was of the plaintiff's counſel, where in an action of debt upon a bond, the defendant pleaded *quoad* part, payment and an acquittance, and the plaintiff demurred, and the action was held to be diſcontinued. Serjeant *Hall* for the plaintiff ſaid, that it was not a diſcontinuance in this caſe, becauſe the bond is entire, and therefore the plaintiff cannot have judgment for part.

Holt chief juſtice ſaid, that in an action of debt upon a bond, a man might have ſeveral pleas in bar. As ſuppoſe the plaintiff ſued as executor, the defendant might plead the releaſe of the teſtator as to part, and for the reſidue the releaſe of the plaintiff. So a man may plead *quoad* part payment, and an acquittance, and then there being no anſwer to the reſidue, the plaintiff ſhould have took judgment by *nil dicit* for it.

The court were going to give judgment for the defendant, when it was obſerved, that this plea was of this term, and therefore the plaintiff might take his judgment for the reſidue by *nil dicit*, and for the reſidue, for the inſufficiency of the plea.

It was alleged for the defendant, that the plea delivered was of laſt term, and therefore the record ought to have been made up ſo. And it was prayed, that it might be examined. But the clerks certifying the court, that it being only a plea to enter, the record might be made up either way; the court would not order it to be examined, but ſaid it was trick for trick.

Tyſonn *verſ.* Hylyard.

S C. Salk. 269. In error, if a *certiorari* is ſued out, and return a record contrary to what is returned before, it cannot be received. Vide Style 293.

UPON a writ of error of a judgment in the Common Pleas, the declaration was of *Trinity primo*; and upon diminution alleged for want of an original, and imparlance, and continuances, and *certiorari* ſued out, it was returned, that the declaration was of *Hil.* 13 *Will.* 3. with imparlances to *Trinity primo*, and an original of *Trinity primo*. And it was objected, that this could not be the original in this action, being after the declaration; and ſo there being no original, the judgment ought to be reverſed.

The *placita* was of *Trinity primo*. Debt upon a bond of 100*l.* by the plaintiff, as the record is, adminiſtrator of *Chriſtopher Hylyard de bonis non adminiſtratis per Jane Hylyard* widow, executrix of *Chriſtopher*, with the will of *Chriſtopher* annexed. The defendant

dant *in propria perſona ſua venit et defendit, &c. et nihil, &c. dicit,* and thereupon judgment is given for the plaintiff in the ſame term. The plaintiff in error aſſigns for error, *inter alia,* that there was no original of *Hil.* 1701. or *Eaſter* 1702, or *Trin. primo, nec non quod habetur omiſſio certificationis intrationis narrationis, et continuationum proceſſus ſuperinde facti, de termino ſancti Hilarii* 1701 *ſupradicti*; and alſo, that there was not any warrant of attorney for the plaintiff in the Common Pleas, and thereupon prays *certiorari.* The *cuſtos brevium* returns, that there is no original of *Trinity primo,* and thereupon a *ſcire facias* is awarded againſt the defendant in error; and he comes in and pleads, that there is an original of *Trinity primo,* which is omitted in the record certified, and prays a *certiorari* to the *cuſtos brevium,* who returns an original of *Trinity primo.* Thereupon the plaintiff in error prays a *certiorari* to the chief juſtice, to certify, whether there was any warrant of attorney for *Hylyard necne,* and alſo *utrum ſit aliqua intratio narrationis et continuationum proceſſus ſuper inde facti in placito praedicto de termino ſancti Hilarii* 1701, *ſeu de termino Paſchae* 1702, *ſive de termino ſanctae Trinitatis primo, necne.* The chief juſtice returns, *quod invenit intrationem de recordo narrationis, ac licentiam interloquendi ad narrationem illam cum continuationibus inde inter partes praedictas, tenor cujus, &c. Placita irrotulata, &c. coram* the chief juſtice, *&c. de banco, de termino ſancti Hilarii, anno regni Willielmi tertii, &c.* 13°. And then follows the declaration, word for word the ſame with this; and then follow the imparlances, *viz. et praedictus Willielmus Tyſon in propria perſona ſua venit et defendit vim, &c. et petit licentiam inde interloquendi hic uſque in quindenam Paſchae et habet, &c. Idem dies, &c. ad quem diem, &c. et ſuper hoc idem Willielmus petit ulterius licentiam interloquendi hic uſque a die ſanctae Trinitatis in tres ſeptimanas, et habet, &c. idem dies, &c.* And the chief juſtice alſo returns, that there was no warrant of attorney of any of thoſe terms or years. The defendant in error pleads, that there is a warrant of attorney of *Trinity primo,* and prays a *certiorari*; and the chief juſtice returns a warrant of attorney of *Trinity primo*; and thereupon the defendant in error pleads, *in nullo eſt erratum.*

Powell juſtice. The way in the Common Pleas is to enter all their proceedings of the ſame term of which the judgment is given.

Holt chief juſtice. This matter that is returned is impoſſible 1 Roll. 764.
and repugnant, and cannot be in this action. It is contrary to the record, to certify imparlances in a cauſe, as which there is no ſuch cauſe. There is no reaſon in this caſe for an imparlance, for imparlances are not to be given by the court, unleſs they are aſked

for, contrary to 1 *Keb.* 238. *n.* 37. cited by Mr. *Parker* for the plaintiff in error, who holds, that in judgments by *nil dicit*, or *non ſum informatus*, the defendant muſt have time to plead, and they cannot be entered the ſame term. This declaration muſt be took to be in another cauſe between the ſame parties. For to ſay, that this declaration and the imparlances certified were in this cauſe, is to aver againſt the record.

Powell juſtice. There are imparlances in the Common Pleas from term to term; but when the clerks make up the record, they make it up as of that term of which the judgment is given. We cannot take notice of this declaration and the imparlances certified, becauſe it is contrary to the record.

The judgment was affirmed.

Yelv. 108.
1 Lev. 69.

Mr. *Salkeld* cited the caſe of *Booth verſ. Beard*, 1 *Lev.* 61. and 1 *Keb.* 177, 197, 238, 327. to maintain, that the original in a term after the imparlance is not good. As to the difference taken in *Levinz*, where it is ſaid, that the record was made up with an *alias prout patet de termino ſancti Michaelis*, and ſo that it differed from this caſe, where the record is all of the ſame term; he tells me, that the record of that caſe was in court, and was made up as this; and the other matter appeared upon the return of a *certiorari* as here, and that he offered it to the court to be read.

The chief juſtice ſaid it was a ſenſeleſs caſe. See *Stiles* 292.

Eaſter Term

4 Annae Reginae, B. R. 1705.

Vivian *verſ.* Champion.

S. C. Salk. 141.
Covenant for not repairing brought by the heir.

IN an action of covenant the plaintiff declares, *quod cum* his anceſtor *per quandam indenturam ſuam factum apud, &c. cujus quidem indenturae alteram partem ſigillo J. S.* leaving out *ſigillatam, idem* the plaintiff *in curia profert, &c.* had demiſed to the ſaid *J. S.* the premiſſes for ninety-nine years, if three lives ſhould live ſo long; and ſets out a covenant in the leaſe, whereby the leſſee covenanted to repair the premiſſes from time to time, and to leave them repaired at the end of the term; and ſhews, that leſſee aſſigned to the defendant, and that 15 *Decemb.* 8 *Will.* 3. his anceſtor died ſeiſed, and the reverſion deſcended to the plaintiff, and aſſigns the breach, *quod poſt confectionem dictae indenturae* of aſſignment to the defendant, *et poſt mortem* of the anceſtor of the plaintiff, *et poſt* the deſcent of the reverſion to the plaintiff, *viz.* 1 *April* 3. of the Queen, *et per decem annos tunc ultimo elapſos*, the defendant had permitted the premiſſes to be out of repair. Upon iſſue joined, whether the premiſſes were out of repair, there was a verdict for the plaintiff, and intire damages. And now ſerjeant *Darnall* moved in arreſt of judgment, that the breach was laid in part in the anceſtor's time, and conſequently, that the plaintiff had recovered damages for a breach in his anceſtor's time, which was ill. The death of the anceſtor is laid 15 *Decemb.* 8 *Will.* 3. and the breach is, that the defendant 1 *April. tertio, et per decem annos, &c.* which reaches to a matter of four years before the anceſtor's death. Secondly, that it did not appear, that the leſſee ſealed the counterpart, by reaſon of leaving out the word *ſigillatam*, and the jury he ſaid gave damages for the whole ten years. And he ſaid, it was a hard action: for may be the leſſee might leave the houſe in repair at the end of the term, or elſe would be liable to an action, and that therefore it was uſual to give but ſmall damages.

Holt chief juſtice. If the premiſſes were out of repair in the anceſtor's time, yet if the leſſee ſuffers them to continue out of repair in the time of the heir, that is a damage to the heir, and he ſhall have an action. And in theſe actions there ought to be very good damages; and it has been always practiſed ſo before me, and every body elſe that I ever knew. We always inquire in theſe caſes, what it will coſt to put the premiſſes in repair, and give ſo much damages, and the plaintiff ought in juſtice to apply the damages to the repair of the premiſſes. The breach is certainly and well enough aſſigned, by ſaying, that *poſt mortem* of the anceſtor, and the deſcent of the reverſion to the plaintiff, *viz.* the firſt of *April tertio* of the Queen, the defendant permitted, *&c.* and the *decem annos*, being repugnant, are void. And as to the ten years being conſidered in the damages, that cannot be, for that matter is ordered as before. As to the other exception, he ſaid it was admitted by the defendant's plea over; or if not ſo, yet the verdict would help it.

Damages in covenant for not repairing.

Sigillatam. 1 Vent. 109. Farr. 86.

All the court agreed with the chief juſtice; and though the ſerjeant preſſed to have the cauſe ſtayed, the court would make no rule in it.

Smith *verſ.* Goffe.

S. C. Salk. 457. The conſideration of a promiſe being to deliver up a bond, wherein *J. S.* a third perſon is bound, muſt be took to be to the obligor.

IN an action upon the caſe the plaintiff declared, that whereas one *H. M.* was bound to the plaintiff in 60*l.* upon condition to pay 29*l.* and intereſt, *&c.* the defendant, the money not being paid, did promiſe the plaintiff, that if he would deliver up the bond, the defendant would pay, *&c.* and avers, that the plaintiff did deliver up the bond to *H. M. unde* the defendant *notitiam habuit:* and yet, *&c.* Upon *non aſſumpſit* pleaded, there was a verdict for the plaintiff. And now Mr. *Eyre* took two exceptions in arreſt of judgment: firſt, that it was not laid, that the plaintiff gave the defendant notice of his having delivered up the bond, and that ought to have been averred: and for that he cited 1 *Cr.* 571. where a man promiſed to pay another ſo much money, when the other returned from *Hamborough*; and in a declaration upon this promiſe, the plaintiff ſet out his return from *Hamborough*, but did not ſhew that he gave the defendant notice of it, and for want of that a judgment given for the plaintiff in the marſhal's court was reverſed. Secondly, that the bond ought to have been delivered to the defendant within the meaning of the promiſe, that he might have had it as a ſecurity for the money paid by him on the behalf of the obligor. And he compared it to the caſes of actions upon promiſes, where it is not ſaid in the declaration, to whom the promiſe was made, or to whom the money was to be paid, it ſhall always be intended to the plaintiff in the action. So here, the delivering up of the bond being the ground of the action againſt the defendant, thoſe general words muſt be underſtood of a delivering up to the defendant, who is the perſon to be charged by the delivering up.

1 Cr. 77. 3 Cr. 93, 229, 703. So where it is not laid to whom the conſideration was performed, it ſhall be taken to be performed to the defendant.

Sir *James Mountague* for the plaintiff ſaid, that theſe general words muſt be underſtood of delivering to the obligor. And as to the notice, he ſaid, that if it was neceſſary to lay it they had done it; but that it was not neceſſary in this caſe. For the defendant having taken upon him to pay the money upon the delivering up of the bond to the obligor, and the perſon being certain, ſo that the defendant might have informed himſelf, he is bound to take notice at his peril. And he cited the caſe in 3 *Cr.* 97. *aſſumpſit*, in conſideration that the plaintiff at the requeſt of the defendant agreed to give his bond to *J. S.* for the debt of the defendant, the defendant promiſed to ſave him harmleſs, and avers that he gave the bond, and was ſued, *&c.* and exception taken for want of the plaintiff's averring, that he gave the defendant notice of his giving the bond, and over-ruled, becauſe there was a perſon certain appointed, to whom the bond was to be given, and the defendant might inquire of him, and therefore is bound to take notice. So in the caſe in 1 *Lev.* 47. covenant to pay all ſuch ſums of money as ſhall be charged by the plaintiff upon *A.* to be paid to *B.* and ſays, that he charged ſo much money upon *A.* to be paid to *B.* and that the defendant had not paid it, and good without ſhewing, that he gave the defendant notice of what ſums of money he had charged upon *A.* to be paid to *B.* upon the ſame reaſon.

1 Cr. 571. Notice. See 6 Mod. 182, 200, 259, 288. 4 Mod. 230, 239. 5 Mod. 330. Farr. 143.

The chief juſtice ſaid, a ſack full of caſes might be cited upon this head.

Holt chief juſtice. Which way ſoever you underſtand the words, deliver up the bond, the plaintiff had no need to give notice. If you underſtand it, that the bond is to be delivered to the obligor, then there needs no notice; becauſe the obligor being a third perſon, the defendant might come to the knowledge of it. So if *H.* promiſes *J. S.* that in caſe he will deliver him ſuch goods, he will give him as much for them as *J. N.* gave for the ſame ſort of goods; *H.* may bring an action, and declare that *J. N.* gave ſo much, and it will be good, without averring, that he gave *J. S.* notice what it was *J. N.* paid him: for *J. N.* being a third perſon, it lies as much in the notice of *J. S.* as it does in *H.*'s what he

Notice, where neceſſary.

gave. If you underſtand the conſideration, that the bond was to be delivered to the defendant, that is notice of itſelf. Secondly, the meaning of the promiſe is, that the bond ſhall be delivered up by way of diſcharge of the debt, and conſequently it muſt be delivered up to the obligor. For the conſideration muſt be underſtood of the moſt effectual delivering up, and then that muſt be ſuch a delivering up as that the bond may be cancelled.

Powell juſtice. This caſe was moved before in the abſence of the chief juſtice, the laſt day of laſt term. As for the objection of the want of notice, that has no weight, becauſe there is a perſon certain named, to whom the bond is to be delivered up, of whom the defendant might inform himſelf. And the difference is, where the defendant has no way to come to the knowledge of this performance of the conſideration, or the time when the promiſe is to be performed: as if a man in conſideration, *&c.* promiſes to pay another ſo much money upon his marriage, there the plaintiff ought to give notice that he is married; otherwiſe where there is a perſon certain named, as there is in this caſe, to whom the defendant may reſort and inform himſelf. So there needs no notice be given of a matter, which a man is awarded to do, becauſe a man may inquire of the arbitrators. As to the other he ſaid, that delivering up of a bond imported in common parlance a different thing from aſſigning it, and imported a giving it up to the perſon that gave it.

Holt chief juſtice ſaid, that in that caſe put by *Powell*, the plaintiff need not give notice of his being married, becauſe it was a thing notorious of itſelf.

Powell ſtrongly of the contrary.

Holt ſaid, that the difference was, where the conſideration, *&c.* is to be performed, and no perſon is named to whom it is to be performed; and where a certain perſon is named, as here.

Judgment was given for the plaintiff, *niſi cauſa* to morrow.

Mayor of Winton *verſ.* Wilks.

Intr. *Trin.* 3 *Ann.* B. R. Rot. 214.

IN an action upon the caſe the plaintiff declares, *quod cum civitas Winton eſt et a tempore, &c. fuit antiqua civitas, et in eadem civitate habetur et a tempore, &c. habebatur conſuetudo, quod non liceat alicui perſonae praeter homines liberos de gilda mercatoria civitatis illius ad utendum vel exercendum publice infra eandem civitatem aliquod miſterium, artem ſive manualem occupationem in dicta civitate, toto tempore ſupradicto uſitatam, niſi hujuſmodi perſona per ſpatium ſeptem annorum prius educatus fuiſſet tanquam apprenticius in eadem civitate ad vel in hujuſmodi miſterio, arte, ſive occupatione, aut ad inde aliter fuit legitimo modo authorizatus ſecundum morem civitatis illius, &c.* yet the defendant, &c. bringing him within the cuſtom, *ad damnum* of the plaintiff, &c. upon not guilty pleaded, there was a verdict for the plaintiff, and the court was moved in arreſt of judgment; and it being a cauſe of conſequence, it was ordered to be put in the paper; and it was argued by Mr. *King* for the plaintiff, and Mr. *Eyre* for the defendant ſome time ſince. And now it was argued by Mr. Serjeant *Darnall* for the plaintiff: and he ſaid, that there were two objections made: Firſt, that a cuſtom of excluding perſons from exerciſing a trade within a particular place is a void cuſtom, and if it were not ſo in the general, yet this cuſtom, as here ſet out, is void. Secondly, that if the cuſtom were good and well ſet out, that the action was miſconceived, becauſe it ought not to have been brought by the mayor and corporation, but by the guild of merchants. Firſt, that ſuch a cuſtom in the general is good, has been ſettled in *Waganor*'s caſe, 8 *Co.* and that caſe is a ſtrong authority for us.

S. C. Salk. 203.
S. C. 6 Mod. 21.
Caſe for exerciſing a trade not being free of the guild of merchants, nor having ſerved ſeven years as an apprentice, contrary to the cuſtom.

Hob. 85.
Moor 871.
Mod. 421.

Holt chief juſtice ſaid, that caſe was of ſuch a cuſtom in *London*; but he would be glad to ſee a caſe, where ſuch a cuſtom had been allowed good in any other borough or city.

He ſaid, that ſuch a cuſtom is admitted to be good in *Palm.* 2, 3, 4, 5. and by *Mountague* chief juſtice, in the caſe of *Jolly verſ. Broad.* 2 *Roll. Rep.* 203. and that in a caſe, which was in the Common Pleas, the corporation of *Totneſs verſ. Cowden*, in ſuch an action as this, it was never made a point: but that caſe was never adjudged. He ſaid, that the difference as it ſtood upon *Waganor*'s caſe is, that ſuch a privilege granted to a city, &c. by charter is not good: and therefore no city founded within time of memory can have ſuch a privilege. But it can only be in ancient cities,

Totneſs corporation verſ. Cowden.

3 Cr. 803.
1 Lev. 262.

&c. by the ancient cuſtom of the place. He ſaid, that ſuch a cuſtom might be intended to have a reaſonable commencement by agreement among the inhabitants upon their firſt ſettling there. And that ſuch caſes which are founded upon tenure between the lord and tenants to have the ſole trade within a manor, *&c.* are good upon that reaſon. But that if no ſuch good reaſon could be given for ſuch cuſtoms, it is not reaſonable to inquire into them now. And he cited the caſe in the *Regiſter*, 105. *b.* the cuſtom of *Rippon, quod archiepiſcopus Eboracenſis ratione dominii ſui de Rippon talem libertatem in villa praedicta habeat, &c. quod nullus in eadem villa uti debeat ſeu conſuevit officio ſive miſterio tinctoris, ſine licentia ipſius archiepiſcopi.* And ſuch a reſtraint may be good as well to all trades as one. And he cited another caſe, which is alſo cited in the caſe of the city of *London*, 8 *Co.* 125. *a. b.* a cuſtom for the lord of the manor of *H.* to have frank foldage over all the *ville* of *H.* as well within his ſeniory, as without. He ſaid, that though *Waganor*'s caſe was of ſuch a cuſtom in *London*, yet upon the reaſons, on which that judgment was founded, there would be no difference between ſuch a cuſtom in *Wincheſter*, and ſuch a cuſtom in *London:* that that which differs *London* from other cities, *viz.* the confirmation of their cuſtoms by acts of parliament, was not taken notice of in the reſolution of that caſe; and that indeed it would have little weight, for if the cuſtom were a void cuſtom, the confirming acts would not make it good; for they confirm only good cuſtoms. As to the exception to the ſetting out of the cuſtom, that it was too generally laid, to ſay, *aut ad inde aliter fuit legitimo modo authorizatus ſecundum morem civitatis illius*, without ſhewing how that was to be, he ſaid, that in the caſe of *Day verſ. Savage*, *Hob.* 85. in treſpaſs for taking goods, the defendant juſtifies by cuſtom to diſtrain the goods of perſons not lawfully thereof diſcharged, and refuſing to pay wharfage, which he ſaid was as general as this: [Note, it never came to be a queſtion in that caſe, whether ſuch general pleadings were good or no.] That the forms of declarations were altered, and that ſhort ways of declaring were uſed: that to have ſaid no more in a declaration for diſturbing a man of his common, than that the plaintiff *habere debuit communiam,* would have been thought ſtrange heretofore; but that in the caſe of *Strode verſ. Bird*, 4 *Mod.* 411. ſuch a declaration was held good upon demurrer; and the great reaſon of that caſe will come to this, *viz.* that the right would come upon evidence upon the general iſſue; and ſo will the authority in this caſe. And as to the ſecond objection, that the guild of merchants ought to have brought this action; he ſaid, that being free of the guild of merchants was but one of the qualifications which would intitle a man to ſet up a trade; but if he had either ſerved ſeven years apprenticeſhip, or were free by redemption, he might ſet up a trade. And therefore it was not a damage

a damage to the guild of merchants only, but was as much a damage to every freeman: and conſequently, if the guild of merchants might bring an action, every freeman might bring an action. He ſaid, the mayor and corporation muſt bring the action for another reaſon, *viz.* that a corporation by letters patent, as the guild of merchants was, could not maintain this action, but only a corporation by preſcription, ſuch as the city was.

Mr. *Raymond* argued for the defendant, that this was an unreaſonable cuſtom, and conſequently void; for as *Litt. ſect.* 169. is, *conſuetudo* muſt be *ex certa cauſa rationabili uſitata*; and as *Coke*'s commentary is, *conſuetudo contra rationem introducta potius uſurpatio quam conſuetudo appellari debet.* It is unreaſonable upon two accounts; firſt, with relation to the perſon that is bound by it; and ſecondly, to the publick. As to the firſt, every man at common law might uſe what trade he would without reſtraint: ſo is 11 *Co.* 53. 1 *Saund.* 312. and this cuſtom depriving the inhabitants of that city of this liberty, and not giving them any conſideration or recompenſe for it, is therefore unreaſonable and void. Secondly, the freedom of trade tends to the increaſe of trade, and is a publick benefit, and conſequently the reſtraint of trade is an injury to the publick. This cuſtom cannot be intended to have a reaſonable commencement, becauſe it cannot be intended, that all the people of *England* could, if they would, conſent to it. And beſides, by the common law a man cannot reſtrain himſelf from uſing a trade generally all over *England*, though upon good conſideration he may reſtrain himſelf from uſing it in ſuch a particular place. And ſo is the difference upon the caſe of 2 *Hen.* 5. 5. *pl.* 26. 1 *Jones* 13. *Jolliffe verſ. Broad. S. C.* 2 *Cro.* 596. *Allen* 67. *Goſſe verſ. Pragnal.* 3 *Lev.* 241. He ſaid, that a grant by the King by his letters patent in reſtraint of trade is void, 11 *Co.* 84. *Darcy*'s caſe; and the caſe of the *Canary* company, 1 *Sid.* 441. where the King grants to *A.* and *B.* the ſole trade to the *Canary* iſlands, and that if any one traded thither without their leave, the ſhip and goods ſhould be forfeited to them; and the patent was held to be void. By the ſame reaſon a corporation erected by the King's letters patent cannot make a by-law in reſtraint of trade, as that only perſons ſo and ſo qualified ſhall uſe any trade within that corporation. 8 *Co.* 125. *Hob.* 210. Neither can a corporation by preſcription, that has a power to make by-laws by cuſtom, make ſuch a by-law. And ſo it was reſolved in the caſe of the corporation of *Bedford verſ. Tix*, 1 *Lutw.* 562. *Trin.* 2 *Will.* 3. *Rot.* 416. *Lambert verſ. Thompſon.* And if ſuch a by-law made by virtue of a cuſtom is not good, neither is the cuſtom itſelf good; for the derivative has all the efficacy that the principal has. *Wagoner*'s caſe, upon which the ſerjeant has ſo much relied, materially

The grant of the ſole making of cards.

terially differs from this caſe, upon account of the ſeveral acts that have been made for the confirming the cuſtoms of *London.* And that thoſe acts were inſiſted upon, appears by the return, *fol.* 122. *a.* where the act of *Rich.* 2. is ſet out, and 126. *a.* where it is ſaid, that there are divers cuſtoms in *London,* which are againſt common right, and the rule of the common law, and yet are allowed in our books, *et eo potius,* becauſe they have not only the force of a cuſtom, but are alſo ſupported and fortified by authority of parliament: and 129. *a.* where among the grounds of the reſolution, which my lord *Coke* ſums up, he reckons the acts of parliament. And upon this ground it is, that though a *capias* cannot be awarded before a ſummons, even by the cuſtom of a court, as 2 *Roll.* 277. is, yet by the cuſtom of *London* after a plaint, the defendant may be arreſted by his body, as 9 *Co.* 68. *a. Mackally*'s caſe is; and the reaſon given by the book is, becauſe the cuſtom of *London* is eſtabliſhed and confirmed by parliament: ſo 8 *Co.* 129. *a.* a citizen and freeman of *London* may deviſe in *mortmain* notwithſtanding the ſtatutes of *mortmain*; for all the cuſtoms of *London* are eſtabliſhed and confirmed by act of parliament. Beſides he ſaid *Waganer*'s was diſcharged, as appears by the report of the caſe, 2 *Brownl.* 284. As to the other caſes cited by the ſerjeant, he ſaid, they were caſes between landlord and tenants, and went upon the tenure. As for the caſe of the cuſtom of *Rippon*, *Regiſter* 105. that was a reſtraint of one particular trade only, and that too a trade, that was accounted a nuſance, as appears by 9 *Co.* 59. *Raſt. intr.* 442. [Note, the words in that caſe, *ratione dominii ſui de Rippon*] He urged, that the guild of merchants ought to have brought the action, and not the mayor, *&c.* of *Wincheſter*; for the perſons, whoſe franchiſes are broke, and who are thereby grieved, ought to bring the action. And accordingly in 1 *Lev.* 262. the action is brought by a freeman; and in 3 *Cro.* 803. by the corporation, in whom the franchiſe is laid to be. But here the franchiſe is laid in the guild, and therefore the guild ought to bring the action, and not the mayor, *&c.* for it is no franchiſe of the city, nor conſequently does an infringement of it intitle them to an action. And upon this caſe in 3 *Cro.* he took an exception to this declaration, that the plaintiffs did not ſhew themſelves to have been incorporated, or that they had this name of corporation given them, nor how, as the caſe in 3 *Croke* and *Hob.* 210. is. [Note, in that caſe 211. my lord *Hobart* ſays, it is not neceſſary for a corporation in ſuch caſe to ſhew how they were incorporated, for the name argues a corporation, and the like of cities, and upon *nil debet, &c.* it muſt be proved.] As to the other objection he ſaid, they ought to have ſhewed particularly and certainly, what the other qualifications were, and that it was not enough to ſay generally, *aut ad inde aliter fuit legitimo modo* *authorizatus ſecundum morem civitatis.* As to the caſe of *Stroud verſ. Birt*, he ſaid, that differed exceedingly from this, for there the action was againſt a wrong-doer, but here againſt a man for doing a lawful act, and therefore in this caſe there ought to be a certain title ſet out, though there need be none in that caſe. And beſides the generality of the laying the cuſtom, it was ill laid in that manner of laying it *ſecundum morem civitatis*, whereas it ought to be laid directly, that there was ſuch a cuſtom. And for that he cited the caſe of *Devered verſ. Ratcliff*, 3 *Cro.* 185. 2 *Leon.* 29. where in an action of eſcape, that *J. S.* being in his cuſtody, *&c.* was charged in his cuſtody *ſecundum conſuetudinem*, and that was held to be ill. And *Hil.* 8 *Will.* 3. *Rex verſ. Bernard*, an indictment againſt a man for refuſing to ſerve the office of conſtable, being duly elected by the inhabitants of the town *ſecundum conſuetudinem*, was quaſhed for want of ſhewing a cuſtom in the inhabitants to chuſe.

Cuſtom of excluding foreigners from trading in a town.

Cart. 68, 114.

Holt chief juſtice ſaid, that this point had not been ſo well ſettled; that even in *Waganor*'s caſe, which was the ground-work on which the plaintiff's counſel built, the defendant was diſcharged. That it came in queſtion again in the Common Pleas in 18 & 19 *Car.* 2. in a caſe relating to the town of *Colcheſter*, where ſuch a cuſtom was laid, and a by-law grounded upon it, and the caſe had great agitation, but was never determined. I have the arguments of that caſe in a report under chief juſtice *Bridgman*'s own hand. The point is ſtated in *Norris* and *Stamp*'s caſe, *Hob.* 210. There is no reaſon to ſupport ſuch a cuſtom, eſpecially to give the corporation an action; for this exerciſing a trade, though by a perſon not qualified, is no prejudice to the corporation. All people are at liberty to live in this place, and their ſkill and induſtry are the means they have to get their bread; and conſequently it is unreaſonable, to reſtrain them from exerciſing their trades within this place, within which having a liberty to live, they ought alſo of conſequence to have all lawful means of ſupporting themſelves. What was the foundation for making the ſtatute of the 5 *Eliz.* but the general liberty of trade, which all perſons had before the ſtatute? The cuſtom of *London* for excluding perſons from uſing trades there, that are not free, is founded upon cuſtoms that they have relating to the bringing up of the youth within their city, and qualifying them to be freemen of it, which other cities have not, and therefore ſuch a cuſtom is reaſonable there; but it does not follow from thence, that it is reaſonable elſewhrre, where they have no ſuch cuſtom. By the cuſtom of the city of *London* they have a power to make infants be apprentices, and they are bound by the covenants in their indenture of apprenticeſhip. If an apprentice is not inrolled, he may ſue out his indentures of apprenticeſhip,

ticeſhip, and thereby he will be diſcharged; but till then the binding is good. There is alſo a cuſtom of turning over apprentices. And when a perſon has ſerved his apprenticeſhip in *London*, he has a right to be free. Theſe cuſtoms are a good reaſon for excluding all foreigners from exerciſing any trade in *London*. He ſaid, that the words *gilda mercatoria* ſignify a corporation, and that where the King in ancient times granted to the inhabitants of a ville or borough to have *gildam mercatoriam*, they were by that incorporated, 10 *Co.* 30. *a.* but what it ſignifies here in this declaration no body knows; for the plaintiff does not ſhew what it is, but only ſays, that it is not lawful for any perſon to exerciſe a trade, that is not free of the *gilda mercatoria*. He ſaid, the caſe of *Strode verſ. Birt* cited by the ſerjeant was nothing to the purpoſe; for the common was ſufficiently deſcribed in that declaration. And though there was no title ſet forth, yet that was well enough, becauſe the defendant was a wrong-doer; and if the defendant were really owner of the land, he might plead *liberum tenementum*, and that would force the plaintiff to reply a title. It has been held, that in treſpaſs againſt a commoner, he may plead not guilty, and give his right of common in evidence; but I cannot think ſo, but he ought to plead ſpecially, and ſhew his title: otherwiſe of the lord of the waſte, he may plead not guilty, and give his title in evidence.

Gilda mercatoria, what.

Treſpaſs againſt a commoner, he cannot give his right in evidence on not guilty.

Powell juſtice ſaid, that in the caſe in the Common Pleas the declaration was more ſpecial, and the cuſtom ſet out more at large, and it was laid as a franchiſe in the corporation. I thought the corporation might maintain the action, but *Treby* chief juſtice was of another opinion, becauſe the mayor, *&c.* of *London* would have brought an action in *Waganor*'s caſe, and not have made a bylaw, and brought an action upon that. But indeed I thought, that a franchiſe might be veſted in a corporation for the benefit of the members of it, for the breach of which they might bring an action. Which *Gould* agreed. He ſaid, that a cuſtom to exclude people from exerciſing a trade, was a ſtrange cuſtom; but if that were the point now to be determined, he would conſider well of it, becauſe the giving judgment to ſet aſide ſuch a cuſtom, would have a very great influence; becauſe ſuch a cuſtom is claimed in moſt corporations by preſcription; but that there would be no need to come to that in this caſe, for that this declaration was naught: firſt, for not ſhewing that there is ſuch a franchiſe in the corporation; for as this declaration is, the corporation would maintain an action for breach of their franchiſe, without ſhewing they have any: for the franchiſe is laid by this declaration in the *gilda mercatoria*, and we cannot take notice, that the *gilda mercatoria* and the city are all one, though they may be ſo; and upon the evidence it ſeemed probable they were ſo. Secondly, they ought to have ſet out ſpecially, what the cuſtom of the city is, and not have come ſo generally, as *aliter legitimo modo authorizatus ſecundum morem civitatis*. For who can tell what that cuſtom of the city is? This is to maintain an action upon a cuſtom, without ſhewing what the cuſtom is. *Powys* juſtice went upon this laſt exception; and *Gould* juſtice was alſo of opinion, that the declaration was ill, and that therefore there was no occaſion to give any opinion upon the principal point.

Powell, who was a judge, and *Gould*, who practiſed in the Common Pleas, was counſel in the cauſe cited by *Darnall*. Both agreed, that that cauſe was never determined there, and that the point of the cuſtom was never ſpoken to, but taken as admitted. But *Gould* ſaid, that his clients the corporation deſpaired of judgment.

Serjeant *Darnall* mentioned a cauſe in this court, where the corporation had judgment in ſuch an action as this upon the ſame declaration. But to that *Gould* ſaid, that he intended in that cauſe to have moved in arreſt of judgment, but that the plaintiffs being eaſy with the defendants, he adviſed his clients the defendants to agree the cauſe, and accordingly they did, or elſe that had been moved.

1 Lev. 262. Cro. El. 803.

Holt chief juſtice ſaid, he would give judgment for the plaintiff, if he could tell why. Judgment was entred, *quod querentes nil capiant per billam*; *per curiam*, on the exceptions to the declaration.

Sheriffs of Middleſex *verſ.* Barnes.

Debt on a bail-bond in *Middleſex*, the plaintiffs declare in the plural number.

IN an action of debt upon a bail-bond, the plaintiffs declared thus: *A. B. et C. D. vicecom. Middleſexiae praedictae queruntur, &c.* And upon a ſham plea pleaded, there was a demurrer. And now Mr. *Southouſe* took exception to the declaration, that it ought to have been *queritur*, and not *queruntur*, becauſe the bond is taken by them as officers by the name of their office, and they declare by the name of office, and they both make but one officer.

Holt chief juſtice ſaid, that if the plaintiffs had not named themſelves ſheriffs in the declaration, yet it had been a good declaration *prima facie*; but indeed, if the defendant had craved *oyer* of the bond and the condition, and upon that it had appeared, that it was a bail-bond, that might have been ill. He ſaid, that the debt veſted in them in their natural capacity, otherwiſe upon their deaths it ought to go to their ſucceſſors, like the chamberlain of *London*'s caſe; which it would not do, but to the ſurvivor, and upon his death to his executors.

Powell ſaid, that unleſs the defendant had craved *oyer* of the bond and the condition, and it had been entred upon the record, they could not take notice, that it was a bail-bond. Judgment was given for the plaintiffs.

Aubery *verſ.* Barton.

You are a brandy nos'd whore, you ſtink of brandy. Cro. Car. 285, 309. Lat. 155, 156. 3 Salk. 288. *Ante* 1101.

A Woman libelled againſt another in the ſpiritual court for theſe words: "You are a brandy nos'd whore, you ſtink of "brandy." And Mr. *Earle* moved for a prohibition, becauſe they were words of heat, and did rather charge the defendant with intemperance than incontinency. And he relied upon 2 *Roll. Abr.* 296. *n.* 15. a prohibition was granted to a ſuit by the mother for theſe words; Thou art the ſon of a whore, and thy mother "was a bitch:" and 1 *Jones* 44. a precedent cited 3 *Jac.* of a prohibition granted for theſe words; "Thou art a whore, and "a trained whore, and a dirty whore;" and it is ſaid there, that for the word *whore*, without mentioning any particular act of incontinency, no ſuit can be maintained in the ſpiritual court: and 1 *Cro.* 110. "Thou art a cuckold and a wittol, which is worſe "than a cuckold;" the wife cannot ſue in the ſpiritual court for theſe words. 2 *Keb.* 334. a prohibition granted to a ſuit for theſe words; "A whore and an arrant whore;" (but the court there ordered, that a declaration ſhould be delivered, in order to ſettle the point) 2 *Keb.* 581. a caſe cited 11 *Jac.* "Thou art a whore, "and I was never ſtrucken by a whore's hands before," and a prohibition granted: another 21 *Jac.* "He had run away out of "*England* into *Ireland* but for his whore, *Short*'s wiſe, who is "his whore; and there alſo a prohibition granted (but note, the principal caſe in 2 *Keb.* 577. and 581. was a ſuit in the ſpiritual court for calling the defendant whore, and the plaintiff ſuggeſted, that it was ſpoken in heat, *viz.* that the defendant called the plaintiff rogue, and the plaintiff called the defendant whore; and *Twiſden* there ſaid, that before 8 *Caroli*, it was a brangled queſtion, whether a prohibition ſhould be granted for theſe words, and that prohibitions had been ſometimes granted, and ſometimes denied; but that then it was ſettled, that no prohibition ſhould go, and prohibitions have been denied generally ſince. See 3 *Lev.* 119. *Vincent verſ. Alpy*, where the mother libelled in the ſpiritual court for ſaying of her ſon, "He was a rogue and a raſcal, and a ſon

1 Sid. 433. 1 Mod. 23.

“ of a whore.” And the caſe in 2 *Roll.* 296. was cited, as a ground for a prohibition, but the court differed this caſe from that, becauſe there the words, “ and your mother is a bitch,” make the firſt words inſenſible: but here the words import, that the woman was a whore, which is an eccleſiaſtical ſcandal, and therefore the court denied a prohibition, which ſeems to come up to Mr. *Earle*'s caſe in all the views of it.)

Holt chief juſtice ſaid, that a prohibition had been denied in this caſe forty times.

Powell juſtice ſaid, that the court granted a prohibition, where the ſuit in the eccleſiaſtical court was for ſuch words ſpoke in *London*, upon this ſpecial reaſon, becauſe an action will lie for them in *London*, upon account, that a woman that is a whore in *London* may by the cuſtom of *London* be carted. And it being granted upon ſuch a ſpecial ſuggeſtion, is an argument, that the ſpiritual court may proceed, where the words are ſpoke elſewhere. He ſaid, he moved once for a prohibition to a ſuit in the eccleſiaſtical court for calling a woman jade, but could not prevail. But *Holt* ſaid, he would have granted one in that caſe.

Jade.

And in this caſe the prohibition was denied.

Stephens *verſ.* the manucaptors of Hudſon.

A *Scire facias* againſt bail, the defendants pleaded payment of the money by the principal, *&c.* the plaintiff replied, *non ſolvit, &c. et hoc petit, quod inquiratur per patriam, et praedicti defendentes ſimiliter*. The defendants demurred, and the paper-book was made up, without ſtriking out the *praedicti defendentes ſimiliter:* the record was a record of laſt term. And now this term the cauſe came on in the paper, and this exception was taken by Mr. *Whitaker* for the defendants, and the cauſe ſtood an *ulterius conſilium.* And in the mean time Mr. ſerjeant *Hall* came and moved for leave to ſtrike out theſe words, *et praedicti defendentes ſimiliter*.

Amendment by ſtriking out *praedicti defendentes ſimiliter* after the cauſe was in the paper. 2 Barnes 20, 143. Note, theſe amendments are now made every day on payment of coſts.

The court held, that it was a thing of courſe, for the party that takes the iſſue to join the iſſue for the other, upon a ſuppoſition, that they will join in the iſſue, to maintain the fact they have alleged; and therefore if they will not join in the iſſue, but will demur, they ought to ſtrike it out, and the leaving it in is a trick; and therefore the court gave leave to ſtrike it out.

Fanſhaw *verſ.* Morriſon.

Intr. *Paſch.* 3 *Ann.* B. R. Rot. 139.

S. C. Salk. 208, 520. S. C. 6 Mod. 157, 197. *Scire facias* on recogniſance on error. 1 Lev. 193.

A Writ of error of a judgment given in the Common Pleas in a *ſcire facias* upon a recogniſance; the recogniſance was entred into, upon bringing a writ of error upon a judgment in the Common Pleas, in an action of debt; and was conditioned, that if the plaintiff in error ſhould be nonſuited, or the writ of error ſhould be diſcontinued in his default, or the judgment ſhould be affirmed, that then the plaintiff ſhould pay, *&c.* The defendants pleaded, after *oyer* of the *ſcire facias* and the condition, that the plaintiff in the writ of error did proſecute the writ of error with effect, and did aſſign errors, and that *placitum ſuper praedictum breve de errore adhuc pendet indeterminatum.* The plaintiff replied, that the judgment was affirmed, *abſque hoc quod* the plea *adhuc pendet indeterminatum.* And to this there was a demurrer, and judgment was given for the plaintiff below.

This caſe was formerly debated upon an exception to the manner of aſſigning the breach in the *ſcire facias*, and that exception was allowed; but upon the plaintiff's applying to the Common Pleas, that fault was amended. And Mr. *Weld* took an exception to the traverſe in the replication, that it was a traverſe of a matter of record, which was ill; becauſe a matter of record could not be put in iſſue to be tried by the country. Whereas he ought to have replied, that the judgment was affirmed, *prout patet per recordum.* This exception was taken laſt term, and the cauſe adjourned over upon it. And Mr. *Weld* then took another exception, that the defendant appeared contrary to the return of the writ, both the *ſcire facias's* being returned *nichil.*

Upon two *nichils* returned, the defendant may appear.

But *Holt* chief juſtice ſaid, that the books ſaid, that two *nichils* returned amounted to a *ſcire feci*; and that upon two *nichils* returned, the plaintiff would have judgment.

Powell juſtice ſaid, that the defendant's appearance was well, becauſe the *ſcire facias's* were entred upon the roll, and the defendant had day by the roll. So that exception was over-ruled.

Now this term Mr. *Whitaker* for the defendant in error argued, that the plea was ill: firſt, becauſe the plea is to the ſecond *ſcire facias*, and he has only pleaded, *quod ante proſecutionem praedicti brevis de ſcire facias* he proſecuted with effect; and that he might have done, and yet have been defective in proſecuting with effect before the bringing the firſt *ſcire facias*; and therefore he ought to have pleaded it, that before the proſecuting the firſt writ of *ſcire facias*, &c. Secondly, that he does not ſhew, whether he proſecuted the writ of error in perſon, or by attorney; and being at liberty to do it either way, he ought to ſhew which way he did it. Thirdly, he pleads that he aſſigned errors, but does not conclude with an averment to the record, as he ought to do, that being a matter in the affirmative, and a matter triable by the record, to which the defendant may plead *nul tiel record.* Fourthly, that the plea is only general, *quod placitum, &c. pendet indeterminatum*; whereas he ought to have pleaded in the words of the condition, that the writ of error was not diſcontinued, nor the plaintiff in error nonſuited. And he ſaid, that it was a rule, that wherever you plead performance of a condition, or aſſign a breach for non-performance of it, you muſt do it in the very words of the condition; therefore in debt upon a bond conditioned to deliver writs ſuch a day, a plea that the defendant delivered them *ſecundum formam conditionis* is ill, 1 *Lev.* 145. So an award was to pay money *ad vel ante* ſuch a day, and in debt upon bond for non-performance of this the plaintiff aſſigned a breach, that the defendant had not paid the money upon the day, and ill; though it was agreed, that payment before the day would upon evidence maintain the iſſue of payment upon the day. 3 *Lev.* 293. 2 *Ventr.* 221. *Dyer* 243. *b.* Fifthly, the defendant ſhould have pleaded, that the writ of error was returned ſuch a day, and then have ſhewed at large what proceedings were had upon it, and not have pleaded generally, that he proſecuted the writ of error with effect, but have ſhewed *coment.* Sixthly, all the plea is made up of matter of record, and yet there is no concluſion to the record. As to the traverſe in the replication, the ſubſtance of the plea is *pendet*, which is an affirmative, and that is what is traverſed; and the *indeterminatum*, which is the negative, ſhall be rejected, for it is no more than *pendet.*

Weld for the plaintiff in error argued, that the plea was, that he had proſecuted the writ of error with effect, and that *placitum, &c. pendet*; and that ſhewed ſufficiently, that the recogniſance was not forfeited, and there was no need to plead in the words of the condition, that it was not diſcontinued, &c. for that was included by ſaying *pendet.* For it could not be depending, if it were diſcontinued; and it was not material, whether he proſecuted the writ of error in perſon or by attorney, for either was proſecution within the intent of the ſtatute, to ſave the recogniſance. And as to the concluding of the plea with an averment, and not to the record, he ſaid, that the plea, *quod placitum, &c. adhuc pendet indeterminatum*, was a negative, and therefore ought to be concluded with an averment, and not to the record, becauſe it cannot be tried, nor can any iſſue be joined upon it. And as to the aſſigning of errors, there was no need to conclude to the record as to that, becauſe it was not material to be alledged, being no part of the condition of the recogniſance. Then he took an exception to the recogniſance, that it was void, not being purſuant to the ſtatute 3 *Jac.* 1. *c.* 8. which gives it in this caſe, and is only to proſecute the writ of error with effect; but recogniſances with theſe ſpecial conditions in this form ought only to be taken in dower and ejectment, in which they are given by the 16 & 17 *Car.* 2. *c.* 8.

Performance pleaded to a bond muſt be in the words of the condition.

Holt chief juſtice. If a man pleads performance to a bond with a condition, he ought to plead it in the very words of the condition; otherwiſe if he pleads a matter by way of excuſe, as he does here; for this matter of a writ of error depending is only pleaded by way of excuſe, why he has not paid the money. Which *Powell* juſtice agreed. The defendant's plea is in the negative, and therefore he is not to vouch a record for it; but if the judgment be affirmed, you ought to ſhew that of your ſide, *viz.* ought to plead that the record was certified in the King's Bench, *&c.* ſuch a term, and that *ſuperinde taliter proceſſum fuit* that the judgment was affirmed, and conclude your plea *prout patet per recordum*; and if it were not ſo, the defendant might rejoin *nul tiel record.* Not proſecuting his writ of error by the plaintiff is no forfeiture of his recogniſance, without giving him a rule below, in caſe where the record is not certified, to certify it, and then, if he does not certify it, nonſuiting him; or in caſe the record is certified, he does not forfeit his recogniſance, unleſs you nonſuit him here above. And theſe matters all appear upon record; and therefore the plaintiff ought to ſhew, either that the judgment was affirmed, or that the writ of error was diſcontinued, or the plaintiff in error nonſuited, and it lies of his ſide. The traverſe is naught, for it puts a matter of record in iſſue to be tried by the country. And as to the ſaying in the replication, that the judgment was affirmed, the plaintiff can have no advantage of that, becauſe it comes in only by way of inducement to the traverſe.

Matter of record not traverſable.

Powell juſtice. The replication is ill, for you make that the inducement of the traverſe, that ought to have been the iſſue.

Holt chief juſtice ſaid, that though the condition of the recogniſance was particular, yet it was well enough, for they were no more than what the law implied: and *expreſſio eorum, &c.* And *Powell* juſtice ſaid, that ever ſince the ſtatute of King *Charles* 2. they had purſued the words of that ſtatute in the framing the conditions of their recogniſances. And *Holt* chief juſtice ſaid, that if there were no ſtatute, which gave any ſuch power, that the recogniſance would be good; for any judge of this court, or of the Common Pleas, might take a recogniſance by the common law. And if a man would enter into ſuch a recogniſance voluntarily, and there were no coercion uſed, it would be a good recogniſance. So if a man upon a writ of error would enter into a recogniſance in more than double the ſum.

Judges of the King's Bench and Common Pleas may take recogniſances by the common law.

Recogniſance in more than double the ſum on error, good.

The court were juſt going to reverſe the judgment, when Mr. *Whitaker* took an exception to the writ of error, that the writ of error was a writ of this Queen's time, and recited a judgment *ſuper quoddam breve noſtrum de ſcire facias*; and the *ſcire facias* was brought in the late King's time, which appeared to be ſo by one of the continuances, in which it was entred, *ante quem diem dominus Willielmus, &c. diem clauſit extremum:* and for this the writ of error was quaſhed, *niſi*.

Variance.

Bell *verſ.* Gipps.

DEBT upon a bond, condition to perform an award; the defendant pleaded no award; the plaintiff replied, and ſet out an award *ore tenus*, that the defendant ſhould pay the plaintiff 21 *l.* and that the plaintiff ſhould deliver up to the defendant ſuch a bond, being the matter in controverſy, to be cancelled, and that the plaintiff and defendant ſhould give one another mutual releaſes to the day of the date of the ſaid bond: and aſſigned a breach in the non-payment of the 21 *l.* And upon iſſue joined, there was a verdict and judgment for the plaintiff in the Common Pleas. And upon that this writ of error was brought. Mr. *Page* for the plaintiff in error took an exception to the award, that it was not final, for the delivering up of the bond would not deſtroy the effect of it, but ſtill the plaintiff might bring an action on it. And as for the releaſe, that was to be only to the day of the date of the ſaid bond, which muſt be intended the bond that was to be delivered up, that being the bond that was laſt mentioned, and the controverſies ſubmitted were ſince that. In anſwer to which Mr. *Smith* for the defendant in error ſaid, that it did not appear, the bond to be delivered up had any date, and therefore the words muſt be applied to the bond of arbitration, which had a date; and alſo that the word *datus* ſignified delivery, and therefore it muſt be conſtrued to the day of the delivering up of the bond; and that it did not appear there were any other matters in difference, beſides this bond; and that the court would not intend any, and if there were none, the releaſe extending to diſcharge that bond, the award will be

Award, that the defendant ſhould pay the plaintiff 21 *l.* and the plaintiff ſhould deliver up ſuch a bond to be cancelled, and mutual releaſes to the day of the date of the ſaid bond.

be final. Beſides, the award was good without that, for there is money awarded to be paid on one ſide, and a bond to be delivered up of the other to be cancelled. And he cited 2 *Ventr.* 242. that an award by *parol* ſhould be favourably expounded.

Holt chief juſtice held, that the award was good. For this bond, which is awarded to be delivered up, was the foundation of all the controverſies between the parties; at leaſt it does not appear, that there were any controverſies between them about any thing elſe, or that aroſe ſince the date of the bond; and therefore the awarding the bond to be delivered up to be cancelled, and a general releaſe to the defendant to the day of the date of that bond, will make an end of all the controverſies between them.

Powell juſtice held, that the award was mutual and final, if the releaſe was left out of the caſe. And the judgment was affirmed.

The earl of Yarmouth *verſ.* Ruſſel.

A Writ of error of a judgment in the Common Pleas by default in an *indebitatus aſſumpſit*, and a writ of inquiry awarded and ſeveral damages, and a *remiſit damna* entred upon all the counts but one. And Mr. *Raymond* took two exceptions: firſt, that the inquiſition was taken upon a ſecond writ of inquiry, and that was awarded without returning the firſt, but upon a *vicecomes non miſit breve* only to the firſt; and that he ſaid was held ill in the caſe of *Atwood verſ. Burr*, in a writ of error of an award of execution upon a *ſcire facias* upon a recogniſance againſt bail in the court of *Maidſtone*, and the proceedings were upon the *alias ſcire facias*, and that was awarded without any return of the firſt, and for that the judgment was held to be erroneous, 1 *Annae B. R.* Secondly, that the *remiſit damna* was not entred in proper perſon.

Poſt. 1252. *Ante* 821.

Remittit damna entred *per attornatum.*

Holt chief juſtice admitted the caſe of *Atwood verſ. Burr*, but ſaid that this was only a *ſicut prius*. And as to the ſecond he ſaid, that it was not neceſſary that it ſhould be ſo. And the judgment was affirmed.

Bullock *verſ.* Parſons.

UPON iſſue joined in an action of debt, there was a verdict for the plaintiff, and Mr. *Eyre* moved in arreſt of judgment, becauſe the *diſtringas* was *de placito* with a blank, omitting *debiti*. The *venire facias* was right. And he ſaid, that the court would intend this was a *diſtringas* in another cauſe depending between the ſame parties, which *Holt* chief juſtice denied.

S. C. Salk. 454.
The *diſtringas* in debt was *in placito* with a blank.
2 Ro. Rep. 111.
Sty. 374.

Mr. *King* for the plaintiff ſaid, that this was a void *diſtringas*, and ſo as none, and conſequently aided now after a verdict by the ſtatutes of *jeofailes*; and if the court would not take it ſo, but to be only an ill *diſtringas*, yet they would amend it by the *venire facias*. And for that cited *Hob.* 246. where in treſpaſs the *venire facias* and *habeas corpora* were *placito debiti*, and after a verdict amended. Mr. *Eyre* cited 2 *Cr.* 528. where in an iſſue joined upon a *ſcire facias* the *venire facias* was *in placito debiti*, and ill. And *Holt* chief juſtice ſaid, that the caſe in *Hobart* had been held otherwiſe. And Mr. *Eyre* ſaid, that the judge had no authority to try the cauſe.

Holt chief juſtice ſaid, that the judge of *niſi prius*'s authority was not by the *diſtringas*, but by the commiſſion of aſſiſe; for that by the ſtatute of *niſi prius*, 13 *Ed.* 1. *c.* 30. which gives the trial by *niſi prius*, it is to be before judges of aſſiſe; and the *diſtringas* is only to bring the jury before them: and at firſt the trials by *niſi prius* were had upon the *venire facias*, and the clauſe of *niſi prius* is by that ſtatute expreſly ordered to be inſerted in the *venire facias*. Then came the ſtatute of 42 *Edw.* 3. *c.* 11. and ordered that no inqueſt but aſſiſes and deliverances of gaols ſhould be taken by writ of *niſi prius*, nor in other manner, before that the names of all them that ſhall paſs in the ſame inqueſts be returned into the court. And by reaſon of that ſtatute trials by *niſi prius* came to be upon the *diſtringas*; and the intent of that ſtatute was, that by the jury being returned of record in court, the party might have an opportunity to ſee the panel, and to prepare himſelf to make his challenges.

Juriſdiction of judges of *niſi prius.*

See 14 Edw. 3. c. 16. ſtat. 1.

Powell juſtice agreed with the chief juſtice; only he ſaid, that the reaſon of trials being had upon the *diſtringas* was, to prevent an inconvenience that was frequent heretofore, for the defendants to caſt an eſſoin at *niſi prius*, when all things were ready for trial; for the defendants being by the ſtatute of *Marlb. c.* 13. to have but one eſſoin after iſſue joined; and upon the return of the *venire* *facias*, when the trial was not had upon that, but that was returned above, the defendant muſt be eſſoined above, and could have no eſſoin below upon the *diſtringas*, and ſo the miſchief was helped.

No *diſtringas* aided by verdict, but not an ill one.

As to the fault in the *diſtringas* being aided after a verdict, the court took the difference between no *diſtringas* and a bad one: in the firſt caſe it is helped, otherwiſe in the laſt. And *Powell* juſtice ſaid, he knew an ill *diſtringas* dropped once at the bar.

The whole court held, that the *diſtringas* was amendable, and gave judgment for the plaintiff, *niſi*.

Regina *verſ.* Smith.

S. C. Salk. 680.
Indictment for uſury not good, if took before juſtices at ſeſſions.

A Writ of error of a judgment at the ſeſſions for *Middleſex* at *Hickes*'s *hall*, upon an indictment upon the ſtatute of uſury: and Mr. *Eyre* aſſigned for error, that the juſtices at ſeſſions had no juriſdiction of uſury by the ſtatute. And upon looking into the ſtatute, the court were of the opinion, and reverſed the judgment.

See 1 Hawk. c. 68. & 82.
1 Leon. 54.
Cro. Car. 283, 253.
Cro. Jac. 104, 509.

See for the reaſon of this and the like caſes, the caſe *Rex verſ. Alſop*, 4 *Mod.* 49. an indictment for ſhooting with a hand-gun and hail-ſhot, found at the ſeſſions, and held not to lie. And *Rex verſ. Bugg*, an indictment found alſo at the ſeſſions, for that the defendant being a cloth-worker, and not living in any city, borough, or town corporate, did yet keep in his houſe more than one woollen loom. 4 *Mod.* 379.

Idle *verſ.* Cooke.

S. C. Salk. 620.
3 Danv. Abr. 186. p. 14.

Intr. *Trin.* 11 *Will.* 3. B. R. Rot. 283. or 823.

Copyhold ſurrendered to the uſe of *A.* for life, afterwards to the uſe of *B.* and *C.* his wife *pro et durante termino vitarum ſuarum naturalium, et haeredum, et aſſignatorum praedictorum* B. *et* C. *et pro defectu talis exitus ad uſum* of the right heirs of *A. B.* and *C.*

UPON a ſpecial verdict in ejectment the caſe was no more than this: *Zachary Cliffe* the father, a copyholder in fee, ſurrendered his copyhold to the uſe of himſelf for life, and after to the uſe of *Valentine Cliffe* his ſon, and *Alice* his wife, *pro et durante termino vitarum ſuarum naturalium, et haeredum et aſſignatorum praedictorum Valentini et Aliciae*; *et pro defectu talis exitus ad opus et uſum rectorum haeredum praedicti Zachariae in perpetuum.* And whether by theſe words an eſtate-tail paſſed to *Valentine* and *Alice*, or a fee-ſimple, was the queſtion between the leſſor of the plaintiff, who claimed by ſurrender from *Zachary*, made after the death of

Valentine and *Alice* without iſſue, and the defendant, who claimed by ſurrender from *Alice*, who ſurvived *Valentine* her huſband. The caſe was argued ſeveral times at the bar, and now this day the court delivered their opinions *ſeriatim*.

S. C. 11 Mod. 57.
Wms. 57, 79.
3 Lev. 5.
Perk. ſ. 173.
Jo. 342.
Bro. Eſtates, p. 61.
Cro. El. 478.
Mo. 424.

Same conſtruction of a ſurrender of a copyhold as of a conveyance at common law.

Gould juſtice ſaid, he had conſidered very well of the caſe, and could not bring himſelf to be of opinion, that it was a fee-ſimple, but did take it to be an eſtate-tail, though in this his opinion he was ſo unfortunate as to differ from the reſt of the judges. That which ſtuck moſt with him was the caſe of *Abraham* and *Twigg*, but upon conſideration he thought this caſe differed from that: that in this his opinion he had the intention of the parties of his ſide. He ſaid, the reaſon he went upon was, that thoſe preciſe words *of the body*, were not requiſite to create an eſtate-tail; but if there were words, that did tantamount and declare the intention of the parties, it was ſufficient, ſo thoſe words were conſiſtent with the rules of law. He ſaid, he did not go at all upon any difference between a ſurrender of a copyhold, and a conveyance of freehold lands; for he thought they ought to have the ſame conſtruction. Firſt, he ſaid, here was the word heirs, and that explained to be the heirs of *V.* and *A.* and being *Valentini et Aliciae* in the genitive caſe, it was all one as if it had been *de Valentino et Alicia.* He ſaid, that this was like *Beresford*'s caſe, 7 *Co.* 40. where a feoffment was made to the uſe of *A.* for life, and after his deceaſe to the uſe of *B.* and the heirs male of the ſaid *B.* lawfully begotten; and for default of ſuch iſſue the remainder over; and that was held to be an eſtate-tail in *B.* Now there of *B.* is juſt the ſame with what this muſt be, if it were put into *Engliſh*; but indeed as this ſtands in *Latin* it is the genitive caſe, and if that were to be tranſlated it might be *de B.* the words *lawfully begotten*, that are in that caſe, ſignify nothing; becauſe every heir muſt be lawfully begotten. But that which makes the doubt in that caſe is, that it is not limited in certain of what body the heirs male ſhould come, and therefore there ought to be ſomething in the words to ſhew that. And that in *Beresford*'s caſe is done by the words, *of B.* in *Latin*, *de dicto B.* and here by the words *Valentini et Aliciae* in the genitive caſe, which is in *Engliſh* in the ſame manner of *Valentine* and *Alice*, the words *ſuch iſſue* refer to them two. He ſaid that *Beck*'s caſe, *Litt. rep.* 344, *&c.* and 1 *Cr.* 363. ruled this: there a feoffment was made to the uſe of *A.* for life, remainder to *C.* ſecond ſon of *A.* for his life, remainder to the uſe of the firſt ſon of *C.* which ſhould have iſſue male of his body, and to his heirs for ever; and for want of ſuch iſſue remainder to the right heirs of *C.* *A.* died, leaving *B.* his ſon and heir; *C.* had iſſue *D.* a ſon, who died without iſſue; *C.* after the death of *D.* levied a fine to *E.* and in ejectment by *B.* againſt *E.* it was reſolved, that that was an eſtate-tail in contingency to the firſt ſon of *C.* who ſhould have iſſue male, and ſo the remainder in fee veſted in *C.* and that muſt have been the queſtion; for if it had been a fee to the firſt ſon of *C.* then the remainder to the right heirs of *C.* had been void, being limited after a fee. But they held the remainder to be good, and conſequently, that the eſtate to the firſt ſon of *C.* was an eſtate-tail. He ſaid, that the caſe of *Abraham verſ. Twigg* was objected, which is reported in *Beresford's* caſe, and in 3 *Cr.* 478, and *Moor* 424. where a limitation of an uſe was, *ad opus et uſum Gabrielis Dormer et haeredum maſculorum ſuorum legitime procreatorum, et pro defectu talis exitus* the remainder over; and it was adjudged to be a fee-ſimple, becauſe it was not limited of what body the iſſue male ſhould iſſue. But to this caſe I anſwer, that our caſe differs from it, becauſe in our caſe it is ſaid to the uſe of the heirs of the ſaid *Valentine* and *Alice*, and in that it is only *haeredum maſculorum ſuorum*; but if it had been in that caſe, *haeredum maſculorum dicti Gabrielis Dormer*, as our caſe is, it had been a fee-ſimple; and ſo it is held by *Richardſon* chief juſtice, and the difference taken in his argument of *Beck's* caſe, *Litt. rep.* 347. It is objected farther, that the word aſſigns alters the caſe, and will make it a fee-ſimple, becauſe an eſtate-tail is not aſſignable. But to that I anſwer, that that makes no difference in the caſe, and therefore, where the caſe in *Plowd.* 541. *a.* out of 13 *Ric.* 2. is, that if a man makes a feoffment to one to have and to hold to him and his heirs, *et ſi contingat* that the feoffee die without heir of his body, that then the land ſhall revert: this is an eſtate-tail. So it would have been in the ſame manner, though the *habendum* had been to him and his heirs and aſſigns; as *Cotton's* caſe is, 3 *Leon.* 5. where the caſe was, a feoffment to the uſe of the feoffor and his wife *pro termino vitae ac etiam rectorum haeredum* of the feoffor *et aſſignatorum* of the feoffor after the death of the feoffor, and his wife; *et ſi contingat praefatum feoffatorem obire ſine exitu de corpore ſuo procreato*, remainder over: this was adjudged to be a good eſtate-tail in the feoffor, though there was the word aſſigns. So that upon the whole I am of opinion, that judgment ought to be given for the plaintiff.

Powys juſtice for the defendant, that it is a fee-ſimple. To make an eſtate-tail it muſt be limited by the gift, of what body the iſſue male or female ſhall iſſue. So is *Litt. ſect.* 31. and therefore a gift to a man and his heirs male, or to a man, and his heirs female, is a fee-ſimple; but indeed a deviſe to a man and his heirs male, or to a man and his heirs female, is an eſtate-tail; becauſe wills are conſtrued according to the intent of parties, which is apparent in that caſe, to create an intail. So is 27 *Hen.* 8. 27. where the difference is taken between ſuch a deviſe by will, and a gift. *Hob.* 32. *C. L.* 27. *a.* There are books, as 9 *Hen.* 6. 25. 3 *Cr.* 478.

that even a deviſe to a man and his heirs males, is a fee-ſimple, but the other is the better opinion. But in all other caſes there muſt be, in caſes of limitations of eſtates-tail, either the words *de corpore*, or words equivalent: as the caſe of 37 *Aſſ.* 15. a gift to a man *habendum* to him *et haeredibus ſuis, ſi haeredes de carne ſua habuerit, et ſi nullos de carne ſua habuerit, revertatur, &c.* that was adjudged to be an eſtate-tail. So in the ſtatute *de donis*, two of the inſtances there put, have not the words *de corpore* in, but *haeredibus de ipſis viro et muliere procreatis*, which are tantamount. And where-ever the words *de corpore* are not in, there ought to be the words *de J. S.* or *ex J. S.* as 5 *Hen.* 5. 6. a gift to *R. et K. uxori ejus et haeredibus eorum, et aliis haeredibus dicti R. ſi dicti haeredes de R. et K. exeuntes obierint ſine haeredibus de ſe*, is an eſtate-tail in *baron* and *feme*. So 3 *Edw.* 3. *brief* 743. a gift to one *et haeredibus ſuis de prima uxore ſua*, is an eſtate-tail. And the difference between *de dicto Adeno*, and *haeredum ſuorum maſculorum*, which are the words in *Abraham* and *Twigg*'s caſe without *de*, or *haeredum Adeni*, is that which gave the turn to *Beresford*'s caſe, and was the ground upon which the judges adjudged it to be an eſtate-tail. In this caſe the words are in *Latin* in the genitive caſe, there the words that were in *Engliſh* are turned into *Latin*, and made *de dicto Adeno*, to ground that conſtruction upon, that they created an eſtate-tail. If the words here were, and the heirs and aſſigns of *Valentine* and *Alice*, then it were *Beresford*'s caſe, but as it is, it is the very caſe of *Abraham verſ. Twigg*, which was a caſe adjudged upon great deliberation, only this ſeems to be the ſtronger caſe of a fee-ſimple of the two. The only objection is, what could be meant by the words, *and for want of ſuch iſſue*, which it may be ſaid, muſt be underſtood of ſuch iſſue of their bodies? But to this I anſwer, that here is a total omiſſion of what body the iſſue ſhould come of, which was the thing chiefly neceſſary, and therefore it is altogether uncertain what iſſue was meant, and ſuch iſſue may as well mean iſſue of the ſurvivor, as heirs is the heirs of the ſurvivor in the precedent words, ſo that that is totally uncertain. This caſe does not come up to the caſe of 5 *Hen.* 5. 6. for there the words are, *haeredes de R. et K.* and *haeredibus de ſe*; nor are the words ſo ſtrong for an eſtate-tail, as they are in the caſe of *Abraham verſ. Twigg:* there are the words, *haeredum maſculorum ſuorum legitime procreatorum:* here the words are, *haeredum V. et A.* as general as can be. And there is no difference between a limitation in a ſurrender of a copyhold, and in a conveyance of freehold land, but there muſt be proper words uſed to create the eſtate. And ſo is the caſe of *Seagood verſ. Hone*, 1 *Cr.* 366. where a copyhold was ſurrendered to the uſe of *A.* and *B.* and the longeſt liver of them, and for want of iſſue of *B.* remainder over; and reſolved, that though in a deviſe thoſe words would give an eſtate-tail to *B.* by implication, yet it ſhould not be ſo in a ſurrender or conveyance, in paſſing which the party ought or might have had ſufficient counſel to direct him; but in regard an eſtate for life is limited to *B.* by expreſs limitation, it ſhall not be an eſtate unto him higher by implication. It is objected, that the words of the ſtatute *de donis* are, *quod voluntas donatoris de cetero obſervetur*, and here in this caſe it appears to have been the intent of the donor, to have it an eſtate-tail. But the anſwer to this is, in thoſe other words of the ſtatute, *ſecundum formam in charta doni ſui manifeſte expreſſam*; that the intention, which is by the words of the ſtatute to be obſerved, is the intention of the donor plainly expreſſed in his deed of gift. The caſe of *Harrington verſ. Smith* in 2 *Sid.* 41. is the very caſe in point: there the caſe was a ſurrender of a copyhold to the uſe of *A.* and his wife and their heirs lawfully begotten, remainder over; and though there is no mention in *Siderfin* what became of the caſe, yet in a manuſcript report that I have, it is reported to have been adjudged a fee-ſimple. To conſtrue this an eſtate-tail upon the intention of the parties, without any words to raiſe ſuch an eſtate, may be of very ill conſequence in altering the forms of words, that have been hitherto ſtuck to, and thought neceſſary to create an eſtate-tail; and to judge eſtates to be intails upon ſuch looſe words, will occaſion a great deal of uncertainty in titles, and beget a great many diſputes, and I think the judges have carried it far enough already.

Powell juſtice for the defendant. He ſaid, that the queſtion was, whether this was an eſtate-tail, or a fee-ſimple: that it was objected, that it was the intent of the party, that it ſhould be an eſtate-tail, and that the ſtatute *de donis* had been taken by equity to ſupport the intent of the parties, and he would go as far as he could to ſupport the intent of the party, but he could not comply with it ſo far as to take away all diſtinction, and leave no difference between the forms of words neceſſary to create an eſtate-tail and a fee-ſimple. He ſaid, that the ſort of eſtate, which is now ſince the ſtatute *de donis* called an eſtate-tail, was well known before that ſtatute, and that the ſtatute did not create the eſtate, but only preſerved it: that there were three ſorts of eſtates of inheritance at common law: Firſt, an abſolute eſtate of inheritance to a man and his heirs: Secondly, a fee-ſimple qualified as to the time of its duration; as an eſtate to a man and his heirs as long as *J. S.* has heirs of his body, or as long as *Bow* church ſtands, or as long as *J. S.* lives; for in theſe caſes, though the eſtate ſhall deſcend to a man's heirs, yet they ſhall have it for no longer time than is contained in the reſpective limitations: Thirdly, a fee-ſimple reſtrained as to what heirs ſhall inherit it. And this was called a fee-ſimple conditional at common law: but that is not ſo to be underſtood, as if upon the

Inheritances at common law.

the performing the condition a fee accrued; for then it would have been the ſame caſe, as a gift for life with a condition, that if the donee did ſuch an act, that then he ſhould have fee, and conſequently, if the tenant in fee-ſimple conditional had aliened before iſſue had, it would have been a forfeiture of his eſtate, which was not ſo. But it was only a qualification as to what ſort of heirs ſhould inherit it: but the tenant in fee-ſimple conditional had an eſtate of inheritance in him before iſſue had; but it was qualified as to the deſcent of it, to ſuch particular heirs as were expreſſed in the limitation. And therefore if lands at common law were given to a man and the heirs male of his body, and he had iſſue two ſons, and the eldeſt ſon had iſſue a daughter, the ſecond ſon ſhould inherit, and not the daughter, becauſe ſhe was not within the form of the gift. But the ſtatute *de donis* takes notice, that there had an abuſe crept in before the making of that ſtatute, in letting perſons in to take, that were not within the limitation. As if lands were given to *baron* and *feme*, and the heirs of their two bodies, and the wiſe died, and the huſband took a ſecond wife, ſhe was held to be dowable; ſo if the huſband died, and the wife took a ſecond huſband, he ſhould be tenant by the curteſy, and the iſſue by ſuch ſecond marriage ſhould be inheritable; and the ſtatute provides that *de cetero* it ſhall not be ſo. If then this eſtate, which is now called an eſtate-tail, was a fee-ſimple conditional at common law, to create it there muſt neceſſarily be ſuch words as would have been ſufficient to have created a fee-ſimple conditional into an eſtate-tail, and the poſſibility of *reverter* into a reverſion or remainder. Now let us ſee, if there be any thing in this caſe to reſtrain the general word heirs to any particular ſort of heirs: and that there ſhould be ſome words to reſtrain it is equally neceſſary in wills as well as ſurrenders and deeds. There is indeed this difference between wills and deeds, that as in wills the preciſe word heirs is not neceſſary to make a fee, ſo neither are the words *de corpore J. S.* or *de J. S.* or *ex J. S. &c.* neceſſary to make an entail; but there muſt be ſomething in the will, by which it muſt appear, that it was the intent of the deviſor, that it ſhould be an eſtate-tail. And therefore if a man deviſes his lands to his ſon and his heirs for ever, and for default of heirs of his ſon, to his daughter and her heirs for ever, which was the caſe of *Hearne* and *Allen*, that is a tail, becauſe of the manifeſt intent of the deviſor appearing from the clauſe for limiting the lands over to the daughter and her heirs, for default of heirs of the ſon; for the ſon could never die without heirs in a general ſenſe, as long as the daughter had any, and therefore heirs could be intended by the deviſor nothing but iſſue. And there muſt be ſomething in the will to reſtrain the generality of the word heirs to ſpecial heirs, either in expreſs words, or words that ſhew an apparent intent of the parties to reſtrain it; for we can judge of the intent of the parties

only

only by their words, and this muſt be ſo in wills as well as deeds. And where there is no ſuch thing, we muſt judge according to the generality of the words, and conſequently there being no reſtraint to tie the words to any particular heirs in this caſe, we muſt judge it a fee-ſimple. The judges ſhewed their favour to eſtates-tail, and ſupporting the intention of the donor, in *Bereſford*'s caſe, and the reaſon they grounded their reſolution upon in that caſe was, becauſe the *Engliſh* words in that caſe, the heirs of the ſaid *B.* might be tranſlated, *haeredes de dicto B.* which words are ſufficient to create an eſtate-tail: but here the words are in *Latin*, and therefore it is the very caſe of *Abraham* and *Twigg*. My brother *Gould* has endeavoured to give an anſwer to the caſe of *Abraham* and *Twigg*, but I cannot ſee the force of his anſwer; for I cannot apprehend any difference between theſe words, *Gabrielis Dormer et haeredum maſculorum ſuorum*, and *Gabrielis Dormer et haeredum maſculorum praedicti Gabrielis Dormer*, that is in *Engliſh*, between *G. D.* and his heirs males, and *G. D.* and the heirs males of the ſaid *G. D.* but they are to me both the ſame thing. The clauſe, *and for default of ſuch iſſue*, will not help it, becauſe there is no limitation to any iſſue before, for it to relate to, for all heirs are iſſue of ſome body: if the words had been, if they ſhall have no iſſue, or for want of iſſue of them, that would have reſtrained the general word heirs to the iſſue of their bodies. He ſaid, that the judges had gone too far already in ſupporting the intents of parties without proper words; and if they ſhould go farther, it would introduce great uncertainty into titles of eſtates. He ſaid, it was not material to the reſolution in *Beck*'s caſe, whether that limitation was an eſtate-tail, or a fee-ſimple, and that when the cauſe came into this court by writ of error, there was no notice taſten of that point; and it was ſufficient to ſupport that reſolution, that it was a contingent eſtate. For though it was a doubt in *Leonard Lovey*'s caſe, whether a remainder could be limited after a contingent fee, yet it is none now. And therefore if a fee-ſimple be limited to ſuch perſons as *A.* ſhall appoint by his will, remainder over, that is a good remainder veſted, till the appointment. But beſides in that caſe, there are words for the clauſe *and for want of ſuch iſſue* to relate to, iſſue male of his body going before. For though thoſe words are indeed only a *deſcriptio perſonae*, yet they may ſerve for thoſe words to relate to, and help a little. But here in this caſe is nothing for *ſuch iſſue* to refer to, but the general word heirs, which is of no avail, becauſe every heir muſt be iſſue of ſome body. *Harrington*'s caſe is in point, but I never knew before that it was adjudged. This conſtruction will make too much uncertainty in limitations of eſtates.

Remainder limited after a contingent fee.

Holt chief juſtice for the defendant. He ſaid, the queſtion was, whether theſe words being in *Latin* in the ſurrender, do make an eſtate-tail: and that they could not be conſtrued by any rule or reaſon of the law an eſtate-tail. He ſaid, that the intention was, it ſhould be an eſtate-tail, and therefore he was deſirous to make it ſo; but he could not do it by any rule of law, but according to and in purſuance of them he muſt conſtrue it to be a fee-ſimple. He ſaid, that this limitation muſt be conſidered in the ſame manner, as if it were a deed, though it were a limitation of the uſes of a ſurrender of a copyhold eſtate; for that limitations of uſes, and ſurrenders of copyholds, muſt be confined to the rules of the common law. He ſaid, that according to *Littleton*, *ſect.* 31. in all gifts in tail it muſt be limited of what body the iſſue ſhall come, and if that be omitted, though the gift be to a man and his heirs males, or to a man and heirs females, yet the donee has a fee-ſimple and not an eſtate-tail; but the word males in the one caſe, and females in the other, ſhall be rejected. And though the ſtatute *de donis* ſays, that the will of the donor ſhall be obſerved, yet it is confined, *ſecundum formam in charta doni ſui manifeſte expreſſam*; and therefore in that caſe of a gift to a man and his heirs males, becauſe it is not limited of what body the heirs ſhall come, the word males ſhall be rejected, though it be in the ſame ſentence, and the lands ſhall go to all the heirs of the donee without diſtinction, though the intent of the donor was, that it ſhould go only to the male heirs. According to this is my lord *Coke* in his comment upon this ſection, 27. *b.* where are theſe words: "It "is a certain rule in law, that in every eſtate in tail within the "ſaid ſtatute, it muſt be limited either by expreſs words, or by "words equipollent, of what body the heir inheritable ſhall iſſue." And being there are no words in this caſe to ſhew of what body the heirs inheritable ſhall iſſue, and there are words to make a fee-ſimple, this is the very caſe in *Litt.* *ſect.* 31. He ſaid, that in a will indeed this would be an eſtate-tail, but the reaſon of that was, becauſe of the intention of the party: but in expreſſing a man's intention in a deed, a man muſt obſerve other methods than he need do in a will, where if he did but expreſs his intention, it mattered not in what form he did it. For the law has appointed particular ſettled words to carry eſtates in a deed, as for inſtance the word heirs to paſs a fee-ſimple, which are not neceſſary in a will; and the reaſon of this difference is, becauſe the ſame law by virtue of which a man has a right to his eſtate rather than *J. S.* and ſuch an eſtate paſſes by ſuch a conveyance, has reſtrained and tied up that conveyance to particular ſet words, in which it ſhall be penned. But the ſtatute of 32 *Hen.* 8. by which the power of deviſing lands by will is given, ſays, that all perſons having ſocage lands,

Eſtate-tail in a will.

lands, and no knight-ſervice lands, ſhall have power to diſpoſe of them by their laſt wills and teſtaments in writing, at their free will and pleaſure, and ſo leaves them at liberty to expreſs their wills in what words they pleaſe. And therefore, though a gift of land to a man for ever in a deed is but an eſtate for life, yet in a will it is a fee-ſimple, becauſe the intention of the deviſor is plain, that the deviſee ſhould have the inheritance, and the ſtatute has left him at liberty to uſe the words he thinks fit, to expreſs his intention.

He ſaid ſecondly, that there were not words ſufficient to turn the eſtate in fee-ſimple limited by the firſt words, to the heirs of the ſaid *V.* and *A.* into an eſtate-tail. If it had been, *and if they die without iſſue of their bodies*, the remainder over, there had been particular words to expreſs what heirs the ſurrenderor meant, and ſuch as were conſiſtent with the general words preceding, and would have reſtrained them. And ſo it was in theſe caſe of 5 *Hen.* 5. 6. and *Perkins*, *ſect.* 171. where the caſes are put, *viz.* if lands be given to a man and his heirs, if he have iſſue of his body, and if he die without heir of his body, the reverſion to the donor: this is a tail. So a gift to a man *habendum ſibi et haeredibus ſuis, ſi haeredes de carne ſua habuerit, et ſi nullos haeredes de carne ſua habuerit*, the reverſion to the donor, is a tail alſo. But it is objected, that an eſtate-tail may be created by implication, and for that *Perkins*, *ſect.* 173. is cited; where the caſe is, that if land is given to *J. S. et ſi contingat ipſum obire ſine haeredibus de corpore ſuo, quod tunc revertatur* to the donor and his heirs, the donee has an eſtate-tail, notwithſtanding that it is not given to him and his heirs, becauſe the ſtatute of *Weſtm.* wills, *quod voluntas donatoris ſecundum formam in charta doni ſui manifeſte expreſſam, de cetero obſervetur.* I agree *C. L.* 20. *a.* that caſe, becauſe there the intent of the donor appears in expreſs words in the deed, and the implication is a neceſſary one upon the words. But there is no ſuch force in the words, *and for default of ſuch iſſue*, uſed in this ſurrender, nor no ſuch implication, for every heir is iſſue of ſome body. But the remainder limited over in this caſe is a fee limited after a fee, and void. As if lands were given to a baſtard and his heirs, and if he died without heirs, the remainder over; though a baſtard can have no heirs but of his body, yet the limitation is a fee-ſimple, and the remainder over is a void remainder, becauſe it is a limitation of a fee after a fee.

Note, I apprehend this caſe was further urged by the chief juſtice to anſwer the objection mentioned by *Powys*, that there could be no heirs, that would be heirs to both husband and wife, but what muſt be heirs of their bodies.

He ſaid thirdly, that there could be no implicatio againſt expreſs words. And for that he cited the caſe of *Seagood verſ. Hone*, 1 *Cro.* 367. and therefore, there being a fee given in this caſe by expreſs words to the ſurvivor of *V.* and *A.* there ſhall be no eſtate raiſed by implication, contrary to that expreſs limitation. He ſaid, that he could not differ this caſe from the caſe of *Abraham verſ. Twigg*, which he ſaid was a great authority, ſo great a one, that he could not get over it. He ſaid, that was a caſe of limitation in a deed; that by the words, *haeredum maſculorum ſuorum legitime procreatorum*, and the clauſe *pro defectu talis exitus*, it plainly appeared what heirs the party meant, and yet that was reſolved to be an eſtate in fee-ſimple, contrary to the apparent intent of the parties, and the ſtrong implication upon the words of the limitation, for want of complying with *Littleton*'s and *Coke*'s rule, and ſhewing of what body the heirs ſhould iſſue. My brother *Gould* ſays, that there is no difference between the genitive caſe and the ablative, between *haeredum ſuorum*, and *de ſe*. But there is a very great one; for *de* is the word made uſe of in the ſtatute *de donis*, and *ex* and *de* import a man's body. And if you were to tranſlate this *Engliſh*, the heirs of *John*, into *Latin*, it would not be proper to tranſlate it by the genitive caſe, *haeredes Johannis*, but *haeredes de Johanne*; ſo *heirs of him*, not *haeredes ejus*, but *haeredes de ipſo*; ſo *ſon of ſuch a father*, not *natus* or *filius talis patris*, but *natus* or *filius de tali patre*. And therefore when, as it was in *Bereſford*'s caſe, a limitation is in *Engliſh* to the uſe of *B.* and the heirs male of the ſaid *B.* lawfully begotten, and for default of ſuch iſſue, the remainder over, that muſt be tranſlated into *Latin* according to the ſubject matter, *de dicto B.* He ſaid, the words *de corpore* were not neceſſary, but that words tantamount were ſufficient: as a gift to a man *et haeredibus de carne ſua*, or *de ſe*, or to a man and his heirs, which he ſhall beget of his wife, are eſtates-tail. And ſo is *Co. L.* 20. *b.* He ſaid, that if in the caſe of *Abraham* and *Twigg* the words had been, the heirs males of *Gabriel Dormer*, in *Engliſh*, inſtead of, his heirs males, or *haeredum maſculorum ſuorum*, that had been an eſtate-tail; and that is the difference taken in *Bereſford*'s caſe. As to *Beck*'s caſe, there the words, *and for want of ſuch iſſue*, refer to the words *iſſue male of his body* before. For what muſt *ſuch* iſſue be, but ſuch as is mentioned before.

He ſaid fourthly, that to make this an eſtate-tail, would be a conſtruction repugnant to the premiſſes; for the limitation is not only to the heirs of *V.* and *A.* but alſo to their aſſigns, and that word is very conſiderable in the caſe; for it ſhews, that the ſurrenderor intended, that *V.* and *A.* ſhould have an aſſignable eſtate; and therefore to conſtrue it an eſtate-tail is to give *V.* and *A.* an eſtate that is not aſſignable (for it is the very eſſence of an eſtate-tail not to be aſſignable, the words of the ſtatute *de donis* being, *quod* the donees *non habeant poteſtatem alienandi*) and conſequently is a conſtruction contrary to the firſt part of the limitation by which the eſtate is expreſly limited to the heirs and aſſigns of *V.* and *A.* if having, and not having, a power of aſſigning, are contraries. But to this I foreſee it will be anſwered, that the word aſſigns is only a conſequence in law upon the nature of the eſtate, and is void, according to that maxim, *expreſſio eorum quae tacite inſunt nihil operatur.* But to that he ſaid, that that maxim muſt be underſtood, that it will have no operation upon the ſame clauſe wherein it is expreſſed, but it may control a ſubſequent clauſe: and therefore a man may make a leaſe with a condition, that the leſſee ſhall not alien, but if he make a leaſe to the leſſee and his aſſigns with ſuch a condition, the condition is void; and yet leaſing it to the leſſee and his aſſigns, was no more than what the law implied. So the caſe in *Dier* 265. a leaſe of a houſe paſſes the ſhops, and yet if a man leaſes a houſe with the ſhops by expreſs name, and after excepts the ſhops, that exception is void. And for theſe caſes he cited *Hob.* 170. So here, though the limitation to a man, his heirs and aſſigns, is of no greater effect than a limitation to a man and his heirs, yet it may have that effect as to prevent the ſubſequent clauſe, *and for default of ſuch iſſue,* from making it an eſtate-tail contrary to the expreſs limitation before, whereby an aſſignable eſtate was limited to *V.* and *A.* He concluded, that though the intent of the party ought to be regarded, yet ſo ought alſo the rules of law, and that eſpecially in a caſe of a conveyance in a man's life-time, and that of an eſtate, to the creating of which the law required a particular form of words, or words that did tantamount.

Judgment was given for the defendant.

Kempe *verſ.* Goodall.

S. C. Salk. 277.
Nihil habuit in tenementis pleaded in debt for rent upon demiſe by indenture.
1 Stra. 611.

IN an action of debt for rent the plaintiff declared upon a demiſe by indenture, *&c.* The defendant pleaded *nihil habuit in tenementis tempore dimiſſionis praedictae.* And the plaintiff demurred generally. Mr. *Salkeld* for the defendant ſaid, that he did not pretend that *nihil habuit in tenementis* could be pleaded contrary to the *eſtopple* by acceptance of the leaſe by indenture, but that the plaintiff for want of replying, and relying upon the *eſtopple*, had loſt the benefit of it. For inſtead of demurring, he ſhould have replied and prayed judgment, if the defendant, contrary to his own acceptance of a leaſe of this land by indenture, ſhould be admitted to plead this plea. And he compared it to the caſe of *Speak verſ. Richards, Hob.* 206. where in an action of debt againſt the ſheriff for money levied upon a *levari facias*, the plaintiff in his declaration ſet out the recogniſance and all the proceedings upon it and the *levari facias*, and that upon it the defendant levied the money, and at the return of the writ returned, that he had levied it, *quos paratos habeo, &c.* the defendant pleaded as to part *nil debet*, and to the reſidue payment and an acquittance before the day of the return of the writ. And though it was objected, that theſe pleas were directly contrary to the defendant's return upon record, yet the court held, that in regard the plaintiff had joined iſſue upon the *nil debet*, and demurred to the plea of payment and the acquittance, and had not relied upon the *eſtopple*, the pleas were made good.

The whole court held this to be no plea, becauſe it appeared upon the declaration to be a demiſe by indenture, and ſo the *eſtopple* appeared upon record, and ſo there was no need of replying it: otherwiſe where a man declares *quod cum demiſit* generally. And *Powell* ſaid, that all the books were to the contrary. And *Holt* chief juſtice ſaid, that in that caſe in *Hob.* they did not ſet out the return in the declaration with a *prout patet per recordum*, and therefore the levying the money was the ground of the action, and not the return: but if a man ſhould bring debt upon a judgment, and in his declaration ſet out the judgment, *prout patet per recordum*, the defendant could not plead payment. Judgment was given for the plaintiff, *niſi*.

Glover *verſ.* Rogers.

Intr. *Hil.* 3 *Ann.* B. R. Rot. 345.

A Writ of error of a judgment in the Common Pleas, in an action upon the caſe, wherein the plaintiff declared, that the defendant in conſideration the plaintiff's *teſtator tranſportaſſet* for the defendant from ſuch a port to ſuch a port ſuch and ſuch merchandizes, promiſed to pay the plaintiff's teſtator *tantam denariorum ſummam pro tranſportatione merchandizarum praedictarum rationabiliter habere meruiſſet*, and avers, that *pro tranſportatione merchandizarum* he had deſerved ſo much, *&c.* Upon *non aſſumpſit* pleaded there was a verdict for the plaintiff. Sir *James Mountague* for the plaintiff in error took theſe exceptions: firſt, that it was only *tantam denariorum ſummam*, and not ſaid *quantam:* ſecondly, that it was *tantam denariorum ſummam pro, &c. rationabiliter habere meruiſſet*, and not ſaid who: thirdly, that the averment was only *pro tranſportatione merchandizarum* he had deſerved

S. C. Salk. 557.

In a *quantum meruit* the word *quantum* omitted.

Ipſe omitted.

Praedict. omitted.

ſo much, and not ſaid of theſe; whereas if they were others, it made nothing to this cauſe of action.

But the court over-ruled all the exceptions, and after the cauſe was twice on in the paper, affirmed the judgment. And firſt, as for the leaving out *quantam*, they ſaid *tantam* imported enough alone, *viz.* that the defendant promiſed to pay ſo much the plaintiff had deſerved. As to the ſecond, they ſaid, *meruiſſet* was he deſerved; and if it had been *ipſe meruiſſet*, that muſt have related to the perſon that tranſported the goods, eſpecially that being the ground of the action; and therefore *meruiſſet* ſignifying as much as *ipſe meruiſſet*, would be well. And *Powell* ſaid, there were but two perſons in the declaration, and therefore it could be no body but the tranſporter, and ſo was good within that difference. As to the third, they ſaid, that if the tranſporter had not tranſported theſe merchandizes, the plaintiff could never have had a verdict, and therefore now after a verdict the want of *praedict.* was helped. And *Gould* juſtice ſaid, that *Twiſden* juſtice uſed to call a verdict omnipotent.

Ante, 899.

Smith et alii *verſ.* Stoneard.

S. C. Salk. 267. Barnard. Rep. *Addey v. Hutchinſon.*

A Writ of error of a judgment in the Common Pleas after a verdict. The plaintiff in error aſſigned for error want of an original, but did not take out a *certiorari*, as the courſe is, and get the want of the original certified: the defendant in error pleaded, *in nullo eſt erratum.* And now when the cauſe came on in the paper, it was objected, that there ought to have been a *certiorari* taken out, and a certificate made of the error; for it might be that there was an ill original, and if that were returned, the plaintiff in error might take advantage of it, and that would not be helped by the verdict, though the want of the original were.

Holt chief juſtice. If the want of an original be aſſigned for error, and the plaintiff in error does not take out a *certiorari*, and get a return to it, and the want of an original certified; the courſe is for the defendant in error to go to the maſter of the office, and get a rule for the plaintiff in error to return his *certiorari*; and if he does not get it done, as is ordered by the rule, the aſſignment of error ſtands for nothing. But if the defendant in error will come in *gratis* and confeſs the error, there need be no *certiorari* returned. And as to the matter, that there might be a bad original, &c. that is another ſort of error, and when the want of an original is aſſigned for error, the court will never intend, that there is a bad original. And the judgment was affirmed.

Regina

Regina *verſ.* Weſt.

THE defendant was adjudged by two juſtices to be the reputed father of a baſtard-child, purſuant to the 18 *Eliz.* and ordered to pay, *&c.* and upon appeal to the ſeſſions in *Hertfordſhire* the order was confirmed, and for not paying of the money ordered, the defendant was committed, and was now brought into court upon a *habeas corpus*; and ſeveral exceptions were taken to the order of the two juſtices, and after they had been ſeveral times ſtirred, Mr. *King* took an exception to the return of the *habeas corpus*, that this was not a ſufficient cauſe of commitment, but that in caſe of refuſal to obey the order, the juſtices ought to have proceeded againſt the defendant upon his recogniſance, which is the method preſcribed by the ſtatute, the words of which are, "that "every perſon making default in not performing the order of the "two juſtices ſhall be committed to ward to the common gaol, "there to remain without bail or mainpriſe, except they ſhall put "in ſufficient ſurety to perform the ſaid order, or elſe perſonally "to appear at the next general ſeſſions of the peace to be holden in "that county where ſuch order ſhall be taken; and alſo to abide "ſuch order, as the ſaid juſtices of the peace, or the major part "of them, then and there ſhall take in that behalf (if they then "and there ſhall take any) and that if at the ſaid ſeſſions the ſaid "juſtices ſhall take no other order, then to abide the order before "made." So that the two juſtices only have the power to commit, if the party refuſe to give ſecurity; but the ſeſſions have no power to commit: but in caſe the perſon will not perform their order, they muſt go againſt his ſecurity. And for this reaſon in the like caſe between the King and *Hammond*, 2 *Bulſtr.* 341. where the defendant was committed at the ſeſſions after a bond given to the two juſtices purſuant to the ſtatute, he was diſcharged.

S. C. 6 Mod. 180.
Rep. Q. A. 59.
If a man is adjudged by two juſtices the reputed father of a baſtard, and ordered to pay, and on appeal the order is confirmed, the juſtices at the ſeſſions cannot commit for non payment, but muſt proceed on the recogniſance took by the two juſtices.
Vid. 2 Salk. 477, 488.

Holt chief juſtice. Where the ſeſſions proceed by way of appeal, it is by virtue of the power given them by the 18 *Eliz.* and by that ſtatute they have no power to commit, but the proviſion that is made by that ſtatute, to compel the party's obedience to their orders, is by a recogniſance, which is to be taken by the two juſtices that made the order; and if the party will not give ſuch a recogniſance, they have power to commit him. Indeed if the ſeſſions proceed originally by 3 *Car.* 1. they may commit for not performing their order. And he ſaid, it was not material in this caſe, whether the two juſtices had taken any recogniſance of *Weſt* or no (which Mr. *Eyre* objected did not appear to have been done, and ſo would diſtinguiſh this from *Hammond*'s caſe); for if they had

Original proceedings at ſeſſions.

not done it, it was a neglect in them; but the ſeſſions would not thereby have a power to commit, when no ſuch power is given them by the ſtatute.

Powel juſtice. The two juſtices power to commit is only conditional, except the party put in ſufficient ſecurity, *&c.* as by the act.

Upon this exception the defendant was diſcharged; and as to the order, *curia adviſare* till next term, and *Weſt* was bound by recogniſance to appear in the King's Bench the firſt day of next term. *Poſt.*

Startup *verſ.* Dodderidge.

S. C. 11 Mod. 60.
S. C. Salk. 657.
Lill. Ent. 19.

Modus to pay 2 *s.* in the pound, is void.
Ro. Abr. 378.
Hob. 192.
12 Mod. 563, 564.

MR. *Broderick* moved for a prohibition to a ſuit in the eccleſiaſtical court for tithes, upon this ſuggeſtion, *quod a tempore cujus, &c. habebatur talis antiquus uſus et conſuetudo de modo decimandi de et pro omnibus decimis quibuſcunque infra parochiam de W. et fines, limites, et loca decimabilia ejuſdem, quoquo modo creſcentibus, renovantibus, ſive contingentibus, viz. quod omnes et ſinguli proprietarii, eorum firmarii, vel occupatores aliquarum terrarum vel tenementorum infra parochiam de W. praedictam, &c. per totum tempus praedictum annuatim ſolverunt, et ſolvere conſueverunt, rectori eccleſiae parochialis de W. praedicto firmario ſive deputato rectoriae illius pro tempore exiſtenti* upon requeſt *ſecundum ratam* 2 *s. legalis monetae Angliae pro qualibet et utraque libra veri adaucti annualis redditus vel valoris, Anglice*, of the true improved yearly rent or value, *reſpectivorum terrarum et tenementorum infra parochiam de Whatlington praedictam, &c. et non ultra, in nomine, loco, ac in plena ſatisfactione, omnium et ſingularum decimarum quarumcunque annuatim creſcentium, &c. in vel ſuper reſpectiva terras et tenementa ſua infra parochiam de W. praedictam, &c.* which the ſeveral rectors, *&c.* have time out of mind accepted in full ſatisfaction, *&c.* of all tithes, and the cuſtom aforeſaid inviolably obſerved; yet the defendant knowing the premiſſes, has ſued the plaintiff in court *Chriſtian* for ſubtraction and non-payment of tithes of hay and wheat in and upon the lands and tenements aforeſaid in the tenure and occupation of the plaintiff, being in the year of our Lord 1696, growing, *&c.* and ſuppoſed by him to be ſubtracted and taken away, *licet* the plaintiff, *&c.* And a rule was made for the defendant to ſhew cauſe, why a prohibition ſhould not be granted. And now Mr. *Pengelly* moved, that the rule might be diſcharged. He ſaid, this *modus* was not good for the uncertainty, for the yearly rent or value is variable and utterly uncertain, and may change every year: but a *modus*, which is againſt common right, and goes in deſtruction of the original right of the parſon to take his tithes *in ſpecie*, ought to give the parſon a certain recompenſe for a certain duty, and otherwiſe the court cannot adjudge that it is ſuitable. And he cited the caſe of *Perry verſ. Soame*, 3 *Cro.* 139. where in a ſuit in the ſpiritual court for tithes of herbage of dry cattle, the defendant ſurmiſed for a prohibition, that every pariſhioner there, which had milch kine and calves under the number of ſeven, ſhall pay for every calf he rears a halfpenny, for every one he kills a penny, and for every one he ſells the tenth penny; and if he has ſeven or above, to give one in ſatisfaction of tithes of them, and of all dry cattle. And they held this to be an ill *modus*, becauſe if the pariſhioner had only dry cattle and no calves, he pays nothing, and it is uncertain, whether he ſhall have calves or not, and ſo it is an uncertain thing for a certain duty. And *Allen*'s caſe, 2 *Roll.* 265. *d. p.* 2. a preſcription to pay one penny or thereabouts for every acre of arable land in lieu of tithes, naught for the uncertainty. And 1 *Keb.* 612. *Took verſ. Ledgard*, a *modus* to pay 4 *s.* for every day's plowing of wheat, and 2 *s.* for every day's plowing of barley, is not good for the uncertainty; but if the *modus* had been, ſo much for every day's work, with an averment that it is certainly known, and the contents of it, it might be. And a note on the ſide of Dr. *Leyfield*'s caſe in *Hob.* 11. where the principal caſe was, a libel for tithes of ſtables, ſuggeſting a preſcription time out of mind for the parſons to have a *modus decimandi* for the houſes, ſtables, and buildings, *viz.* after the rate of the tenth part of the yearly rent or value of the ſame, and a prohibition was granted in the caſe, with directions to declare. And on the ſide of that caſe is this note, *viz.* that *modus decimandi* can hardly ſtand to riſe and fall according to the rent by preſcription. And though ſuch a *modus* be allowed to be good in Dr. *Grant*'s caſe, yet that caſe is made a queſtion in 1 *Roll.* 642. *n.* 1. and the authority of Dr. *Leyfield*'s caſe oppoſed to it. Secondly, this *modus* is void, becauſe it gives room to the pariſhioner to defraud the parſon, for it is in the power of the pariſhioner to take a great fine, and reſerve a ſmall rent, and ſo the parſon ſhall have nothing. For the cuſtom is to pay 2 *s. per* pound *veri adaucti annualis redditus vel valoris*, *Anglice*, of the true improved yearly rent or value, *reſpectivorum terrarum et tenementorum*: alſo the parſon cannot come to the certain knowledge, what rent was reſerved. And he cited the caſe of *Wilſon verſ. le Eveſque de Carliſle*, a *modus* for tithe wool, that if the pariſhioner had under ten fleeces, that he ſhould pay one penny to the parſon for each, in lieu of tithes; and if he had more, that he ſhould deliver to the parſon the tenth part of his wool upon his conſcience without fraud or covin, *ſine viſu vel tactu* of the parſon; and held to be ill, becauſe it lays the parſon open to be defrauded.

And

And my lord *Hobart* in his report of the caſe ſays, that it is a weak anſwer to ſay, that if it be not a juſt tenth, the parſon may refuſe it, and ſue for his due: for firſt, he hath no means to be aſſured whether it be true or not, ſo his ſuit may be cauſeleſs: ſure he may be it may be fruitleſs. *Hob.* 107. 1 *Roll.* 647, 648. *p.* 5. Secondly, the ſuggeſtion in this caſe is not ſufficient, becauſe it is not averred, what was the value of the land, nor what rent was paid for it, as it ought to have been; for it is only ſaid, *licet* the plaintiff *obtulit et paratus fuit et exiſtit ad ſolvendum praedictam ratam* 2 *s. pro qualibet et utraque libra veri adaucti annualis redditus vel valoris terrarum et tenementorum praedictorum*, &c. without ſaying how much that was, or what ſum was tendered; and for this the ſuggeſtion is ill. For in every ſuggeſtion of a *modus* the party ought to aver the performance of the conſideration, or ſomething which tantamounts, and ſo bring his caſe within the compaſs of the cuſtom, by averring that he has done as the cuſtom requires. And for that he cited 1 *Roll. Rep.* 38, 39, 62. 3 *Cro.* 139. (Note, the caſe in *Rolle* is againſt the objection, and takes the diſtinction, where the *modus* extends to ſuch of the pariſhioners as keep cows, &c. there the plaintiff muſt ſhew, that he keeps cows: but where the *modus* is to pay money, &c. in lieu of tithes, there the plaintiff need not allege payment, &c. becauſe it is a good ground for a prohibition, that the parſon ſues for tithes in kind; whereas a *modus* ought only to be paid, and not tithes in kind, and conſequently the parſon ought to ſue for the *modus*. 1 *Roll. Rep.* 63. *S. C.* And the caſe of 3 *Croke* well underſtood, turns upon the ſame diſtinction.

Mr. ſerjeant *Broderick* ſaid, that the value of land was certain enough, and made the *modus* certain enough, according to the rule, *id certum eſt quod certum reddi poteſt*; that the value of land was ſuch a certainty as the law took notice of, and therefore where a man demiſed a chamber, paying for it yearly ſo much as it ſhould be reaſonably worth, debt was brought for the rent, with an averment that the leſſee held the chamber from ſuch a time to ſuch a time, and that for that time it was reaſonably worth ſo much. *Stiles* 397. *Farmer* and *Lawrence*. And in powers in ſettlements for tenants for life to make leaſes, it is a common *proviſo*, that the beſt improved rent, that may be reaſonably had for the ſame, be reſerved. And 2 *Cro.* 671. *Page*'s caſe, it was held to be a good cuſtom of a manor, that the land was demiſable for twenty-one years, paying three years value. So 2 *Leon.* 117. a tenure was by the ſervice *ſolvendi poſt quamlibet vacationem ſive alienationem* the value of the annual profits of the lands. So is the caſe of *Titus verſ. Perkins*. the cuſtom of a copyhold manor was for the tenant upon admittance to pay to the lord for a fine, *tantam denariorum ſummam quantam* the tenements *valebant per annum tempore talis admiſſionis*; 3 Mod. 132.

admiſſionis; and adjudged by the Common Pleas, and affirmed upon a writ of error in the King's Bench, to be a good cuſtom, becauſe it is certain enough, and iſſuable, and triable by the country, if it be of ſuch a yearly value or not, 3 *Lev.* 255. 3 *Mod.* 132. And that, as it is certain enough, ſo of conſequence it is well enough known. He ſaid, that the principal caſe of Dr. *Leyfield* was for him; and that as to the marginal notes, they were not to be regarded, being added as he ſuppoſed by the editor of the book, but were not my lord *Hobart*'s, many of them being of matters which happened after his death. He ſaid, that Dr. *Grant*'s caſe was in point, where the caſe was, a libel by Dr. *Grant* in the ſpiritual court, alleging a cuſtom for every pariſhioner, *&c.* occupying, *&c.* a manſion-houſe, *&c.* to pay quarterly *nomine et loco decimarum ſuarum juxta ratam cujuſlibet* 20*s.* rent *per annum ex qualibet hujuſmodi domo*, *&c.* 2*s.* and upon a ſuggeſtion of a diſcharge by the 31 *Hen.* 8. a prohibition was granted, and upon traverſe of the ſuggeſtion, there was a verdict for *Grant*, and upon motion by *Grant* for a conſultation, it was oppoſed, becauſe the cuſtom was againſt common right, no tithes being to be paid for houſes, and therefore void. But a conſultation was granted, becauſe this might have a lawful commencement; for this *modus decimandi* might have been paid time out of mind for all the tithes of the land, upon which the houſes were built, and the lands being built after would not take away the right of the parſon. 11 *Co.* 15. *b.* He ſaid, that though according to this *modus* the parſon might have more one year, and leſs another, yet that would not make it void; and for that he compared it to the caſe in *Co. Litt.* 96. *a.* a tenure to ſheer all the ſheep depaſturing within the lord's manor, that is certain enough, although the lord hath ſometimes a greater number there and ſometimes a leſs, being referred to the manor, which is certain.

Holt chief juſtice was of opinion upon the firſt ſtirring this caſe, that the *modus* was not good; and that upon the face of it, it appeared plainly to be nothing but an agreement between the parſon and the pariſhioners. If it were an ancient compoſition with the conſent of the patron and ordinary, before the 13 *Eliz. c.* 10. that would bind the parſon; but then that was no ground for a prohibition, being it might be pleaded and tried below in the eccleſiaſtical court. That there had been formerly prohibitions granted upon ſuggeſtions of compoſitions, and that there were old caſes to that purpoſe, but that it had been held otherwiſe ſince; which *Powell* agreed. But if it were a compoſition made ſince 13 *Eliz.* it was void. He ſaid, that a compoſition time out of mind was a *modus*. Taking it to be a *modus*, it would be hard to maintain it to be good; taking it as to the yearly rent, it could not be good, becauſe

No prohibition to be granted on old compoſitions, but they ought to be pleaded below.

Compoſition ſince 13 Eliz. is void.

3 Cro. 159. Lady Greſham's caſe.

becauſe the land might be unlet, and then no tithes would be paid; or it might be let at an under-rent with a fine, and then the parſon would be cheated. And as to the value, in caſe the lands ſhould be unlet, who ſhould determine what that was. He ſaid, that if the *modus* were void, it was in vain to grant a prohibition to try it, becauſe, though it ſhould be found for the plaintiff, yet the court muſt grant a conſultation. And to that purpoſe he remembered the caſe of *Dix verſ. Woodſon* adjudged *Hil.* 8 *Will.* 3. *B. R.* where a prohibition was granted upon a ſuggeſtion of a cuſtom within the hundred of *D.* to pay no tithes for agiſtment of barren cattle, and in a declaration upon the prohibition iſſue was joined upon the cuſtom, and found for the plaintiff, and notwithſtanding, becauſe the cuſtom was void in law, a conſultation was awarded. And he remembered the diſtinctions taken in that caſe, about a cuſtom *in non decimando.* He ſaid, that Dr. *Leyfield*'s caſe was a full caſe againſt the *modus*, for that the parſon might ſue in the Spiritual Court for the cuſtomary duty; which the reſt of the judges agreed. As to the exception to the ſuggeſtion, he ſaid, it was well enough, for it was enough for the plaintiff that came for the prohibition, to bar the defendant of his ſuit in the court below, which is ſufficiently done by the ſuggeſtion of this *modus*, if it be good; for then the parſon ought not to ſue for tithes in kind, but for the *modus.* But the laſt time the caſe was ſtirred, after hearing Mr. ſerjeant *Broderick*, he was for granting a prohibition, and puting the plaintiff to declare, and the defendant might demur, and the point be determined judicially. I did not well hear his reaſons, but I apprehended them to be, becauſe the value of land was a thing well known, and conſequently certain enough: that if ſuch a compoſition had been made before 13 *Eliz.* and confirmed, it would have bound the ſucceſſors: that as the parſons might by cuſtom have tithes of things, of which they had no right to have any by the common law, as fiſh, *&c.* ſo cuſtom might model or reſtrain their tithes, or alter them.

But the other three judges were againſt granting a prohibition, becauſe this was a void *modus*, being an uncertain recompenſe for a certain duty. And therefore, though it might be certain enough for a tenure or contract, yet it was not ſo certain, as that in conſideration of that, they could adjudge the parſon ought to be barred of his tithes in kind. Alſo they thought this unreaſonable, becauſe the *quantum* of the rent was not in the conuſance of the parſon, and ſo he could not know what to demand or ſue for, and was expoſed to be cheated; and for the value of the land, they thought it unreaſonable, that the parſon ſhould be put under a neceſſity every year of trying that, upon any difference between him and his pariſhioners, upon the peril of coſts. They ſaid, that it was plain

this

this was an agreement between the pariſhioners and ſome of their former parſons, and now they had a mind to turn this into a *modus*; but that it could not be.

Powell juſtice ſaid, there was no caſe like this in the law, where a prohibition had been granted upon ſuch an uncertain *modus*. *Powys* juſtice ſaid, that the *modus* was too high, *viz.* two ſhillings in the pound, and that while he ſat in the Exchequer, if a *modus* were high, they always diſallowed it; your ancient *modus*'s being very low, one penny, or two pence, *&c.* And the rule to ſhew cauſe was diſcharged by the three judges againſt the chief juſtice. The ſame motion was made in the Common Pleas in *Trinity* term following by ſerjeant *Weld*, and oppoſed by ſerjeant *Parker*. And the chief juſtice, and *Nevill*, and *Blencowe* held the *modus* void; but *Tracy* gave no opinion, it not being neceſſary. And in a caſe by *Engliſh* bill in the Exchequer between the ſame parties, the *modus* was decreed to be void by all the barons. In conſideration of which judgments in the King's Bench and Exchequer, the three judges of the Common Pleas ſaid, they would not have granted a prohibition, though they had not thought it ſo clearly a void *modus*. *Ex relatione m'ri Pengelly.*

Regina *verſ.* Wigg.

S. C. Salk. 460. Indictment for a nuſance concluding with *contra formam ſtatuti.*

THE defendant was indicted for keeping of hogs here in town, in ſome of the back ſtreets, *contra formam ſtatuti*. And Mr. *Whitaker* moved to quaſh the indictment, becauſe by the 2 *Will. & Mar. ſeſſ.* 2. *cap.* 8. *ſect.* 20. there was a particular penalty appointed for this offenſe, *viz.* forfeiture of the ſwine to the uſe of the poor of the pariſh where they are kept, and therefore an indictment would not lie, at leaſt not upon the ſtatute as this was, by concluding *contra formam ſtatuti*. And he cited the caſe of the *King* and *Watſon*, where it was adjudged, that an indictment would not lie for keeping an alehouſe without licence, becauſe there is a particular penalty appointed by act of parliament.

Rex verſ. Watſon, Salk. 106.

Holt and the court agreed the caſe of the *King* and *Watſon*, becauſe the keeping an alehouſe without licence was no offenſe at common law; and they took the difference, where a new penalty is appointed by act of parliament for a matter that was an offenſe at common law, there you may either take that remedy which is given by the act of parliament, or proceed by way of indictment as you might have done before: and therefore keeping of ſwine in the city, *&c.* being a nuſance at common law, the proſecutor is at liberty either to proceed by way of indictment for the nuſance, or to

See 2 Ro. Abr. 140, 141. 9 Rep. 57, 58. Palm. 536. Hutt. 136. 1 Bulſt. 115. Bro. Action ſur le Caſe 123.

to take that more expeditious remedy, which is given him by the act of parliament, by ſale of the ſwine. But where the ſtatute makes the offenſe, there you muſt purſue that. As to the *contra formam ſtatuti*, the offenſe being an offenſe at common law, that was but ſurpluſage, and would do no harm. *Ante*, 149. But beſides they ſaid, that if the defendant had any hopes in his exception, he ſhould demur; for that it was a rule, never to quaſh indictments for nuſances.

Thornborow *verſ.* Whitacre.

S. C. 6 Mod. 305.
3 Salk. 97.
Aſſumpſit in conſideration of 5 *l.* to deliver two rye corns next *Monday*, and double every ſucceeding *Monday* for a year.
1 Keb. 569.
1 Vent. 267.

ACTION upon the caſe, in which the plaintiff declares upon an agreement between the plaintiff and defendant, that the defendant in conſideration of 2 *s.* 6 *d.* in hand paid, and of 4 *l.* 17 *s.* 6 *d.* to be paid upon the defendant's performing the agreement of his part, *deliberaret* to the plaintiff two grains of rye corn on *Monday* the 29 of *March*, and four grains of rye corn on *Monday* then next following, and eight grains of rye corn on *Monday* next after the *Monday* laſt mentioned, and ſixteen grains of rye corn on *Monday* next after the ſaid third *Monday*, and double the number of grains of rye corn, *viz.* thirty-two grains of rye corn on *Monday* next after, being the fifth *Monday*, *et progreſſu ſic deliberaret quolibet alio die lunae ſucceſſive infra unum annum ab eodem* 29 *Martii bis tot grana ſecalis quot die lunae proximo praecedente reſpective deliberanda forent, &c.* the defendant demurs to the declaration.

Mr. *Salkeld* to maintain the demurrer ſaid, that the agreement appeared upon the face of it to be impoſſible, the rye to be delivered amounting to ſuch a quantity, as all the rye in the world was not ſo much, and being impoſſible was void, and the defendant not bound to perform it. He ſaid, that there were three ſorts of impoſſibilities; *impoſſibilitas legis*, ſuch are all immoral actions, as to murder *J. S. &c.* Secondly, *impoſſibilitas rei*, ſuch as are all natural impoſſibilities, which cannot be done from the nature of the thing; Thirdly, *impoſſibilitas facti*, *viz.* ſuch an impoſſibility, as though there is nothing in the nature of it impoſſible to be done, yet it is impoſſible for a man to do, as to touch the heavens, or go to *Rome* in a day. And a covenant or condition to do any of theſe impoſſibilities is void. And he mentioned the caſe in *Lit. ſect.* 129. that though relief be by law to be paid immediately upon the death of the tenant, yet if the relief be a roſe, or a buſhel of roſes, if the tenant die in winter, the lord ſhall not diſtrain for his relief, till the ſeaſon that roſes come; becauſe *lex non cogit ad impoſſibilia*; and the law takes notice that roſes cannot be kept, but otherwiſe of wheat, *&c.* which may. Note alſo, theſe other caſes 40 *Edw.* 3. 6. *a. per Finchden:* if a man be bound by his deed to do things which cannot be done by impoſſibility (although it was his folly) yet the deed is void; but a man is liable to do as far as can be done by the power of a man. And the principal caſe there, which is alſo cited 1 *Co.* 98. *a.* and abridged *Fitz. Cov.* 16. and is put in *Perkins, ſect.* 738. that if a leaſe be made of a wood, and the leſſee covenants to leave the wood in as good plight as it was at the time of the leaſe made, and during the term the wood is blown down by a ſudden tempeſt, the leſſor ſhall not have an action of covenant: otherwiſe in caſe of a like covenant upon a leaſe of a houſe, and the houſe is blown down by a tempeſt during the term. For in the laſt caſe it is in the leſſee's power to have the houſe in as good plight as it was at the time of the demiſe; and for that reaſon, though it was blown down by a tempeſt, yet the leſſee muſt rebuild it, becauſe it was his own agreement: but in the firſt caſe it is impoſſible, becauſe the leſſee cannot make the trees grow again as they were before; and therefore by reaſon of the impoſſibility, he is excuſed from his covenant. *C. L.* 206. *b.* a bond, condition that if the obligee go from *Weſtminſter* to *Rome* within three hours, that the bond ſhall be void, the bond is abſolute, and the condition void. So of a feoffment with the like condition.

Fitzh. Covenant 16.

Dier 33. a. Allen 27.

Holt chief juſtice. Suppoſe *A.* for money paid him by *B.* will undertake to do an impoſſible thing, ſhall not an action lie againſt him for not performing it; as in caſe of a bond with ſuch an impoſſible condition, the bond is ſingle. So where a man will for a valuable conſideration undertake to do an impoſſible thing, though it cannot be performed, yet he ſhall anſwer damages.

And as to the impoſſibility the court ſaid, it was only impoſſible with reſpect to the defendant's ability, which was not ſuch an impoſſibility as would make the contract void. And the chief juſtice ſaid, the words, *quolibet alio die lunae*, muſt be conſtrued what we ſay in *Engliſh*, every other *Monday*, that is, every next *Monday* but one, and that would bring the contract nearer to the defendant's ability of performance. And he ſaid, that *impoſſibilitas rei et facti* were all one.

Powell ſaid, that though the contract was a fooliſh one, yet it would hold in law, and that the defendant ought to pay ſomething for his folly.

Upon this occaſion the caſe in 1 *Lev.* 111. *James verſ. Morgan* was remembered, which was an agreement to pay for a horſe a barley corn a nail, for every nail in the horſe's ſhoes, and double every nail, which came to 500 quarters of barley; and at a trial before *Hide* chief juſtice the jury gave the plaintiff the value of the horſe in damages, and he had his judgment: which caſe was admitted of all hands to be good law, and did, as the counſel for the plaintiff urged, rule this. But Mr. *Salkeld* ſaid, that differed from this, becauſe that was poſſible to be performed, though it was an ill bargain, but this impoſſible.

The counſel for the defendant perceiving the opinion of the court to be againſt his client, offered the plaintiff his half crown and his coſt, which was accepted of, and ſo no judgment was given in the caſe.

Kinſman *verſ.* Crooke.

The depoſitions in Chancery by a man who could then ſee, but now is blind, and which he now referred to, are permitted to be read in evidence.

IN a trial at bar *May* 14, 1705. of an iſſue directed out of Chancery, to try if a leaſe was made in purſuance of a power, which was to make leaſes for the beſt rent that could be got: a witneſs named *Ruſhley* was examined in Chancery concerning the value of the land, having been collector of the rents; and at the time of his examination in Chancery he referred to and conſulted his rental. But now at this trial he was become blind, and therefore his examination in Chancery and depoſitions there were admitted to be read; becauſe if he had been ſo ill as that he could not have come to the trial, they had been good evidence, and now he is diſabled to conſult the rental by the act of God, and therefore the ſame reaſon holds. He alſo gave evidence of what he remembered beſides.

Secondly, 6000 *l.* was deviſed to *A.* and *B.* in truſt to purchaſe lands to be ſettled on *Francis Goſton* for life, with remainder to his ſons in tail in contingency, remainder to *William Goſton* for life, with contingent remainder to his ſons in tail, remainder to *Harold Kinſman* in fee, with power to make leaſes, *ut ſupra*, &c. *Francis Goſton* made a leaſe to *Crooke*, rendring 170 *l. per annum* rent, and died; and the queſtion was, whether the value was 270 *l. per annum* at the time of the purchaſe or not. My lord *Gorges* and Mr. *Latin* the truſtees, were produced as witneſſes to prove it. And it was objected, that they were not witneſſes, becauſe *Kinſman* the remainder-man not joining in the purchaſe, and who now conteſted the leaſe, if the lands were not of that value, it would be a breach of truſt in the truſtees, and they would be liable in Chancery to make ſatisfaction to the *ceſtuy que truſt*, and therefore they were to give evidence to excuſe themſelves. *Sed non allocatur per curiam*, and they were ſworn and gave evidence.

Trin. Term

4 Annae Reginae, B. R. 1705.

Regina *verſ.* Beſt.

S. C. Salk. 174.
S. C. 6 Mod. 185.
An indictment for conſpiring to charge a man as a father of a baſtard, and it is not averred, he was not the father, and good.

INdictment. That the defendant and three others, *exiſtentes perſonae malorum nominum, &c. et compaſſantes deviſantes et inter ſe conſpirantes* how to cheat the Queen's ſubjects of their money, &c. 18 of *December*, the ſecond year of the Queen, *falſo illicite nequiter et aſtute machinantes intendentes et inter ſe conſpirantes quendam P. P. non ſolum de pecuniis ſuis decipere et defraudare, verum etiam ipſum P. P. de bono nomine fama ſtatu et credentia ſuis deprivare, et eundem P. in maximum ſcandalum, contemptum, et infamiam, apud omnes ligeos et ſubditos* of the Queen *inducere*, the ſaid day *apud London, viz.* ſuch a pariſh and ward, *falſo, illicite, deceptive, malitioſe, et ex iniqui lucri cauſa inter ſe conſpiraverunt, machinaverunt, conſultaverunt, et agreeaverunt, falſo, injuſte, nequiter, et diabolice ad oneraudum et accuſandum praedictum P. eſſe patrem infantis, unde praedicta E. E.* one of the defendants *tunc gravida fuit: et illi adtunc et ibidem praetendebant, et conſpiratione inter ſe ſic ut praefertur praehabita, adtunc et ibidem vi et armis, &c. falſo et malitioſe affirmabant, et quilibet eorum adtunc et ibidem affirmabat falſo et malitioſe, quod idem P. tunc nuper praeantea habuiſſet carnalem cognitionem corporis ipſius praefatae Eliz. E. et ipſam praefatam E. E. carnaliter cognoviſſet, et quod ipſe praefatus P. fuit pater praetenſi infantis, de quo praedicta E. E. tunc gravida fuit, ut ipſa aſſeruit et praetendebat: ac quod pro ulteriori executione praemiſſorum iidem* the defendant *Beſt* and the others *adtunc et ibidem inter ſe agreeaverunt et concluſere, quod ipſe praedictus B. ad praefatum P. accederet, et eundem P. accuſaret, quod ipſe praedictus P. tunc nuper praeantea habuiſſet carnalem cognitionem corporis praefatae E. E. et ipſam E. E. carnaliter cognoviſſet, et quod ipſe praefatus P. fuit pater dicti praetenſi infantis, de quo praetendebant ipſam praedictam E. gravidam eſſe. Et juratores praedicti ſuper* *ſacramentum ſuum praedictum ulterius dicunt, quod praedictus Beſt in executione praemiſſorum, ac ſecundum praedicta conſpirationem, conſultationem, et agreamentum inter ipſos Beſt et alios defendentes, ut praefertur, praehabita, poſtea ſcilicet,* the ſaid day and year and place, *ac in diverſis aliis locis infra, &c. vi et armis, &c. falſo, nequiter, malitioſe, diabolice, et ex iniqui lucri cauſa, in auditu quamplurimorum ligeorum et ſubditorum* of the Queen *fidedignorum, onerabat et accuſabat praedictum P. quod ipſe praefatus P. tunc nuper praeantea habuiſſet carnalem cognitionem corporis praefatae E. et ipſam E. carnaliter cognoviſſet, et quod ipſe praefatus P. fuit pater dicti praetenſi infantis, de quo affirmabant praedictam E. tunc gravidam eſſe: ad grave damnum, ſcandalum, et defamationem praefati P. in peſſimum et pernitioſum exemplum omnium aliorum in conſimili caſu delinquentum, et contra pacem dictae dominae reginae nunc coronam et dignitatem ſuas.* The defendants demurred.

Mr. ſerjeant *Weld* for the defendant took exception: firſt, that it did not appear, that any thing came of this conſpiracy, and bare conſpiring to do an ill thing by another is not criminal, unleſs the thing be done; for it is the damage the party receives by the conſpiracy, that makes it criminal: ſecondly, that it did not appear, that the facts the defendants conſpired to charge the proſecutor with was falſe, and a conſpiracy to charge a man with a fact that is true, is not puniſhable; and therefore the indictment ought to have ſaid, the proſecutor was not the father of the child; and for the adverbs of falſly, unjuſtly, wickedly, and deviliſhly, which were inſerted in the indictment, thoſe went to the conſpiracy, and the defendants might falſly conſpire to charge the proſecutor with a fact that was true; as if they had promiſed him not to do it: and he reſembled this to the caſe of perjury, where it is not enough to ſay, a man did *falſo, &c.* ſwear, but the indictment muſt lay, that the fact was falſe: thirdly, the woman, upon whoſe body the child was ſuppoſed to be begotten, was laid in the indictment by ſeveral ſurnames; and he ſaid, may be ſhe might be the wife of the proſecutor, and ſhe might go by his name among the reſt of her *alias*; and this he ſaid was the rather to be intended, becauſe they charged the proſecutor with being *pater*, which he could not be to a baſtard child: fourthly the indictment ought to have laid that the child was like to become chargeable to the pariſh; for unleſs the proſecutor by this accuſation were like to be ſubjected to ſome penalty, the indictment will not lie: the indictment here is nothing, but that the defendants conſpired to tell the proſecutor, that he was the father of the child *E. E.* was big with.

9 Co. 56. b.

The ſecond exception was ſtirred twice before in *Hilary* term, and ſeemed to ſtick much with the court; and they ordered precedents to be ſearched. And for the Queen were cited the caſes of the Queen againſt *Kimberly*, 1 *Lev*. 62. 1 *Sid*. 68. an indictment for conſpiring to charge *J. S.* for having begot a baſtard of the body of *T. G.* to the intent to extort money out of him; and held good, and yet no averment that the proſecutor was not the father. And the King againſt *Armſtrong*, 1 *Ventr*. 304. an indictment in like manner for conſpiring to charge one for the keeping of a baſtard child, and thereby alſo to bring him to diſgrace. And in both thoſe caſes a conſpiracy without any further act done was held to be indictable.

Holt and *Gould* ſaid, that though thoſe caſes were debated, yet this exception was never taken in either of them.

9 Co. 56. b.

Now this *Trinity* term the court gave judgment for the Queen, for they ſaid, the defendants were charged at leaſt with a conſpiracy to charge the proſecutor with fornication. And though that was a ſpiritual defamation, yet the conſpiring to do it was a temporal offenſe and indictable, and the conſpiracy was the *git* of the indictment. And the chief juſtice ſaid, that confederacies were one of the articles in the commiſſion of *oyer*. And they ſaid, that *E. E.* could not be intended to be the proſecutor's wife, and eſpecially, as *Powys* ſaid, becauſe in the indictment ſhe was named ſpinſter.

Upon ſome of the arguments in this caſe, the exception in the caſe in 5 *Co*. 122. *Long*'s caſe, of *dans* was cited, for which the indictment there was held inſufficient. And *Holt* chief juſtice ſaid, that by his conſent they would not be ſo nice again, and that there was not a caſe in the law like that. And *Powell* ſaid, that *dans* did tantamount to *et dedit*. And *Holt* and *Powell* agreed, that the caſe of perjury differed from this caſe, becauſe unleſs the matter that is ſworn is falſe, it is not perjury. And it was ſaid, that the proſecutor had been adjudged by two juſtices to be the reputed father of the baſtard *E. E.* was big with. And *Holt* ſaid, if the defendants had pleaded that conviction, it would have been a good bar to the indictment. *Powell* ſaid, that *Weſt*'s precedents was a petty judicious book; but *Holt* ſaid, that there were many bad precedents in it.

Conviction before two juſtices a good bar.

Ante, 902.

Queen *verſ.* the inhabitants of Stretford.

A Writ of error of a judgment given at the ſeſſions of the peace for the county palatine of *Lancaſter* againſt the defendants for a nuſance. And the indictment was, *quod alta regia via*, &c. 11 *Januarii primo*, *fuit et adhuc eſt valde lutoſa et tam anguſta ita quod* the Queen's people cannot paſs without danger of their lives, &c. and the inhabitants of *Stretford* had time out of

S. C. Rep. Q. A. 56.

That a way was 11 *January valde lutoſa et tam anguſta*, that people could not paſs.

mind repaired it, and ought to repair it as often as need was. The indictment was found at a ſeſſions held the 22d of *July* the ſecond of the Queen. The defendants pleaded not guilty, and a *venire facias* was awarded, returnable at the next quarter-ſeſſions, and upon the return of the *venire facias* only part of the jury appeared, and thereupon a *tales de circumſtantibus* was awarded, and the principal panel and *tales* tried the cauſe, and the defendants were found guilty and fined 40 *l.* The plaintiffs in error aſſigned the general errors.

Mr. *Raymond* for the plaintiffs in error took exception, that it appeared upon the indictment, that the time the way is laid to be *foeda et lutoſa* is the 11th of *January*, which is in winter, and it is no offenſe for the highways to be dirty in winter: ſecondly, that the matter, in which the nuſance ſeemed to be aſſigned by the indictment, was that the way was *tam anguſta ita quod* the Queen's people could not paſs; and that the pariſh was not indictable, becauſe the ways were narrow; but there was a particular power veſted in the juſtices of peace by act of parliament, to widen them, but the pariſh had no power to widen them.

1 Ro. Abr. 390. (A.) pl. 1.

Holt chief juſtice and *Powell* held the indictment naught, for want of ſaying, that the way was out of repair. And *Powell* ſaid, that the ſaying it was *tam anguſta* that the people could not paſs, was repugnant to its being *alta regia via*; for if it had been ſo narrow, people could never have paſſed there time out of mind. And *Holt* chief juſtice cited *Duncomb*'s caſe, that incloſing the land next adjoining to the highway would draw upon the owner of the land the charge of repairing the highway.

Cro.Car. 366. *A.* incloſing land nigh the highway muſt repair the highway.

A *tales* not grantable on a *venire facias.*

The chief juſtice took another exception, that here was a miſtrial, for a *tales de circumſtantibus* cannot be granted upon the *venire facias*. And the judgment was reverſed.

Darby *verſ.* Anely.

S. C. Salk. 660.

Variance, the writ of error was *loquela per billam*, and the record removed by writ of privilege.

A Writ of error was brought of a judgment in the Common Pleas, and the writ of error was, *quia in recordo, &c. cujuſdam loquelae quae fuit in curia, &c. per billam*; and the record returned was, the defendant *attachiatus fuit per breve, &c. de privilegio e curia hic emanans ad reſpondendum* the plaintiff, one of the attornies of the court of Common Pleas, *juxta libertates, &c. de placito tranſgreſſionis ſuper caſum, &c. et unde* the plaintiff *in propria perſona ſua queritur, &c.* And a motion was made by Mr. *Eyre* to quaſh this writ of error for the variance, the writ of error being of a judgment in a plaint by bill, and the record returned being a record of a judgment upon a writ of privilege. And it was alleged, that attornies had two ways of proceeding in the Common Pleas, either by writ of privilege, or by bill; and that thoſe proceedings were different. The caſe of *Covell verſ. Deval*, 2 *Lut.* 1634, 1637. was cited, where an attorney brought an *indebitatus aſſumpſit* againſt an executor, and the entry was, that the defendant *attachiatus fuit per breve dominae reginae de privilegio, &c.* as here; and the defendant pleaded a bond to a third perſon ſtanding out, *quodque* the defendant *nulla habet bona ſeu catalla quae fuerunt* his teſtators *tempore mortis ſuae in manibus ſuis adminiſtranda, nec habuit die exhibitionis billae* of the plaintiff, inſtead of *brevis*, and that was held an incurable fault. And he ſaid the writ of error in the caſe of *Thurſton verſ. Slatford*, which was an *indebitatus aſſumpſit* by writ of privilege, and was *loquela quae fuit in curia noſtra, &c. per breve noſtrum.* And ſo is the entry in 1 *Lut.* 905. *b.*

Now ſee Stat. 5 Geo. 1. c. 13. ſec. 1. whereby theſe variances are amendable.

Lutw. 905, 1634, 1637.

And for theſe reaſons the court quaſhed the writ of error.

Foy *verſ.* Liſter.

A Prohibition was granted in this cauſe in *Michaelmas* term laſt to a ſuit in the eccleſiaſtical court for tithe milk, upon a ſuggeſtion of a *modus* to pay from *April* to *November* the tenth day's milk once ſkimmed made into cheeſe, in lieu of all tithe milk, with intent to have the cuſtom tried, and that the queſtion might be judicially determined. For the plaintiff in the prohibition were cited the caſes of *Auſtin* and *Lucas*, 3 *Cro.* 609. *Moore* 909. a *modus* to pay the tenth cheeſe made from *May* day until the firſt of *Auguſt*, in recompenſe of all tithe milk for the whole year, is good, becauſe of the labour of the pariſhioner, which goes to the making the milk into cheeſe. And *Latch* 226. a *modus* to be excuſed of tithes of the odd ſheaves of corn, for making the reſt into ſhocks.

S. C. Salk. 554. Vid. 6 Mod. 261. 1 Mod. 311. 2 Salk. 656. pl. 3. Ray. 278. 6 Mod. 261. 2 Inſt. 662.

Modus to pay from *April* to *November* the tenth day's milk once ſkimmed made into cheeſe.

Mr. *Eyre* for the defendant argued, that the labour of the pariſhioner here was imployed about the leſs valuable part of the tithe, and that would diſtinguiſh this from all the caſes. For though he admitted it was a good *modus*, in conſideration that the pariſhioner wound up the tenth fleece of his wool at his ſheering for the parſon, to be diſcharged of tithes of neckings, or the dirty locks; or in conſideration that the pariſhioner made the graſs into hay for the parſon, to be diſcharged of tithes of the after-mowth, yet it would not hold *vice verſa*.

1 Roll. 646. n. 17, 648, 649. D.

Conſultation for not proving the ſuggeſtion within ſix months.

Now this term Mr. *Eyre* came and moved the court for a conſultation, becauſe the plaintiff in the prohibition had not proved his ſuggeſtion within ſix months, according to the ſtatute of 2 *Ed.* 6. which ſix months he ſaid were to be accounted from the *teſte* of the writ of prohibition, which in this caſe was the 25th of *November*, and conſequently the time of proof expired the 25th of *May*. The chief juſtice upon the motion doubted if this clauſe extended any farther than prohibitions to ſuits for predial tithes, and upon that the counſel were directed to look farther into it. And after upon motion by Mr. *Eyre* in the abſence of the chief juſtice, it was agreed by the counſel for the plaintiff in the prohibition, and by the court, that the act extended to prohibitions to ſuits for ſmall tithes as well as great. *Watſon* 489. *Yelv.* 102. 2 *Keb.* 134. and the court granted a conſultation. And Mr. *Eyre* moved, that it might be part of the rule, that they ſhould have their double coſts and damages according to the ſtatute. But the court ſaid, that could not be made part of the rule, but that they muſt have them of conſequence. Mr. *King* for the plaintiff in the prohibition cited the caſe in *Moore* 573. that the time of ſix months given by the 2 *Edw.* 6. to prove the ſuggeſtion, ought to be intended ſix months in term-time, and that the vacation ſhould be no part of the time, and that conſequently the time in this caſe was not expired. But the court over-ruled him, and ſaid, it had been adjudged contrarywiſe ſince.

Noy 30. and the time ſhall be reckoned by calendar, and not lunar months. Hob. 179. Litt. Rep. 19.

N. B. For precedents of entries of proofs of ſuggeſtions, ſee *Co. intr.* 462, 463, 464.

Precedents of writs, and entries of awards of conſultations for default of proving the ſuggeſtion, ſee *Aſhton*'s *intr.* 444, 445. Same entry *Book of judgments* 97. and *Theſaurus brev.* 80. But note, that the entry in *Aſhton* is ill, in the award of the coſts; for there is only an aſſeſſment of them, *viz. ideo conſideratum eſt* that the defendant in the prohibition *recuperet, &c.* And ſo is *Yelv.* 119. 1 *Brownl.* 98. *S. C.*

Scawen *verſ.* Garrett.

S. C. Salk. 545.
Lil. Entr. 3.

Plea of privilege of attorney of the Common Pleas need not ſay, *prout patet per recordum.*

THE defendant pleaded his privilege of attorney of the Common Pleas, to an action brought in this court, and pleaded it without producing any writ of privilege. Mr. *Ward* took exception to the plea, that where the defendant laid himſelf to be attorney, he did not ſay, *prout patet per recordum*; and yet attorney or not, muſt be tried by the record.

Farr. 97. 6 Mod 114. 5 Mod. 310. 1 Salk. 1.

Mr. ſerjeant *Broderick* ſaid, that the precedents were all otherwiſe, and that they need not aver it by the record; becauſe the matter of record was not the only matter in iſſue, but alſo the identity of the perſon.

The court inclined againſt the exception, but gave day over to ſearch precedents. And now Mr. ſerjeant *Broderick* ſaid, he could not find any ancient precedents; but there were ſome in ſome later books, and they were all without. As 1 *Brown. intr.* 2. *Thompſ. intr.* 4. *Clift's intr.* 570. And he ſaid, that the plaintiff by his demurrer had confeſſed, that the defendant was an attorney.

Brevia Jud. 169, 172.

Holt chief juſtice ſaid, that a demurrer confeſſed nothing but what was well pleaded. They all agreed, that attorney or not, was triable by the record.

The chief juſtice ſaid, there were two ways of pleading this matter, ſo as it could not be denied, *viz.* with a *profert* of a writ of privilege, or of an exemplification of the record of his admiſſion of attorney. Or elſe it may be pleaded as it is here. And as to the averment by the record, it is never pleaded as a matter of record, which is always pleaded with time, *viz.* of ſuch a term, *&c.* but never any plea was ſeen, that the defendant was of ſuch a term admitted an attorney, *&c.* He ſaid, that in an avowry for a fine in a court-leet, you never ſay, *prout patet per recordum.* He ſaid, that the plaintiff in this caſe might have pleaded *nul tiel record.* The exception was over-ruled.

Two ways of pleading privilege of attorney ſo as it cannot be denied.

Co. intr. 570, 571.

Avowry for a fine in a court-leet does not ſay, *prout patet per recordum.*

Mr. *Ward* took another exception, that there was no place laid, where the defendant was attorney, nor where the Common Pleas was. And though by the ſtatute the Common Pleas is to be held *in aliquo certo loco*, yet that need not be *Weſtminſter*, but may be *Hertford*, *&c.*

1 Saund. 67. 1 Sid. 362. 2 Keb. 346.

The chief juſtice ſaid, it was not neceſſary to lay a *venue* where the defendant was attorney, becauſe that being a matter concerning the perſon of the defendant, ſhould be tried where the writ was brought. And therefore where *alien nee* is pleaded in abatement, the plaintiff may reply generally, that he was born in *England*, without laying a place, becauſe it ſhall be tried where the writ is brought. But if *alien nee* be pleaded in bar, there the plaintiff muſt reply, that the plaintiff was born in *England*, *viz.* at ſuch a place.

No *venue* need be laid of matters concerning the perſon of the defendant.

Alien pleaded.

Ante 853, 1014. *Poſt.* 1243.

Powell agreed. And he put the caſe, where in treſpaſs the defendant juſtifies, becauſe the plaintiff is his *villein regardant* to ſuch a manor, *&c.* the plaintiff replies, that he is free: he need not allege a place, becauſe it ſhall be tried where the writ is brought. And as to the matter of laying a place for the Common Pleas, the chief juſtice ſaid, it was not neceſſary, for they could write to the chief juſtice of that court by that name, where-ever the court was. And he could not imagine the reaſon, why it had been held neceſſary to ſhew it in pleading a record, unleſs it were, that that was part of the deſcription of the record.

Powell gave the ſame anſwer to this objection, as to the ſecond.

The bill was abated, *niſi, &c.*

Regina *verſ.* Sainthill.

S. C. 6 Mod. 255.
S. C. Salk. 359.
Indictment for not repairing *quendam communem pontem pedalem.*
Palm. 389.
2 Keb. 178.
1 Vent. 208.

A Writ of error of a judgment given at the ſeſſions of the peace, before the juſtices of the peace, upon an indictment for not repairing a bridge. The indictment ſets forth, *quod* the defendant *vi et armis apud B. &c. occidentalem partem cujuſdam communis pontis pedalis communiter vocati L. ſcituati ſuper rivum de Calme in quadam communi ſemita pedali ibidem ducente a B. uſque H. ac continentem in ſe dimidium ejuſdem pontis tam ruinoſam confractam et in decaſu eſſe permiſit ob defectum reparationis et emendationis ejuſdem partis, ita quod ratione inde ligei ſubditi dictae dominae reginae in per et ſuper pontem praedictum ire, tranſire, ſeu laborare, prout debent et ſolebant, ſine magno periculo non poſſunt, ad grave damnum et commune nocumentum eorundem ſubditorum et ligeorum, ac contra pacem, &c. et juratores praedicti ulterius praeſentant, quod* the defendant *ratione tenurae, &c. reparare debet et ſolebat.* This caſe was ſpoke to twice in *Michaelmas* term laſt. And Mr. *Eyre* took two exceptions: Firſt, that it did not appear to be a bridge in a common highway, as it ought, but was only *in communi ſemita.* For the ſtatute of 22 *Hen.* 8. *c.* 5. which gives the juriſdiction to the juſtices of peace in their ſeſſions in caſes of nuſances of bridges, is confined by the words to bridges in the highways: and ſo my lord *Coke* holds in his expoſition upon that ſtatute, 2 *Inſt.* 707. and therefore he ſays the indictments upon the ſtatute are, *quod pons publicus et communis ſitus in alta regia via ſuper flumen ſeu curſum aquae, &c.* And agreeable to this are the precedents in *Weſt* 119, 156, 157. Secondly, that the indictment in aſſigning the defect of reparations was too general, being only *occidentalem partem*; whereas it ought to have been that ſo many feet in length, and ſo many in breadth were *ruinoſ. &c.* And for that he cited 2 *Roll.* 81. *n.* 16, 17. an indictment for ſtopping *quandam partem regiae viae apud K.* naught, for want of ſaying what part, as ſo many feet in length, and ſo many in breadth, *&c.* So an indictment for ſtopping *quandam partem regiae viae continentem per aeſtimationem* ſo many feet in length, and ſo many in breadth, naught for the uncertainty of *per aeſtimationem.* To the firſt Mr. *King* made anſwer, Firſt, that this muſt be taken to be a bridge in a common highway, becauſe it is ſaid to be *communis pons,* and that by reaſon of its being out of repair *ligei ſubditi dictae dominae reginae* could not paſs *prout debent et ſolebant.* Secondly, that there was a *communis ſtrata,* which was not the Queen's highway, as *C. L.* 56. *a.* and that no action lies for a nuſance in ſuch a way; but only an indictment: and that the way in queſtion muſt be taken to be ſuch. And that the juſtices had an original power of inquiring into nuſances by their firſt creation by the ſtatute of *Edw.* 3. before the ſtatute of 22 *Hen.* 8. that in *Weſt's Precedents* 156. *ſect.* 346. there was an indictment that was only, that *communis pons apud, &c. adeo confractus, &c.*

As to the ſecond exception, the court over-ruled it upon the firſt argument, and held, that it being ſaid, *continentem in ſe dimidium ejuſdem pontis,* that made the *occidentalem partem* certain enough; for it is half the bridge, be that half more or leſs. As to the firſt the court then ſeemed to think it a good exception, and that it ought to have been *in ſemita communi pro omnibus ligeis dominae reginae:* and if it had been ſo, they agreed it would have been well, for that the bridge need not be laid to be *in alta regia via.* But as to Mr. *King*'s firſt anſwer they held, that would not help it, for thoſe words were by way of inference only, which would do no good without premiſſes.

For not repairing *occidentalem partem* of a bridge *continentem in ſe dimidium ejuſdem pontis.*

The laſt day of *Eaſter* term laſt, the caſe was mentioned by the court, and they held the indictment naught, becauſe it was *pons pedalis,* which ſignifies a bridge of a foot long, inſtead of *pedeſtris.* And ſo it does not appear what ſort of bridge it is, whether a bridge for carts and carriages, or for horſes, or for footmen only, which is neceſſary to be ſhewn. And the caſe in *Styles* 108. the King againſt Sir *Henry Spiller* was mentioned, where it was allowed to be a good exception to an indictment for not repairing a bridge, becauſe it did not ſhew, whether the bridge were a cart bridge, or a horſe bridge, or a foot bridge, or what other paſſage was over it. As for the exception to *communis ſemita,* they held it was well enough. And they remembred the caſe of the King *verſ. Thrower* in my lord *Hale*'s time (1 *Ventr.* 208. 3 *Keb.* 28.) where an indictment was for ſtopping *communem viam pedeſtrem ad eccleſiam*

Indictment for not repairing a bridge ought to ſhew what ſort it is.

A bridge *in communi ſemita.*

eccleſiam de Whitby, and the indictment was held to be good; for it ſhould be taken to be a common foot way, and that the church was only the *terminus ad quem*. And *Styles* 108. S. C. exception taken, that it does not ſhew the bridge is in the highway, and over-ruled; becauſe it ſays it is a common bridge, which is enough, and it is needleſs to ſay, it is in the highway. (*Weſt.* 3. 346. *acc.*) But the court did not at that time reverſe the judgment.

But afterwards the laſt day of this term the judgment was reverſed for the exception of *pedalis*, as Mr. *Pengelly* informed me.

Ball *verſ.* manucaptors of Ruſſel.

S. C. Salk. 602.
The recogniſance was, that the defendant ſhould render himſelf *mareſcalli mareſcalciae dominae reginae coram ipſa regina*; the breach in the *ſcire facias* was, that he did not render himſelf *priſonae mareſcalciae mareſcalli noſtri.*

See Lutw. 1273.
2 Salk. 599.
Farr. 40, 96, 138.
6 Mod. 86, 146.
1 Lutw. 26.

A *Scire facias* againſt bail. The writ ſet out a recovery againſt *Ruſſel, cumque etiam E. T. de &c. et J. F. de &c. alias ſcilicet termino ſancti Hilarii ultimo praeterito, in eadem curia noſtra coram nobis apud Weſtmonaſterium perſonaliter venere et devenere plegii, &c.* that if judgment ſhould be againſt the defendant, that the money recovered ſhould be levied of their lands and chattels, *ſi contingat* that the defendant ſhould not pay it, *nec ſe priſonae mareſcalciae noſtrae ea occaſione reddere, praedictus tamen* the defendant *debitum, &c. nondum ſolvit nec ſe priſonae mareſcalli mareſcalciae noſtrae hucuſque reddidit prout, &c.* the defendants pray *oyer* of the recogniſance, and it is entred *in haec verba. Robertus Ball executor teſtamenti et ultimae voluntatis Caroli Ball defuncti queritur, &c.* in an action of debt for 80*l.* on a bond, and the defendant by his attorney *venit et defendit vim et injuriam quando, &c. et ſuper hoc coram domina regina apud Weſtmonaſterium venit E. T. de, &c. et J. F. de, &c. in propriis perſonis et devenerunt plegii, &c.* for the defendant *quod ſi contingat, &c. debitum et damna* to the plaintiff *minime ſolvere aut ſeipſum priſonae mareſcalli mareſcalciae dominae reginae coram ipſa regina ea occaſione non reddere, &c. quo lecto, &c.* the defendants plead that no *capias* was ſued out and returned againſt the principal. The plaintiff replied and ſet out a *capias*. And the defendants demurred. Several exceptions were inſiſted on by Mr. *Pengelly*.

Firſt, That the plaintiff in his *oyer* ought to have ſet out what term the recogniſance was of, that it might appear to be the ſame with that upon which the *ſcire facias* is grounded; but as this is ſet out without any term, it does not appear to be the ſame. But to this the chief juſtice ſaid, that this was an imperfect *oyer*; not being the whole record, but then the defendant ſhould have inſiſted upon want of *oyer*, and not have gone on. But it is no variance, for what is ſet out agrees well enough with the recogniſance upon which the *ſcire facias* is grounded.

Secondly, That it appeared by the *capias* ſet out in the replication, that there were but five days between the *teſte* and return of it; whereas every *capias* ſued out againſt the principal in order to charge the bail, ought to have eight days between the *teſte* and return, and ought to lie four days in the ſheriff's office. Which the court agreed, but ſaid, that it was only an irregularity in proceeding, and therefore the defendants ſhould have moved the court to have them ſet aſide for the irregularity. But in point of law the chief juſtice ſaid, proceſs in the court may be made returnable *de die in diem*, eſpecially proceſs which goes into *Middleſex*.

But five days between the *teſte* and return of the *capias ad ſatisfaciendum*.

Thirdly, And which was the principal objection, that the plaintiff had not aſſigned a ſufficient breach, by reaſon of the variance in the ſtile of the priſon between the *ſcire facias* and the recogniſance. For the breach was too large, the word *mareſcalciae* being uſed for more priſons than the priſon of the King's Bench. The priſon of the palace court is called *mareſchalcia hoſpitii domini regis*, and the keeper of it is called *mareſchallus mareſchalciae hoſpitii domini regis*, 10 *Co.* 68. *b.* *Theſ. brev.* 233. And *mareſchallus* indeed ſignifies no more than a keeper, and ſo is *Spelman verbo mareſchallus*. And there the citation out of the red book of the Exchequer makes mention of the marſhal of the Exchequer. And there being ſo many marſhals and marſhalſeas, *priſona mareſchalli mareſchalciae dominae reginae* may as well be taken for the marſhal of the marſhalſea of the houſhold's priſon, as the priſon of the Queen's Bench. For that is never ſtiled *mareſcalcia dominae reginae*, or *priſona mareſcalciae mareſcalli dominae reginae*, but always *priſona mareſcalciae mareſcalli dominae reginae coram ipſa regina*, as it is here in the recogniſance; or elſe *mareſchal del bank le roy*, as it is in *F. N. B.* 251. *J.* and 5 *Edw.* 3. *c.* 8. And if ſo, then the breach is too large. The exception ſtuck with the court ſome time. And Mr. *Raymond* ſpoke to it for the defendants. And the laſt day of the term the court gave judgment for the plaintiff, becauſe it being a bail here, *priſona mareſcalli mareſcalciae noſtrae* muſt be intended the priſon of the marſhal of this court, for the court cannot take any other bails.

Ante 805.

Powell juſtice ſaid, when this caſe was ſtirred before, that all theſe marſhalſeas were derived from the earl marſhal, and that he had granted the inheritance of the office of marſhal of this court out of him.

Spelm. ubi ſupra.

Holt ſaid, that the marſhal of the houſhold is never ſtiled *mareſchallus marſchalciae noſtrae*.

Warner *verſ.* Sir Edward Irby.

Miſnoſmer pleaded in abatement as to the addition. 1 Salk. 2, 47, 50.

IN two actions againſt the defendant by the name of Sir *Edward Irby* baronet, the defendant pleads in one thus: *Et praedictus Edwardus Irby armiger, in propria perſona ſua venit et dicit*, that he is not a baronet: and in the other he pleaded the ſame matter, only with this difference, that he ſaid only *praedictus Edwardus venit, &c.* The plaintiff demurred. Mr. *Southouſe* took exception to the pleas, that it was ſaid *praedictus Edwardus*, which was admitting himſelf to be right named, and after that he is eſtopped to plead any *miſnoſmer*. But he ought to have pleaded, that *Edwardus Irby armiger, qui per nomen Edwardi Irby baronetti* is ſued, *venit in propria perſona ſua, &c. et dicit, &c.* Serjeant *Broderick* for the defendant inſiſted, that there was a difference, where *miſnoſmer* of the ſurname or addition is pleaded in abatement, and where *miſnoſmer* of the *Chriſtian* name: there you may ſay *praedictus* the *Chriſtian* name, where it is the *miſnoſmer* of the ſurname is pleaded, or *praedictus* the *Chriſtian* and ſurname where it is only the *miſnoſmer* of the addition: but otherwiſe if *miſnoſmer* of the *Chriſtian* name be pleaded. And he cited 1 *Edw.* 4. 3. and ſaid, that all the books were ſo. *Holt* ſeemed to doubt the difference, but ſaid, that if if it were ſo, yet the plea was naught, for want of ſhewing what he is. For every one that will abate the plaintiff's writ, muſt give him a better. And therefore it is not enough for the defendant to ſay, he is not a baronet, without ſhewing what he is. And beſides he ſaid, one of the pleas was not within his own rule, for he ought according to that to have ſaid only, *praedictus Edwardus*, or *praedictus Edwardus Irby*, and not *praedictus Edwardus Irby armiger*. But the ſureſt way of pleading it would have been, to have ſaid, *venit Edwardus Irby armiger*, who is ſued *per nomen Edwardi Irby baronetti, et dicit*, that he is an eſquire, and not a baronet.

Cannot plead he is not a baronet as ſued, without ſhewing what he is.

The court gave judgment, that the defendant *reſpondeat ulterius, niſi, &c.*

Regina *verſ.* Franklyn.

THE defendant was indicted for uſing the trade of a ſeamſtreſs, not having ſerved an apprenticeſhip to it, *&c.* And the indictment was, *ubi revera* the defendant never was educated in the ſaid art or myſtery *tanquam apprenticus* for *apprenticius.* And becauſe the word *apprenticus* was nonſenſe, the indictment was quaſhed. And judge *Powell* took another exception, that the defendant was called labourer, which he ſaid was not a good addition for a woman. *Paſch. 5 Annae B. R. Regina verſ. Maddox,* ſuch an indictment was quaſhed for the ſame exception. And *Holt* ſaid, that the word apprentice was the very material word of the ſtatute; and that an indictment for exerciſing a trade, in which the defendant had not been educated for ſeven years, without the word apprentice, would be ill, which *Powell* agreed.

Apprenticus. Comb. 254, 255. 2 Salk. 610, 611. *Poſt.* 1188.

Labourer no addition for a woman.

Regina verſ. Maddox, Salk. 613.

Wilſon *verſ.* Ingoldsby.

A Writ of error of a judgment in the Common Pleas in ejectment, *teſte* the firſt year of the Queen, judgment was not given in the ejectment till the third year of the Queen, and then the record was tranſcribed, and brought into this court. And the defendant in error ſued out a *ſcire facias quare executio non* to compel the plaintiff to aſſign errors. And the plaintiff in error pleaded *nul tiel record*, and upon bringing in the record, the counſel for the plaintiff in error moved that here was a *failer* of the record, which the court agreed. For they ſaid, that the plea is *nullum tale habetur recordum*, which refers to the *ſcire facias*, which recites a record of a judgment in the Common Pleas removed hither by writ of error, which this record never was, no judgment having been given till after the return of the writ of error was out. The chief juſtice ſaid, that this being a record of the ſame court, it would have been moſt proper to have prayed *oyer* of it.

In a *ſcire facias ad aſſignandum errores* the defendant pleaded, *nul tiel record*, the judgment being given after the writ of error brought.

1 Salk. 329. 2 Salk. 659.

Regina *verſ.* Mackarty et Fordenbourgh.

S. C. Salk. 286, 283. S. C. 6 Mod. 301, 311. Far. 119. 1 Sid. 431. 2 Keb. 572. Hard. 331. 1 Vent. 49, 78.

Indictment for a cheat.

AN indictment againſt the defendants for that they *exiſtentes lucri inhoneſti avidi, et nequiter, falſo, deceptive, et malitioſe intendentes Thomam Chowne de London haberdaſher de diverſis bonis et merchandizis ſuis defraudare,* ſuch a day, year and place, *inſimul deceptive bargainizaverunt cum praefato T. C. ad commutandum, Anglice* to barter, *vendendum et excambiandum quandam quan-*

titatem vini praetenſi, ut bonum et verum novum vinum regni Portugalliae, vocatum new *Liſbon* wine *ipſius A. F. pro quadam quantitate galerorum, Anglice* hats, *ipſius T. C. ad valentiam* 118*l. bonae et legalis monetae Angliae: et ſuper commutationem venditionem et excambiationem praedictas ipſe praedictus A. F. aſſumpſit ſuper ſe eſſe mercatorem Londini, et negotiare et merchandizare ut mercator in vinis regni Portugalliae, et adtunc et ibidem perſonavit mercatorem Londini at ſi fuiſſet verus mercator Londini, ubi in facto ipſe praedictus A. F. nunquam fuit mercator Londini, nec negotiavit vel merchandizavit ut mercator in vinis regni Portugalliae, ſeu aliquo vino quocunque, ut mercator; et ſuper commutationem, venditionem, et excambiationem praedictas ipſe praedictus M. M. aſſumpſit ſuper ſe eſſe bargainizatorem, Anglice* a broker *Londini, et adtunc et ibidem perſonavit bargainizatorem Londini, at ſi fuiſſet verus bargainizator Londini, ubi in facto ipſe praedictus M. M. tempore commutationis venditionis et bargainizationis praedictae, ſeu unquam poſtea, non fuit bargainizator Londini: ac praedictus T. C. fidem adhibens eiſdem fictis aſſumptionibus, perſonationibus, et deceptionibus, adtunc et ibidem commutavit vendidit et excambiavit praedicto A. F. et deliberavit eidem M. M. ut bargainizatori inter praedictum T. C. et A. F. pro uſu ipſius A. F. quandam quantitatem galerorum valentiae* 118*l. pro doliis praedictis vini praetenſi praedicti: et quod praedictus M. M. et A. F. ſuper commutationem bargainizationem et venditionem praedictas affirmabant vinum praetenſum praedictum fore verum novum vinum regni Portugalliae, vocatum* new *Liſbon* wines, *et fore vinum praedicti A. F. ubi in facto praedictum vinum praetenſum non fuit vinum regni Portugalliae, nec potabile, nec ſalubre, nec fuit vinum praedicti A. F. in magnam deceptionem et damnum ipſius T. C. in contemptum dictae dominae reginae nunc, legumque ſuarum, et contra pacem dictae dominae reginae nunc coronam et dignitatem ſuas, &c.* This indictment was found at the ſeſſions of the peace in *London*, and removed into the King's Bench by *certiorari*. And upon not guilty pleaded, the defendants were at *niſi prius* before the lord chief juſtice *Holt* in *London* convicted. And now Mr. Common ſerjeant, and Mr. *Raymond* took ſeveral exceptions to the indictment in arreſt of judgment.

1. That here was no offenſe laid, for the agreement was, as it is here laid, to barter, ſell and exchange a certain quantity of pretended wine as good and true new *Liſbon* wine for a certain quantity of hats. Now to have made an offenſe of it, it ſhould have been laid, that the defendants pretended this liquor to be new *Liſbon* wine, and pretending it to be ſuch did barter, *&c.* it for ſuch a quantity of hats. And *Dee* ſaid, that the bargain, as it is here laid, is nonſenſe and impoſſible; for either it is wine, or no

wine; if it be wine, then it is not *praetenſum*, and if it be *praetenſum*, it is not *vinum*.

2. That the indictment was uncertain, it not appearing how much of this *vinum praetenſum* the proſecutor was to have for the hats, and conſequently to what degree he was cheated, which it ought to do, as well as in caſes where damages are to be recovered, becauſe the fine ought to be greater or leſs. And ſeveral caſes were cited to this purpoſe: the King *verſ. Foſter*, *Trin.* 11 *Will.* 3. and the caſes there cited: and 2 *Leon.* 38. *Henbeck*'s caſe. An information upon the ſtatute of *Hen.* 6. which requires that all pipes of wine ſhall be gauged, *&c.* before they be ſold, and that ſo much of the price as it wants in meaſure ſhall be abated, on pain to forfeit the value to the King and the informer: and that the defendant had ſold ſeveral pipes of wine, of which none contained 126 gallons: and that he had not abated the price in proportion: and becauſe he had not ſhewed, how much was wanting in each pipe, judgment was againſt the informer. [For uncertainty take the caſes following, 5 *Co.* 34. *Plaiſter*'s caſe, treſpaſs *quare piſces cepit*, without ſhewing the number or nature, ill. *Mich.* 8 *Will.* 3. in the Common Pleas, *Smith verſ. Therbold: trover pro parcella culmi*, judgment arreſted after verdict. Indictment for ingroſſing *diverſos cumulos tritici*, ill. 2 *Bulſtr.* 317. *Rex verſ. Goldsborough & Whiſtler*, and 2 *Roll. Indictment*, *p.* 13, 14, 15. *fol.* 80.]

3. *Dee* ſaid, that *aſſumpſit ſuper ſe, &c.* was improper; for that was, he promiſed, and not pretended, which was intended. That *at ſi* was alſo improper, and ſignified *but if*, which was nonſenſe, and not *as if*, which is *ac ſi*. 4. That to make it an offence, they ought to ſhew, that the proſecutor delivered the hats, which they had not done. For when they came to lay that, they ſay, *deliberavit eidem M. M. &c. quandam quantitatem galerorum valentiae* 118 *l. pro doliis praedictis vini praetenſi praedicti*: and there are no *doliis* mentioned before. And by Mr. *Raymond*, where a *praedict.* or a *ſcilicet* ſhall be rejected, the difference is, where the matter appears once well upon the record before, and then a *praedictus* or a *ſcilicet*, which is repugnant, follows, it ſhall be rejected, becauſe there is enough before for a foundation for their judgment. But where that which follows the *praedict.* or *ſcilicet* is material to the point of the action, and not well ſhewed, as this is, the *praedict.* cannot be rejected. 2 *Cro.* 149. *Yelv.* 97. *Jennings verſ. Markham*: debt upon an obligation to perform an award, *nul award* pleaded: the plaintiff replies an award, that the defendant ſhould pay upon 21ſt of *May tunc proxime ſequen.* to the plaintiff 20 *l.* and that the plaintiff *ſuper praedicto* 1ſt of *May* ſhould releaſe to the defendant all his right in a copyhold

upon the payment: and aſſigned a breach, that he was ready to make the releaſe, and the defendant had not paid the 20*l.* held, that becauſe the releaſe was to be made the aforeſaid 1ſt of *May*, and there was no ſuch day mentioned before, the award is inſenſible and void, and no money need be paid. 5. That the affirmation, that it was new *Lisbon* wine, will not ſupport the indictment. For the rule of law is *caveat emptor*. And therefore 2 *Cro.* 4. *Chandler verſ. Lopus*, an action does not lie againſt a goldſmith for ſelling a ſtone, affirming it to be a *bezoar*, where it was not, 386. *Bayly verſ. Merrell:* caſe does not lie for affirming a thing to be of leſs weight than it was, or that a horſe has two eyes where he has but one. *Yelv.* 20. *Harvy verſ. Young:* it does not lie for affirming a term to be of the value of 150*l.* where it was worth but 100*l.* Indeed where a man is in poſſeſſion of a thing, and in order to ſell it, affirms it to be his, where it is not, caſe will lie, 1 *Cro.* 474, and the caſe of *Medina verſ. Stoughton*, *Trin.* 12 *Will.* 3. *B. R.* and the caſes there cited. But if it ſhould be criminal to make ſuch an affirmation, yet it can never be ſo, unleſs the defendant knew what he affirmed to be falſe. And therefore the indictment ought to ſay at leaſt, *ubi revera* the defendant knew *vinum praetenſum praedictum non fore vinum regni Portugalliae*, and not to ſay only, as it is here, that the *vinum praetenſum* was not *vinum regni Portugalliae*; for it may be, the defendants might underſtand wines no better than the proſecutor. And therefore 9 *Hen.* 6. 53. *p.* 37. there is a caſe cited to have been adjudged in the King's Bench, that if one ſells a piece *de panno laneo ſciens ipſam eſſe rancam*, and not well fulled, an action lies without a warranty.

Salk. 210.

Mr. *Southouſe* for the Queen acquainted us, that the indictment was of his drawing. He ſaid, that as to the quantity of *vinum praetenſum* the proſecutor was to have, it was not material to lay that. Firſt, becauſe it was laid expreſly in the indictment, that it was good for nothing, that it was *non potabile nec ſalubre*; and therefore how much ſoever there was of it, that would not alter the caſe. Secondly, that the thing the proſecutor was cheated of was the hats, and therefore it was only material to ſhew how many of them there were; and they had made that certain enough by ſaying, that it was a certain quantity of hats *ad valentiam* 118*l.* That if a man was to be indicted for cheating another at play with falſe dice, it would be no ways material to lay how many dice he plaid with, when he cheated him; but the matter material to be laid, is the ſum he cheated him of. So if a man ſhould be indicted of putting *magnam quantitatem coloquintidae* into a pond, and poiſoning ſo many fiſh, or fiſh to ſuch a value, that would be good, without ſhewing the quantity of the *coloquintida.* He ſaid, he admitted the caſes cited for the defendants, of indictments for ingroſſing *magnam quantitatem foeni*; and the caſes in *Roll's Abridgment*, &c. for there the uncertainty was in that, that was the offenſe. But here the hats the proſecutor was cheated of, which is the offenſe, are certain enough, *viz.* to the value of 118 *l.* He alſo cited the caſe of the King *verſ. Wetwang*: an indictment for taking out of a pond *quoſdam piſces vocatos* carp fiſhes, *de bonis et catallis J. S.* and upon exception for the uncertainty, becauſe it is not ſaid how many, and *Plaiſter*'s caſe cited, *Keeling* and *Wyndam* over-ruled the exception, upon the difference between indictments, and actions where damages are to be recovered. For upon an indictment the defendant is to be fined according to the nature of the crime upon the circumſtances of the fact, and not according to the number of the fiſhes taken: *Twiſden contra, Morton ſilente.* He ſaid, *at ſi* and *ac ſi* were the ſame: but however it was well without: for *perſonavit mercatorem L.* was the ſame thing, for if he were a merchant, he could not perſonate one. As to the *praedict.* he ſaid, that muſt be applied to *vini praetenſi*; but if that could not be, then it ought to be rejected. And for that he cited 3 *Bulſtr.* 198, 199. *Proby verſ. Lumley*, in an action of eſcape againſt the ſheriff upon a *meſne* proceſs: the defendant pleaded, that he had taken the party upon a *latitat*, and that in bringing of him from *Iſlington praedicto* he was reſcued, and pleads the return of the reſcue; and exception taken to the *praedicto*, becauſe there was no *Iſlington* mentioned before; but reſolved, that the *praedicto* was ſurpluſage and idle. So 1 *Lutw.* 561. *Lambard verſ. Kingsforth*: debt upon a bond to perform an award, the defendant pleads *nul agard*, the plaintiff replies and ſets out an award, that the defendant ſhould pay to the plaintiff at the houſe of the plaintiff apud *Sevenoak praedictum*, and aſſigns a breach in non-payment; and exception was taken to the *praedictum*, becauſe there was no *Sevenoak* mentioned before; but reſolved, that the *praedictum* was void. He ſaid, there was no need to ſay *ſciens*, becauſe the fact itſelf, as it was laid, was a crime. He ſaid, that upon the whole, taking all the indictment together, it appeared to be a cheat.

1 Lev. 203.

Holt chief juſtice. I do not know what *vinum praetenſum* is.

Powell juſtice. The ſtatute of maintenance mentions pretenſed rights, and yet a pretenſed right is no right at all.

The chief juſtice. It is a fault to buy any right, but it is no fault to buy *vinum praetenſum*, pretenſed wine.

Powell juſtice. Pretenſed child in the language of indictments is, where a woman pretends to be with child. Mr. *Southouſe*, you do not anſwer the exception, that the quantity is not ſet out, for it ought to appear, that the court may know how to ſet the fine.

Chief juſtice. Be the quantity of the wine what it will, the cheat is of the hats.

Powell juſtice. If a man ſhould bring treſpaſs for taking a great many hats *ad valentiam* 100 *l.* that would be naught.

Chief juſtice agreed: but the reaſon of that caſe is, becauſe damages are to be recovered for the hats.

Powell juſtice. There is the ſame reaſon here, becauſe we are to ſet a fine. As to the *ſciens*, that it is neceſſary to be laid: ſuppoſe a man ſhould take bad money, and put it off again; that is no crime, unleſs he knew it to be bad.

Chief juſtice. Beſides, perſonating a man is no harm, unleſs it be to an ill intent. Why ſhall we preſume the defendants knew wine better than the proſecutor?

Powell juſtice. A man may buy bad wine, and ſell it again, without knowing it was bad.

The chief juſtice ſaid, that the fact as it appeared upon the evidence was criminal. This caſe was firſt moved in *Michaelmas* term 3° and ruled to ſtay *quouſque*, *&c.* Then Mr. *Southouſe* moved for judgment *Paſch* 4° and it was ſpoke to the effect as before. And now the laſt day of this term, as Mr. *Pengelly* told me, judgment was given for the Queen. And the court ſaid, that the quantity is not neceſſary to be ſhewn, and that here was enough ſet out, to ſhew the defendants to be cheats.

Speed *verſ.* Parry.

Mich. 3 *Ann.* B. R. Rot. 222.

S. C. Salk. 697.

Words importing only a power to do an ill thing. 1 Roll. Abr. 72. pl. 9. is here denied to be law.

AN action upon the caſe was brought for theſe words ſpoken of the plaintiff: "You are a raſcal and a villain, you have forgot ſince you lived in the *Black bull yard*, there you could procure broad money for gold, and clip it when you had ſo done; and then the ſhears could go."

Mr. ſerjeant *Darnall* moved in arreſt of judgment after a verdict for the plaintiff, that theſe words were not actionable, for that they imported only a power, and not any act done, and every man had a power to clip money, and as he had a power to do it, ſo he had alſo to let it alone. And he cited 1 *Roll.* 51. *Q.* 4. if a man ſays of another, "He keepeth men to rob me," no action lies: and that words ought to be taken in the moſt favourable ſenſe.

Mr. *Mountague* for the plaintiff argued, that theſe words in common parlance imported an act done. And the court were of the ſame opinion. And *Powell* juſtice ſaid, that where words were only potential, but a time and place was added, there the words imported an act done; for they cannot import a bare power in that caſe, becauſe a man has the power every where alike, as well any where elſe as in the *Black bull yard*. And he reſembled it to a caſe which was in the Common Pleas *Trin.* 12 *Will.* 3. *Horne verſ. Powell*, where an action was brought for theſe words: "You may well ſpend money at law, for you can coin money out of half-pence and farthings:" and there the words were held to be actionable, becauſe they imported an act done; for from a bare power, he could never have been the better able to ſpend money at law. And the chief juſtice agreed it was a caſe in point, becauſe there the difference of the charge was only in the tenſe, and that in the potential mood, as it is here.

So of a perſon, as if a man ſpeaking of *J. S.* who is dead, ſhould ſay to another, you could murder *J. S.* that would be actionable. *C. J.*

Horne verſ. Powell.

Mr. ſerjeant *Darnall* to encounter that caſe cited 1 *Roll.* 72. *n.* 9. where an action was brought for theſe words: "Thou muſt needs be richer than I, for thou didſt coin thirty new ſhillings in a day, thou art a coiner of money;" and reſolved, that no action lay, becauſe peradventure he was a coiner of money in the mint, and earned money by it. But the chief juſtice and *Powell* both ſaid, that if that caſe were to be adjudged now, they would adjudge it otherwiſe. And Mr. *Page* mentioned a caſe in the Common Pleas, which *Powell* agreed, where theſe words, "You are a coiner of

You are a coiner of money.

“ money,” were reſolved to be actionable; and the caſe in *Rolle's Abridgment* denied.

1 Roll. 57. n. 36.

The chief juſtice ſaid, that words ſpoken ironically would be actionable, and remembered the caſe, where a man ſaid of a receiver of the revenue, “ Mr. *Deceiver* has deceived the King;” and reſolved, that it was actionable. And *Powell* obſerved, that that was a ſtrong caſe, becauſe the words were actionable upon the account of the plaintiff's office of receiver only.

This caſe was firſt moved the firſt day of the term, and a rule to ſtay *quouſque*, as uſual. And then Mr. *Mountague* moved for judgment. And the court all along inclined for the plaintiff, but took time to conſider; and as Mr. *Pengelly* informed me, the laſt day of the term gave judgment for the plaintiff.

Follet *verſ.* Troake et alios.

A cuſtom of a manor for the reeve to make a drift of the cattle at any time by the appointment of the ſteward.

IN treſpaſs for chaſing his ſheep, *viz.* 200 ſheep, that were feeding upon, and uſing his common, and impounding them; the defendant as to the *vi et armis* pleads not guilty; and as to the reſidue of the treſpaſs, *dicit quod tempore quo, &c. et diu ante tranſgreſſionem praedictam,* the place where was *clauſum paſturae continens, &c. parcella manerii de C. infra manerium praedictum in comitatu praedicto, infra quod quidem manerium ſunt, et a toto tempore cujus contrarii memoria hominum non exiſtit fuerunt, diverſa tenementa cuſtumaria infra manerium praedictum ſecundum conſuetudinem ejuſdem manerii; quodque quilibet tenens cuſtumarius tenementi cuſtumarii manerii C. praedicti, et omnes illi, quorum ſtatum ipſe habet, de toto tempore cujus contrarii memoria hominum non exiſtit haberet communiam paſturae in praedicto loco in quo, annuatim et quolibet anno per totum annum pro omnibus magnis averiis communicalibus in et ſuper tenementis ſuis praedictis levantibus et cubantibus, ac pro certo numero ovium in et ſuper tenementis ſuis praedictis levantibus et cubantibus reſpective, ratione reſpectivorum tenementorum ſuorum cuſtumariorum manerii praedicti tanquam ad tenementa cuſtumaria ſua ibidem reſpective ſpectantem et pertinentem; quodque per conſuetudinem manerii praedicti a toto tempore ſupradicto ibidem uſitatam et approbatam ballivus, Anglice* the reeve, *ejuſdem manerii cum tenentibus ejuſdem manerii, vel aliquibus eorum, ſimul cum aliquibus aliis perſonis auxiliantibus et juvantibus, quandocunque per ſeneſchallum, Anglice* the ſteward, *manerii praedicti pro tempore exiſtentem juſſus, effugavit, Anglice* hath driven, *oves in et ſuper communiam praedictam depaſcentes, et eaſdem imparcavit in aliquo loco infra manerium praedictum ad examinandum ſi aliquis tenens* *cuſtumarius tenementi cuſtumarii manerii praedicti ſuperoneravit, Anglice* hath charged, *communiam praedictam depaſcendo et utendo communiam praedictam per majorem ovium numerum, quam ſibi debitum per conſuetudinem manerii praedicti ratione tenementi ſeu tenementorum ſuorum cuſtumariorum manerii praedicti reſpective; quodque per conſuetudinem praedictam ſi aliquis tenens tenementi cuſtumarii manerii praedicti ſuper examinationem et ſcrutationem praedictam inventus ſit habere majorem numerum ovium utentium et depaſcentium communiam ratione tenementorum ſuorum praedictorum reſpective tempore effugationis praedictae, Anglice* the driving aforeſaid, *quam ibidem habere debet per conſuetudinem manerii praedicti ratione tenementorum ſuorum praedictorum reſpective, quod tunc tot oves talis tenentis, quot ſunt ibidem ſuper numerum ſuum reſpective ſic ut praefertur debitum, detinenatur in parco praedicto, tanquam averia inventa dampnum facientia in communia praedicta, quouſque pro dampnis praedictis per oves praedictas ſic factis ſatisfaciatur, ſeu quouſque oves praedictae per debitum legis curſum deliberentur; et quod tot oves tenentis quot ibidem depaſcere debent per conſuetudinem manerii praedicti in largum ire permittantur, et in communiam praedictam remittantur.* And the defendant farther ſays, that the plaintiff was a cuſtomary tenant of the ſaid manor: and that he and all thoſe, *&c.* ought to have common for a hundred ſheep only, and ſo brings the defendant within the cuſtom: and that upon the drift the plaintiff had ſurcharged one hundred ſheep, and that the defendant detained one hundred ſheep, parcel of the two hundred, in the pound, *quouſque*, and let the other hundred go back into the common. To this plea the defendant demurred.

Mr. *Squib* to maintain his demurrer took theſe exceptions to the plea. Firſt, that the cuſtom was unreaſonable, for the drift to be made at the diſcretion of the ſteward; it ought to be upon a ſurcharge, or at ſome certain times. Secondly, that theſe cuſtomary tenants muſt be taken to be copyholders, and then the preſcription is ill; for copyholders cannot preſcribe in a *que eſtate.* Thirdly, that the cuſtom and preſcription were confounded. Fourthly, that it was ſaid *per conſuetudinem praedictam*, where it ought to be *conſuetudinem manerii praedicti.*

But this notwithſtanding, the court gave judgment for the defendant, *niſi*, on the firſt argument. Firſt, all the court agreed, that it was a reaſonable cuſtom, for the reeve to make a drift by the appointment of the ſteward. In caſe of *common ſans nombre*, if there be a ſurcharge, it muſt be remedied by a writ of admeaſurement. But where the common is for a certain number, there a drift is very reaſonable. For until a drift is made, it is hard to know whether there be a ſurcharge or no. And for that reaſon drifts

Surcharge of common.
F. N. B. 290. 4 Edit.

drifts of commons may be by cuſtom, and there are ſuch cuſtoms in all waſtes. And it is unreaſonable to ſay, the drift ſhall not be, unleſs there is a ſurcharge, becauſe till the drift is made, it is not poſſible to know, whether there be a ſurchage or no; and the intent of the drift was to diſcover the ſurcharge. This is alſo more reaſonable than a cuſtom to drive the common at a certain time; becauſe if that were the cuſtom, the commoners would ſurcharge the common all the reſt of the year, except at thoſe times: and ſo the cuſtom would be ineffectual for the end it was intended. As to the ſecond exception, it was reſolved, that it cannot be taken to be copyholders, for they are *ad voluntatem domini*; and therefore they muſt be taken to be cuſtomary freeholders, and conſequently the preſcription in a *que eſtate* good. Indeed if they had been laid to be copyhold tenements, then they muſt have laid a cuſtom for the common, and the preſcription would have been ill. As to the third, they reſolved that the cuſtom and the preſcription were diſtinct, the preſcription for the common, and the cuſtom for the drift. And it might well be, that the freehold tenants might have a common by preſcription, and a drift of that common by cuſtom. As to the fourth they reſolved, that it was very fully laid before, that there was a cuſtom within the manor, *&c.* and that the words *per conſuetudinem praedictam* related to that.

Mr. *Squib* then took another exception, that the cuſtom was ill, to impound them any where within the manor, for that they ought to be impounded ſomewhere within the waſte, and ought not to be drove out of that. But the court reſolved, that it was good, to impound them any where within the manor. And *Holt*, it was reaſonable to drive them off the waſte, becauſe the common was to be cleared of them. Judgment was given for the defendant, *niſi*, *&c.* The laſt day of the term Mr. *Squib* moved it again, and took another exception, that this drift of common was repugnant to the preſcription; for that was to have common *annuatim et quolibet anno per totum annum*, which was interrupted by this drift: but that ſeemed a ridiculous objection; and the rule was made abſolute, as Mr. *Salkeld* told me, and his plea confirmed.

Regina *verſ.* Harper.

S. C. Salk. 611. *Ante* 1179. *Mercatoris ſciſſoris, Anglice.*] Regina verſ. Corniſh.

THE defendant was indicted for uſing the trade of a merchant taylor, not having ſerved an apprenticeſhip to it, *&c.* And Mr. ſerjeant *Broderick* moved to quaſh it, becauſe it was not a trade within the ſtatute; and it was quaſhed, *niſi* before the end of the term. And ſome days after Mr. *Eyre* moved to quaſh an indictment againſt one *Corniſh*, for uſing the trade of a ſeamſtreſs, *&c.*

for the ſame reaſon. But the court refuſed it, becauſe they ſaid they could not take notice what was, or what was not, a trade within the ſtatute. But there being an averment in the indictment, that that was a trade uſed within the kingdom of *England*, at the time of making the ſtatute of 5 *Eliz.* and the words of the ſtatute being general, any craft, miſtery or occupation now uſed or occupied within the realm of *England* or *Wales*; if this were not a trade within the ſtatute, the defendant would have the advantage of it upon not guilty. And Mr. *Eyre* remembred the caſe of the Queen againſt *Harper*. But the court ſaid, that caſe differed from this, and that the reaſon why that was quaſhed was, becauſe they could not underſtand what a merchant taylor is; and that there was no ſuch trade.

Note, Mr. *Eyre* ſaid, he had known many indictments on this ſtatute quaſhed for that exception. And it ſeems to me, that what is a craft, miſtery, or occupation, is matter of law.

Regina *verſ.* Wyatt.

S. C. Salk. 175, 380. 2 Salk. 502. An indictment for not returning two juſtices warrant for levying a forfeiture on conviction of deer-ſtealing.

THE defendant was indicted at the aſſiſes at *Suſſex*. And the indictment ſet forth, that whereas one *Thomas Naſh* 28 *Auguſt* 13 *Will.* 3. was convicted before two juſtices of peace upon the information of one *W. M.* and upon the oath of *R. H.* of being aiding and aſſiſting to one *E. R.* in the unlawful killing of five deer, upon the 11th of *April* then laſt paſt, in the park of Sir *W. M.* And whereas the ſame *T. N.* on the ſame 28th of *Auguſt* was convicted before the ſame juſtices upon the information of the ſame *W. M.* and upon the oath of the ſame *R. H.* of being aiding and aſſiſting to the ſaid *R. H.* in the unlawful killing of two deer upon the 8th of *July* then laſt paſt, in the park of *M. M.* and *C. M.* and whereas the ſaid two juſtices afterwards, *viz.* the 2d of *September* in the ſaid year, at *Arundel* in the county of *Suſſex*, make a warrant under their hands and ſeals directed to all conſtables, headboroughs, and other officers of the ſaid late King, within the ſaid county, to levy by way of diſtreſs of the goods and chattels of the aforeſaid *T. N.* five ſeveral ſums of 30*l.* amounting in the whole to 150*l.* by him forfeited for the firſt mentioned offenſe, *et quod ipſi vel eorum aliqui retornam facerent, vel eorum aliquis retornam faceret, praefatis juſticiariis vel eorum uni ad certum diem abhinc longe praeteritum in eodem warranto mentionatum qualiter warrantum illud fuerit executum*; and then ſets out in the ſame manner another warrant on the ſecond conviction; which ſeveral warrants *poſtea, ſcilicet, 2 Septembris anno ſupradicto*, were delivered to one *Richard Wyatt*, then being one of the conſtables of the hundred of *A.* in the ſaid county, *viz. apud Felpham praedictum in comitatu praedicto* to be executed: the ſaid *Wyatt* afterwards, *viz.* the ſaid 2d of *September*, at *Walberton* in the ſaid county, and within the ſaid hundred, by virtue of the ſaid ſeveral warrants, levied the money of the goods of *Naſh*; yet the ſaid *Wyatt*, the ſaid 2 *Septemb. anno ſupradicto, ſeu unquam poſtea* to the taking of the indictment *non fecit, nec fieri cauſavit, praefatis* the juſtices, *ſeu eorum alteri, aliquam retornam* of the ſaid warrants, or either of them, *ſeu qualiter et quomodo executi fuerint warranta illa, vel eorum alterutrum, prout* he was commanded by the reſpective warrants, *ſed retornam* of the ſaid warrants, or either of them *facere* to the ſaid juſtices, or either of them, *illicite, obſtinate, et contemptuoſe adtunc apud Felpham praedictum in comitatu praedicto recuſavit et denegavit, et adhuc recuſat et denegat, &c.* The defendant to this indictment pleaded not guilty; a *venire facias* was awarded *de vicineto de Felpham*, and he was tried and was convicted at the aſſiſes. And a *certiorari* was brought by the direction of *Gould* judge of aſſiſe, and the record removed into the King's Bench. And there after three ſeveral arguments by Mr. *Mountague*, Mr. *Eyre*, and Mr. *Whitaker* for the defendant, and by Mr. ſerjeant *Broderick*, and Mr. ſerjeant *Cheſhyre*, and Mr. Attorney for the Queen, judgment was given for the Queen, and the defendant fined 200*l.* which was the ſum levied, by the opinion of the three judges againſt *Holt* chief juſtice.

Conſtable obliged to execute the juſtices warrant on a conviction of deer-ſtealing.

Conſtable of a hundred as much officer of the juſtices as conſtable of a pariſh.

The caſe was argued *ſeriatim.* And firſt *Gould* juſtice argued for the Queen as to the firſt objection, that the conſtable is not obliged by law to execute the juſtices warrant in this caſe. That ſtrikes at the act of 13 *Car.* 2. *ſeſſ.* 1. *c.* 10. againſt deer-ſtealers, for there in the ſame manner as here, the penalty is directed to be levied by way of diſtreſs, upon the goods and chattels of the offender, by warrant under the juſtice's hand before whom ſuch conviction ſhall be made; but no officer named, who ſhall execute the warrant, no more than here. But upon both acts, the conſtable is to execute it. For the penalty is to be levied by warrant of the juſtice; therefore he is not to levy it himſelf, and therefore he muſt ſend the warrant to his officer, which is the conſtable. And a conſtable of a hundred is as much an officer to the juſtices of peace, as a conſtable of a pariſh. And he is properer, becauſe he has a larger juriſdiction, for the goods might be out of the limits of the other's juriſdiction. Beſides, when this power is veſted in the juſtices of peace, they muſt proceed to execute it, in the ſame manner as they do other things in their power. As if an act of parliament were to make any thing a nuſance, the party who ſhould be guilty of it muſt be proceeded againſt of conſequence in the ſame manner, as for a nuſance at common law.

As to the ſecond objection, that when the convictions are ſet out, there is no concluſion *prout patet per recordum*, and that the *venire facias* is only *de vicineto de Felpham*, and not of *Arundel*, where the warrant was made, and *Walberton*, where it was executed; whereas it ought to have been from them as well as *Felpham*, I anſwer, that thoſe matters are only inducement, but that which is the *git* of the charge, and makes the offenſe, is the contemptuouſly not returning the warrants. And there was a caſe *Paſch.* 16 *Car.* 2. *Rex verſ.* the overſeers of the poor of *St. Clements*, which comes up to this; where the defendants were indicted for not obeying an order of ſeſſions; and exception was taken to the indictment, becauſe there was no place laid where the order was made; and it was held to be good, becauſe the neglect was the *git* of the indictment, and the order was but inducement. But it is otherwiſe in caſes of indictments for forging a deed at one place, and publiſhing it at another; the jury muſt come *de vicineto* of both places. 1 Sid. 208. 1 Keb. 696.

As for the power given in the act to the proſecutor to detain the perſon convicted in cuſtody, till a return can be made to the warrant of diſtreſs; from whence it is inferred, that the proſecutor is alſo to execute the warrant of diſtreſs; that ſeems to me to be nothing to the purpoſe.

Powys juſtice for the Queen: it is requiſite there ſhould be a return made of the warrant, that the juſtice of peace may know what is done upon it. Firſt, becauſe of dividing the money levied as the act directs, which is to be directed by the juſtice. Secondly, becauſe if there be not ſufficient diſtreſs to be had, there is to be another puniſhment inflicted, in the nature of a ſecond judgment, *viz.* impriſonment for a year, and the pillory. Thirdly, the act of parliament directs the offender to be kept in cuſtody, during ſuch reaſonable time as a return may be had to the warrant of diſtreſs; which ſhews the act intended the warrant ſhould be returned: and the return of the warrant is part of the execution of it. And a conſtable refuſing to execute a warrant of a juſtice of peace, is indictable. And ſo is 2 *Roll. Rep.* 78.

As to the objection, that the conſtable is not obliged to execute this warrant; it was intended by the act of parliament that the conſtable ſhould execute it. For the money being to be levied by warrant under the hand of the juſtice, and it not being ſaid in the act who ſhould execute the warrant, the conſtable muſt execute it, who is the proper officer attendant on the juſtices of peace. And beſides there are ſeveral things appointed in the act of parliament to be done by the conſtables; as detaining the offender in cuſtody, till a return may be made to the warrants, *ſect.* 4. ſearching for veniſon, ſkins of deer, and toils, *ſect.* 3. which ſhews that the law-makers looked upon him as the proper perſon in this caſe. And as to the objection, that it may as well be the proſecutor, becauſe power is given to him by *ſect.* 4. to detain the offender till a return may be made of the warrant; I anſwer, that he is only named for that particular purpoſe.

As to the objection of the want of *prout patet per recordum*, that is but inducement, and the *git* of the offenſe is, the not returning the warrant. As to the objection, that there is a miſ-trial, I think this is the very beſt place from whence the jury could come, it being the place where the warrant was delivered, which is the place which has the neareſt relation to the offenſe. Alſo this indictment is for a *non feaſance*, and therefore any place may be laid, it is not material what; but the place that is laid here is as right as can be. Alſo it would have been good, if it had been, that he refuſed generally, without any place.

Venue.

Powell juſtice for the Queen. The queſtion is, if this be a good indictment, and I hold it is; a neglect of duty in an officer is indictable at common law, and this is an indictment at common law. And that takes away the exceptions to the indictment from the ſtatute. For this is no otherwiſe an indictment upon the ſtatute, than that the ſtatute makes it the conſtables duty to execute the warrant.

3 Cro. 375.

But it is objected, that the executing of this warrant is not made part of the conſtables duty by this ſtatute. But to this I anſwer, that conſtables are known officers to juſtices of peace. And if an act of parliament ſays, a juſtice of peace ſhall grant a warrant; of conſequence of law it muſt be to the conſtable. Conſtables were officers at common law, they were conſervators of the peace for things within their view, and ſome held they might take a bond. But they are not judges of record. But ever ſince juſtices of the peace have been erected, conſtables have been their officers, and conſtant experience is ſo. Secondly, juſtices of peace cannot command the ſheriff, unleſs power is given them ſo to do in the act of parliament. And that ſuppoſal, that the party ſhould execute the warrant, is harſh; for that is a practice never known in the law, but it muſt be done by the uſual officer. And I believe there are many acts of parliament, which impower juſtices to grant warrants, that do not mention that they ſhall be directed to conſtables. If a juriſdiction of a new matter were given to this court by act of parliament, we muſt proceed in it according to our old forms. So juſtices muſt grant their warrants to their known officer. My lord

Juſtices cannot command the ſheriff without ſpecial power given them.

Coke 4 *Inſt.* 267. ſays, that a conſtable of a hundred was not an officer at common law, but created by the ſtatute of *Wincheſter*. But I hold that he was an officer at common law, and the ſtatute of *Wincheſter* only enlarged his authority in ſome particulars. And ſo it was held by my lord chief juſtice *Hale* in the caſe of *Rex verſ. King*: and the caſe of the King *verſ. Samois*, *Hil.* 16 & 17 *Jac.* cited for it. And the new authority, which was given them by the ſtatute of *Wincheſter*, was what occaſioned the miſtake. And ſo they are officers of the peace, and officers to the juſtices of peace, where no particular officer is named.

3 Keb. 231.

The convictions are but inducement, and therefore they may be pleaded without *prout patet per recordum*: the *git* of the offenſe is the not returning the warrant. And there are many caſes, that where a matter of record, which is alleged in pleading, is only introductory, it is not neceſſary to aver it by the record.

The warrant requires a return, ſo is the warrant itſelf expreſly. And it is neceſſary on the frame of the act of parliament. For, as my brother *Powys* ſays, the offender is to be kept in cuſtody, till a return may be had to the warrant; and for that reaſon the return ought to be ſpeedy, that if there be ſufficient diſtreſs, the offender might be delivered out of cuſtody; or if not, the juſtice might proceed to give ſuch farther judgment as the act directs. And in order to that, the juſtice ought to know, what is done on the warrant.

Warrant of juſtices returnable.

It is objected thirdly, that the *venire facias* ought to have been from all the places mentioned in the indictment. But as to this, the difference is, where the matter in iſſue ariſes in ſeveral places, there the *venue* muſt be from all the places. As where a preſcription for a way from *A.* through *B.* to *C.* is in iſſue, the *venue* muſt be from *A. B.* and *C.* So where the appendancy of common in *A.* to lands in *B.* is traverſed, the jury muſt come from both places. But though a matter ariſing in another place is neceſſary to be given in evidence, yet if the iſſue be not upon it, it is otherwiſe. And to that purpoſe is the caſe of *Clerk verſ. Wood*, *Hutt.* 39. *Hob.* 305. 1 *Jones* 2. where the plaintiff declared, that he was ſeiſed in fee of a houſe in *D.* and that the defendant was ſeiſed in fee of ſeven acres of land in *D.* and that he and all thoſe, *&c.* had had a way over the ſaid ſeven acres to a place in *S.* and that the defendant had plowed up the ſeven acres, *&c.* and upon not guilty pleaded, the *venue* was from *D.* only, and it was reſolved to be well: for not guilty being pleaded, the *tort* in plowing up the way is only in iſſue, though the right to the way muſt be proved upon the trial; and therefore the *venue* need be only from *D.* otherwiſe if the defendant had traverſed the preſcription. And the

Venue.

difference is, where the priſcription is in iſſue, and where the *tort* only. As upon a plea of not *guilty*, 3 *Cro.* 619. *Sidenham verſ. Robins:* an action for ſtopping a way: the ſame caſe and the ſame difference. 3 *Cro.* 751. *Leeds verſ. Shakerley:* an action upon the caſe for ſtopping his water-courſe to his mill, and the declaration of a water-courſe running by three *vills A. B.* and *C.* to his mill, and that the defendant ſtopped the water-courſe in *A.* and upon not guilty pleaded, the *venue* was from *A.* only, and held well, the iſſue being not guilty; otherwiſe, if the iſſue had been upon the preſcription. 2 *Cro.* 631. *Burbolt verſ. Kent*, raviſhment of ward: the plaintiff declared, that the anceſtor of the ward held lands in *S.* and *T.* of the plaintiff, as of his manor of *S.* *&c.* and the defendant raviſhed the ward *apud S.* and upon not guilty pleaded, the *venue* was from *S.* and aſſign'd for error, becauſe it ought to have been from the manor of *S.* or from that and *T.* but reſolved to be well, not guilty being pleaded: for then the iſſue is upon the raviſhment, which is laid at *S.* but otherwiſe if the iſſue had been upon the tenure, for then it ſhould have been from the manor of *S.* and *T.* And yet in both thoſe caſes the tenure, and alſo the water-courſe, muſt be given in evidence; but the iſſue is directly upon the *tort*, and but incidentally upon the tenure, *&c.* But it is objected, that the *venue* ought at leaſt to have been from two of the places; *Felpham* where the warrant was delivered (and that place all agree it ought to come from, for that is the moſt material thing) and it ought to be alſo from *Walberton*, the place where the money was levied. But that I deny, for the matter of the money being levied might have been left out of the indictment, though it will be an aggravation of the fine, for the offenſe is not returning the warrant. And in caſe this had been an action to recover damages, this might have been an objection, becauſe the jury ought to have inquired into the levying the money, in order to have enabled them to aſſeſs damages. But upon this indictment it was enough to prove a delivery of the warrant.

As to the objection, that there ought to have been a place expreſſed in the warrant, where it ſhould be returned; that was not neceſſary, nor ever is inſerted in any warrants. And if the juſtice was not to be found, that would have been a good excuſe for the conſtable upon his defenſe; but we muſt preſume he was in the way. If indictments will not lie in this caſe, the act of parliament will ſignify nothing.

There ought to be time and place in warrants of juſtices.

Holt chief juſtice for the defendant: I make no queſtion but an indictment will lie in this caſe, but I do not like this. The conſtable is a proper officer to execute the warrant; but that which ſticks with me is, that there is neither time nor place mentioned in the warrant, when and where it ſhould be returned; whereas there ought to be both: and all proceſs in the ſuperior courts are ſo. Muſt the conſtable ſeek the juſtice all over the county? Indeed original writs in this court are returnable *ubicunque*; but the ſheriff is an officer to this court, and therefore muſt take notice where the court ſits. But bills in this court have a place of return, and ſo has all proceſs that iſſues out of the Common Pleas and Exchequer. And it is reaſonable for the juſtices of peace, who have but a ſpecial authority, to inſert a place of return in their warrant.

2. The time when the warrant was returnable is not ſet out. All that is ſaid is, that it was *ad certum diem longe abhinc praeteritum*; but the certain time ought to have been ſet out, for it might be delivered after the return was out. It is ſaid, that *poſtea*, *ſcilicet* the ſaid ſecond of *September*, it was delivered to the conſtable the defendant to be executed; but that is but evaſive, for it might be delivered after, and alſo after the return was out, and it is not ſufficiently laid, that it was otherwiſe. And if it was ſo, then the not returning it is no offenſe; for a man is not bound to execute a warrant, that is delivered to him after the return is out: for after the return is out, the warrant has loſt its force. The indictment would have been better, if it had been for neglecting to execute the warrant, for if he had not paid every perſon their ſhare, the defendant had not executed the warrant.

It ſeems, this is another good diſtinct objection, for it ſhould have been, *poſtea et ante retornam ejuſdem*, for the time under the *ſcilicet* is not traverſable.

The caſe cited by my brother *Gould* of the King *verſ.* the overſeers of *St. Clements* was a plain caſe, becauſe the non-execution was in the pariſh of *St. Clements*. But there is no more reaſon in this caſe to ſay, the neglect was at *Felpham*, than at any place elſe.

High conſtable.

As to what has been ſaid about a high conſtable, though the caſe of *Sharrock verſ. Hannemer*, 3 *Cro.* 375. is, that a high conſtable cannot arreſt a man for a breach of the peace within his view, for that he was not ſuch an officer, nor conſervator of the peace, whereof the common law takes any notice, for he is not mentioned in any book; yet that has been ſince contradicted in my lord *Hale*'s time, *Mich.* 25 *Car.* 2. And it has been held, that a high conſtable was an officer at common law, and had power to do all things, which a petty conſtable can do.

3 Keb. 231.

Judgment was given for the Queen by the opinion of the three *puiſne* judges.

Puniſhment for deer-ſtealing.

Upon the former arguments of this caſe, the chief juſtice and *Powell* and the court held, that in caſe an offender was but once convicted, and had goods only ſufficient to ſatisfy part of the ſum forfeited,

forfeited; that his goods could not be taken, but he muſt be impriſoned for a year, and ſet in the pillory. But in caſe he were twice convicted, and had goods ſufficient to ſatisfy one conviction, but not both; he ſhould pay one, and ſuffer corporal puniſhment for the other. But the law never intended he ſhould ſuffer both ways upon one conviction, to pay part, and be ſet in the pillory for the reſidue.

Ante 546.

The chief juſtice ſaid, that upon the return of want of diſtreſs, the juſtice of peace ſhould make a record of it, and give judgment for the corporal puniſhment.

The chief juſtice and *Powell* alſo held, that the conſtable was not obliged to return the warrant itſelf to the juſtice, but might keep that for his own juſtification, in caſe he ſhould be queſtioned for what he had done; but only to give him an account what he had done upon it.

Conviction pleaded.

The chief juſtice held, that it was not neceſſary, to ſet out the convictions in the indictment at large, but only ſhortly, that ſuch an one was before ſuch and ſuch juſtices convicted *ſecundum formam ſtatuti, et ſuperinde* a warrant was iſſued, *&c.*

Gerrard *verſ.* Delaval.

Diſcharge by the act for poor priſoners pleaded in bar of a bond of 200 *l.*

AN action of debt upon a bond of 200 *l.* the defendant, without craving *oyer* of the bond or condition, pleads that he was diſcharged by the act of poor priſoners 2 & 3 of this Queen, *cap.* 15. The chief juſtice took the exception, that the condition of the bond not appearing, the whole 200 *l.* muſt be taken to be a debt, and conſequently the defendant not within the act of parliament (though in truth the bond was only for payment of 100 *l.* and for this reaſon judgment was given for the plaintiff by the whole court. For they could not take notice, but that the whole 200 *l.* was a juſt debt to the plaintiff.

The chief juſtice ſaid, that there were three ſorts of diſcharges by this act. Firſt, the original diſcharge by the juſtices of peace at ſeſſions out of actual cuſtody. Secondly, if a perſon ſo diſcharged was arreſted again, there was a ſecond diſcharge upon common bail. And a third, whereby the body of the debtor was exempted from being liable to be taken in execution. But that the *proviſo* extended to all theſe, that no perſon ſhould have any benefit of any of them, that was indebted above the ſum of 100 *l.* principal money and damages.

Powell juſtice ſaid, that if the money in the condition was not paid at the day, the intereſt was damages *.

* Note, this caſe was adjudged in *Michaelmas* term following, and inſerted here by miſtake.

Regina *verſ.* Peirſon.

A Writ of error of a judgment given at the ſeſſions for the county of *Middleſex* at *Hickes's hall* by the juſtices of peace there, upon an indictment, which ſets forth, that the defendant, ſuch a day and year, and at divers other days, at ſuch a place, *fuit et adhuc eſt communis lena*, *Anglice* a common bawd, *et pro commodo et lucro ſuo proprio adtunc et ibidem quaſdam male diſpoſitas perſonas tam homines quam mulieres in diverſis domibus lupanaribus convenire*, *ſcortationem et fornicationem committere*, *adtunc et ibidem illicite procuravit*, *in contemptum*, *&c.* To this indictment the defendant pleaded not guilty, and was convicted, and fined 100*l.* And the judgment was reverſed; for the indictment ought to have been, for keeping a common bawdy-houſe. But what is charged in this indictment is but ſolicitation of chaſtity, which is a ſpiritual offenſe, and not inquirable or puniſhable at common law. And ſerjeant *Broderick* relied on the difference in 1 *Roll.* 44. *n.* 8, 9. where it is reſolved, that for ſaying a woman is a bawd, no action will lie at common law; otherwiſe, if you ſay ſhe is a bawd, and keeps a bawdy-houſe; becauſe that is an offenſe inquirable and puniſhable in a leet.

S. C. Salk. 382, 384. No indictment lies for being a common bawd. 6 Mod. 178, 256, 311. 1 Sid. 282. Far. 52. 1 Lev. 299.

It was agreed both by the court and counſel in this caſe, that if a perſon was only a lodger in a houſe, yet if ſhe made uſe of her room for the entertaining and accommodating people in the way of a bawdy-houſe, it would be keeping of a bawdy-houſe, as much as if ſhe had the whole houſe.

Regina *verſ.* Weſton.

THE defendant was adjudged by two juſtices of the peace, to be the father of a baſtard child; and the order being removed into the King's Bench by *certiorari*, ſeveral exceptions were taken to it.

S. C. Salk. 122. Shaw's Pariſh Law, cap. 37. ſ. 28.

1. That the juſtices had ordered the weekly payments to be made upon a particular day, *viz.* every *Monday*, in which they

Juſtices of peace may order payment of money for maintenance of a baſtard on a day certain weekly and before the week is quite up.

had gone beyond the power given them in the ſtatute; for computing the time from the making of the order, the week was not up on the *Monday*. But *Holt* chief juſtice held that it was well, and if it was before the day the week was up, yet payment before the day was payment at the day. And *Powell* juſtice ſaid, that if a man had a power to make leaſes reſerving the ancient yearly rent annually, yet if it were reſerved upon a day before the year was up, as if the year ended at *Chriſtmas*, and it was reſerved at *Michaelmas*, it would be well, purſuant to the power; which *Holt* agreed.

Power.

Order of ſuch payment to the overſeers of the poor.

2. That the money was ordered to be paid to the overſeers of the poor, whereas it ought to have been ordered to have been paid to the inhabitants of the pariſh generally. But *Holt* held it was well enough, and that if an order had been made before the 43 of *Eliz.* which conſtituted overſeers of the poor, the juſtices of peace might have ordered the money to have been paid to two or three of the inhabitants of the pariſh, and ſo now they may order it to be paid to the overſeers.

Doth adjudge, in an order by two juſtices ill.

3. But the great objection which ſtuck long with the court was, that after the recital of the order when it came to the adjudication, it was, we the ſaid juſtices *doth* adjudge, inſtead of *do*, the ſingular number for the plural. Mr. *Eyre* to maintain it cited *Fullwood*'s caſe, 1 *Cro.* 489. where *F.* and others were indicted on the 3 *Hen.* 7. *c.* 2. for aſſaulting and taking a woman away by force and marrying her againſt her will; and the indictment was *cepit* inſtead of *ceperunt*; and notwithſtanding that exception taken, yet judgment of death was given againſt the defendants. But *Holt* chief juſtice ſaid, that the anſwer, which is reported in the book to have been given to the objection, is not adequate to it, and is ſo very odd, that he feared the reporter was miſtaken, and ordered the roll to be ſearched: and upon ſearching, the roll was produced in court, and was *intr. Hill.* 13 *Car.* 1. *Rot.* 24. *inter placita coronae*, and was not *cepit* as it was reported to be in the book, but *ceperunt*. And ſo that caſe being removed out of the way, after the caſe had depended two terms, and been ſeveral times ſtirred, the court for that exception the laſt day of the term quaſhed the order.

And afterwards the ſame juſtices made another order with the very ſame fault in it, *viz.* Doth adjudge, and upon a *certiorari* that was quaſhed, *Hil.* 4 *Annae B. R.*

Mich. Term

4 Annae Reginae, B. R. 1705.

Regina *verſ.* Baines.

6 Mod. 192.
2 Salk. 680.
Poſt. 1268.

A *certiorari* to remove all orders againſt *A.* and *B.* will not remove orders only againſt *A.* *Certiorari* bore *teſte June* 25. *anno regni* 1° and was returnable *menſ. Mich.* following.

THE defendant was by order of ſeſſions for ſeveral groſs miſdemeanours turned out from being clerk of the peace, and the order was removed into the court by *certiorari*; and for ſeveral exceptions to the order the court were all of opinion to quaſh the order; when Mr. Attorney took an exception to the *certiorari*, becauſe it was to remove *omnes ordines verſus Baines et Atkinſon nuper factos*, and the order removed was *verſus Baines* only, and appeared to be made after the *teſte* of the writ. And the court ordered counſel of both ſides to ſpeak to this point. And it was argued by Mr. *Weld* and Mr. *Broderick* for *Baines*; and by Mr. Attorney of the other ſide. It was ſaid for *Baines*, that the words ought to be taken diſtributively; as if *B.* and *C.* releaſe to *A.* all actions, which they have againſt *A.* it will releaſe both joint actions, and alſo ſeveral ones: that theſe writs ought to have a liberal conſtruction given them, becauſe they are to inſpect the proceedings of other courts: as upon a *certiorari* a cauſe entred, or an order made, or an indictment found, after the *teſte* of the writ ſhall be removed. That there is a great deal of difference between a *certiorari* and a writ of error; for a *certiorari* is general, to remove *omnes ordines*, but a writ of error is tied up to ſuch a particular record between ſuch an one plaintiff, and ſuch an one defendant, in ſuch a plea; and therefore a writ of error of a judgment between *A.* plaintiff, and *B.* and *C.* defendants, will not remove a judgment in a ſuit between *A.* plaintiff and *B.* defendant: but a *certiorari* to remove *omnes ordines verſus A. B.* and *C.* will remove all orders againſt any of them. And ſo is the caſe of the King *verſ. Lovet*, a *certiorari* to remove an indictment of force, *unde L. et T. indictati ſunt*: and the court held, that that writ would remove an indictment againſt *L.* only; for they held, that a *certiorari* was joint and ſeveral, but otherwiſe

Order made after *teſte* of a *certiorari* removed by it.

3 Keb. 102.

of a writ of error, which would not remove a ſeveral indictment. And even in a writ of error, in the caſe of *Gay verſ. Adams*, 2 *Saund.* 291, 292. the writ of error was directed *majori et aldermannis civitatis ſuae B. ac majori et conſtabulariis ſtapulae B. necnon vicecomitibus ejuſdem, ac ballivis majori et communitati ejuſdem curiae Tolſel, ac ballivis et communitati curiae ſuae pedis pulverizati, et eorum cuilibet*, to certify a record of a judgment *loquelae quae fuit coram vobis in curia noſtra civitatis praedictae ſine brevi noſtro, &c.* and the record certified was, *placita in curia domini regis Tolſel civitatis praedictae, coram* A. *et* B. *tam vicecomitibus comitatus civitatis praedictae, quam ballivis majore et communitate ejuſdem civitatis, &c.* though the record certified was not before ſo many as the record deſcribed in the writ of error, yet it was held to be well, becauſe the *coram vobis* ſhould be taken *diſtributive*; as *coram* all the ſaid officers, or any of them. So in the caſe of *Ord verſ. Morton, Yelv.* 211. the writ of error was of a judgment in ejectment before the biſhop of *Durham*, and ſeven others by name; and the record certified was before the biſhop and eight others: and the record was held to be well removed: for ſo the parties be right named, any other variance will not hurt. The caſe of the King *verſ. Foſſebrook* was, a *certiorari* to remove all orders againſt *A. B.* and *C.* and the caſe was, that there was a joint order againſt *A. B.* and *C.* and another againſt two of them, and another againſt one of them only; and it was reſolved, that the joint order was only removed, and not the two laſt. But the reaſon of that reſolution was, becauſe the court took it, that the firſt was the only order was intended to be removed. Mr. *Broderick* urged farther, that there was a great deal of difference between writs of error and *certioraris*. For writs of error are to deſtroy the judgment, and therefore ought to be taken ſtrictly; and therefore the caſes of writs of error will be no rule to govern this caſe, that a writ of error can remove but one record, though there were many records that would anſwer the deſcription, nay, though there were more that were the ſame *totidem verbis*: but that it was otherwiſe of *certioraris*. He ſaid, that the caſe of *Foſſebrook* was as it is cited; but that it was reſolved by the three judges, *abſente Holt* chief juſtice. 3 *Keb.* 102. was directly contrary: and ſo was 1 *Roll.* 395. *Chayney*'s caſe, 37 & 38 *Eliz.* if a *certiorari* iſſues to remove an indictment of forcible entry againſt ſeveral, naming them, where but four of them only are indicted yet it ought to be removed. He ſaid, that joint words in all mandatory or prohibitory writs are taken jointly and ſeverally; as if a *mandamus* be to ſwear two perſons duly elected, in the return both their elections muſt be anſwered. He cited *Yelv.* 212. and remembered the difference there taken, between writs to remove a record, as *pones*, *recordares*, *&c.* and writs to defeat a record, as

Rex verſ. Foſſebrook, *omnia et ſingula indictamenta.*

writs of error, and writs of falſe judgment. And cited the caſe of the *procedendo*, *Fitz. Procedendo* 3. where the *procedendo* mentioned the aſſiſe to have been arraigned before two juſtices, and in truth it was arraigned before three, and yet good. And 3 *Hen.* 6. 2. *Bro. Recordare* 2. *Fitz. Replevin* 2. where a *pone* in a replevin was ſued at the ſuit of the defendant, and the words were, *et dicas praefato R.* the defendant, where it ſhould have been *J.* the plaintiff; and well. For the plea ſhall not be held upon the *pone*, but upon the plaint. And it has not been ſeen, that a writ of *pone* or *recordare* has been abated, for they have loſt their force, when the plea is removed. [But note, ſays *Brook*, that if the *pone* be between the plaintiff and a ſtranger, it is a void removing.] And in the principal caſe there the record is held to be well removed, though the judges cannot proceed to examine the errors. He ſaid, that joint words ſhould be conſtrued ſeverally, and cited the caſe in *Dier* 34. and *Moore* 164. *Bellingham*'s caſe, where *W. B.* and *L. B.* are pardoned *omnia et omnimoda utlagaria verſus praefatos W. et L. ſeu verſus eorum alterum promulgata*; and though the words of the pardon were joint yet it was allowed; becauſe it ſhould be conſtrued ſeverally according to the ſubject matter, *ſcilicet*, felonies, which cannot be joint: but it ſhould have been, *et eorum aliquem.* So the ſtatute 13 *Eliz. c.* 1. makes it treaſon during the Queen's life to ſay, that ſhe is not, nor ought not to be, Queen of this realm of *England*, and of the realms of *France* and *Ireland:* and yet where one ſaid, that the Queen was not Queen of *France* nor of *Ireland*, ſaying nothing of *England*, it was reſolved to be treaſon, notwithſtanding the word *and*, which was taken as *or*. 1 *And.* 133. 2 *And.* 149.

Mr. Attorney General ſaid, that Mr. *Broderick* agreed, that in caſe of a writ of error no other record could be removed, but only one that anſwered the deſcription in the writ of error. Now a *certiorari* does not differ from a writ of error in reaſon, nor the nature of the thing; for upon this writ the record ſhall be examined. And the reaſon why this writ is brought is, becauſe a writ of error does not lie upon an order of ſeſſions; and the word *terminari* in this writ ſignifies only finally determined. And agreeable to this was the reſolution of that caſe in the year 1700, cited by Mr. *Weld*. In that caſe, there was an indictment againſt all three, and another againſt two of them, and another againſt one of them only; and they were all removed up: but the court would proceed only on that againſt all three, which agreed with the deſcription in the writ. As for Mr. *Weld*'s reaſon of that caſe, becauſe the court took it, that the joint indictment was the only one intended to be removed, that will not ſupport the reſolution;

for if the writ be in its nature joint and ſeveral by conſtruction of law, they muſt have been all removed, becauſe the full import of the words of the writ muſt be anſwered; and it is not a matter of election, to return them all or part only, becauſe the words of the writ upon that ſuppoſition are not ſatisfied by the return of part only. And the *certiorari* was, *omnia et ſingula indictamenta.* The conſtant form of *certioraris* is to make them joint and ſeveral, *viz. omnia et ſingula indictamenta* againſt *A.* and *B.* or either of them: and if what is contended for of the other ſide ſhould take place, if there were a joint indictment or order againſt *A.* and *B.* and ſeveral indictments or orders againſt each of them, if one of them only ſhould bring a *certiorari*, this would remove not only the ſeveral order or indictment againſt him, but the joint one againſt him and the other two. For, as I ſaid before, it is not in the election of the officer, to return up one, and keep back the other. He ſaid, the caſe of *Keble* was not againſt him; for that was only, that a *certiorari* might be joint and ſeveral, which a writ of error could not be; which I agree. But then there muſt be ſeveral words, as it muſt be intended there were in that caſe. The caſe in *Yelverton* he ſaid was for him, but what would be a full anſwer to that caſe, and alſo to the caſe in *Saunders*, was, what was held in the caſe of lord *Cromwell verſ. Andrews*, *Yelv.* 6. that if the record is recited right in the writ of error in the names of the parties and the thing recovered, it would be ſufficient to remove the record, though there were ſome variance in the judges in the number of them.

2. Another exception to the *certiorari* he ſaid was, that it was *omnes ordines nuper factos*, which tied it up to orders made before that time; and this order returned up was made after the *teſte* of the writ. And theſe proviſional *certioraris* ought to be worded generally, *factos.*

Salk. 148. Mr. *Weld* anſwered to this exception, that it was reſolved to be well in the caſe of *Croſſe verſ. Smith*, where the *certiorari* was to remove a plaint *tunc nuper levatam*, and yet held, that it would remove a plaint levied between the *teſte* and return of the *certiorari.*

Upon the firſt ſpeaking to the caſe in *Michaelmas* term 3° the chief juſtice ſaid, that a writ of error was only of one judgment, but a *certiorari* might affect more orders or indictments.

Powell. What is the meaning of putting in the words, or either of them, in theſe writs of *certiorari?* In that caſe cited out of *Saunders* the court went much upon the conſtant form of writs to that court, which had always gone that way: and I heard chief juſtice *Saunders* ſay ſo. To which the chief juſtice ſaid, it would be hard to maintain that judgment otherwiſe.

Upon the ſecond argument of this caſe in *Hil.* 3° *Holt* chief juſtice ſaid, that the *certiorari* was to remove all orders againſt *Atkinſon* and *Baines*; and that there was no order againſt *A.* and *B.* but only againſt *B.* If a man brings an *aſſumpſit* againſt *A.* and *B.* upon the promiſe of both, and upon evidence it appears to have been the promiſe of one of them only, the plaintiff cannot recover; for always when two perſons are named, it is underſtood of them jointly, unleſs it be ſaid, *or any of them:* but it is joint in common parlance. As to the caſe of a pardon to *A.* and *B.* of all offenſes whereof *A.* and *B.* are indicted, that muſt be taken ſeverally from the nature of the thing; becauſe the offenſes are ſeveral, and conſequently ſo muſt the operation of the pardon be. A man may have one prohibition to ſeveral ſuits, but then it muſt appear ſo in the writ. So a man may have one *certiorari* to remove ſeveral indictments, but then the writ muſt mention ſeveral indictments. And here the juſtices of peace cannot certify indictments or orders made by them into this court, without a writ of *certiorari*, as juſtices of *oyer* and *terminer* may; and therefore the removal of this order, whether removed or not, depends upon the efficacy of the writ.

Powell. I thought you would have ſearched for the writ in that caſe in *Keble*; for notwithſtanding any thing that is ſaid in that book, the writ in that caſe might be joint and ſeveral. And *Holt* ſaid, that where a report of a caſe is doubtful, it ought to be verified by the record.

Powell. How do you anſwer the caſe of the King *verſ. Foſſebrook*?

Afterwards in *Mich.* 4. the *certiorari* was quaſhed, becauſe it was not ſufficient to remove theſe ſeveral orders; and a new writ granted: but it was agreed to be a good writ, to remove a joint order againſt *A.* and *B.*

Holt chief juſtice ſaid upon one of the arguments of this caſe, that the juſtices of peace had beſt have a care, of making the order they ſhould return different from the record.

Hyde qui tam, &c. *verſ.* Partridge.

Intr. *Mich.* 3 *Ann.* B. R. Rot. 304.

S. C. Salk. 424.

Plea of the ſtatute of limitations to a ſuit for mariner's wages in the admiralty.

1 Salk. 31, 35. 6 Mod. 11, 12, 25. 2 Salk. 548.

THE caſe was, a ſuit was commenced in the admiralty court for ſeamens wages, and the defendant below pleaded the ſtatute 21 *Jac.* of limitations, and that the contract was made above ten years before the ſuit commenced; and the judge below over-ruled the plea. And the defendant below moved for a prohibition, for refuſing the plea; and the court granted it, with a direction to declare upon it, that the matter might come judicially in queſtion; which was accordingly done, and the caſe put into a declaration; and upon a demurrer to it, the caſe was ſeveral times argued. And when it ſtood for the reſolution of the court, *Holt* chief juſtice took an exception to the plea below, that it was ſaid, that the contract was made above ten years before the ſuit commenced, which was not material; for the cauſe of action did not accrue by the contract, but by the determination of the voyage, and it did not appear when that was; for that might have been within ſix years before the ſuit commenced, though the contract was made ſo long before; and wages are not due till the determination of the voyage, whenſoever the contract is made. And therefore the plea ought to have been, that the voyage determined above ſix years before the ſuit commenced. And for this fault, if this plea had been pleaded to an action brought here, we ſhould have over-ruled it; and conſequently they below have done well in over-ruling it, and therefore a conſultation muſt be granted; elſe the matter were conſiderable.

Ante, 838.

Powell. This exception is fatal, for your prohibition is founded upon the judge of the admiralty's refuſing to allow your plea, which was no more than he ought to do, for that fault in it.

Note, this was remedied next ſeſſions of parliament by the act for amendment of the law.

And a conſultation was granted upon this point *per totam curiam.* But note, that the court inclined, that a conſultation ſhould be granted on the merits. For *Holt* ſaid, that if a contract is made on the high ſea, this ſtatute cannot be pleaded in the admiralty to a ſuit there for it, becauſe they have original juriſdiction of the cauſe, and are not within the act. And by uſage immemorial they have ſued in the admiralty for mariner's wages, though the contract was at land; and the ſtatute ſeems by the penning, to be aimed only againſt ſuits at common law.

Bond *verſ.* Barnes.

THE defendant pleaded another action pendent in abatement, and began his plea thus, *viz. petit judicium de narratione,* and concluded it thus, *unde petit judicium de narratione pro eadem cauſa pendente, et quod narratio caſſetur:* and upon demurrer Mr. *Branthwayte* prayed judgment final, upon the authority of the caſe of *Medina verſ. Stoughton, Trin.* 12 *Will.* 3. *B. R.* where he alledged, it had been reſolved, that the commencement and concluſion to the declaration was in bar, in this court. And the court, *abſente Holt,* held it to be in bar, and gave judgment final upon the firſt opening.

Plea with *petit judicium de narratione* is a plea in bar in the King's Bench.
2 Mod. 261.
3 Mod. 281.
Carth. 187.
Salk. 210, 218.

But it ſeems, that it was only a plea in abatement; and no ſuch matter was reſolved in the caſe cited, but the contrary; and the judgment was only a *reſpondes ouſter* in that caſe.

Miſnomer was pleaded in the ſame manner as before in the caſe of *North verſ. Baker* this term; and judgment final given the laſt paper day, when the court was full, upon the opening of the caſe, and the manner of the plea. But it was not oppoſed, there being no council for the defendant.

North v. Baker.

Colefatt *verſ.* Newcomb.

A Miniſter of a donative was ſued in the eccleſiaſtical court, for that, when he read prayers, he did not read the whole ſervice, but left out what parts of it he thought fit, and for preaching without licence. And Mr. *King* moved for a prohibition, upon a ſuggeſtion that the church was a donative; and he argued, that donatives were exempt from the juriſdiction of the ordinary, and that it was a lay thing, and the biſhop could not viſit it; and that if the incumbent was guilty of hereſy, the ordinary could not meddle with him, for the parſon was privileged in reſpect of the place; but the patron might by commiſſion examine the matter, and upon cauſe deprive him. *Yelv.* 61, 62. *Fairchild verſ. Gaire,* 2 *Cro.* 63. *S. C.* and *Co. Li.* 344. *a.* that the founder ſhall viſit them; and *Bro. Praemunire* 21, to the ſame purpoſe.

A parſon of a donative is puniſhable in the eccleſiaſtical court for reading contrary to the liturgy.
3 Salk. 140-1.
12 Mod. 640.
Farr. 31.
Ro. Rep. 453.
Brownl. 202.

But *Powell, abſente Holt,* took the difference; where the ſuit in the eccleſiaſtical court is in order to deprivation, and where only for reformation of manners; in the firſt caſe the court will prohibit, but not in the laſt: and therefore, if in this caſe the ſpiritual court proceeded to deprivation, the court would prohibit them, but not till then. He ſaid, he had known prohibitions denied frequently to ſuits againſt parſons of donatives for marrying without licence. He ſaid, that by the old canon law preaching was no part of the miniſter's office, however it came to be ſo much in vogue now; but only reading maſs, and adminiſtring the ſacraments; and no body preached then without the licence of the biſhop, but he appointed preachers. And he ſaid, that now ſince the act of uniformity, if the biſhop denied to grant a licence to a parſon, who was fit to preach, they would grant a *mandamus* to him to grant one, and that by the act of uniformity the eccleſiaſtical juriſdiction was ſaved. And the motion was denied.

Mandamus to the biſhop to grant a licence to *J. S.* to preach.

Note, Mr. *Mead* and Mr. *Salkeld*, both of the *Middle Temple*, told me, they had both known the chief juſtice take the ſame diſtinction, that the parſon of a donative was liable to the eccleſiaſtical juriſdiction, as he was a member of the eccleſiaſtical body, for perſonal offenſes, though for matters relating to the church he was exempt; and therefore the ſpiritual court could not deprive him: but for drunkenneſs, or preaching hereſy, they might cenſure him; and that ſeems upon conſideration of the caſe in *Yelverton* to be the better opinion.

Benns *verſ.* Parre.

No prohibition to the admiralty to ſtay a ſuit for mariners wages, though the contract was made by deed on land.

SIR *James Mountague* moved for a prohibition to a ſuit in the admiralty for ſeamens wages, upon a ſuggeſtion that the contract was made by deed at land. But upon reading the ſuggeſtion, it appeared to be general, that the contract was made at land. Then the court directed him to mend his ſuggeſtion, and make it, that it was by deed. And he amended it, and made it *per ſcriptum*. But the court held, that that was not ſufficient, for it might be by writing, and yet not by deed; and if it were ſo, that would not alter the caſe, for notwithſtanding the writing, it is but a *parol* contract. But Sir *James Mountague* urged, that it was a ſpecial agreement, but that the court held did not draw it from the admiralty's juriſdiction. And the motion was denied.

Hackett *verſ.* Tilly.

S. C. Lill. Ent. 160. Rep Q. A. 93. Holt 204. In debt on a bond as adminiſtrator as to this bond, the defendant pleaded in abatement a grant of adminiſtration to *J. S.* of this bond before. 11 Mod. 93. is not S. P.

THE plaintiff brought an action of debt againſt the defendant on a bond of 2000*l.* entred into by the defendant to *Thomas Fox* Eſq; deceaſed; and this was brought by the plaintiff as adminiſtrator to the ſaid *Thomas Fox* as to this bond only, in truſt for Sir *Andrew Hackett*. The bond bore date the 20th of *May* 1695. The adminiſtration was laid to be granted by the archbiſhop to the plaintiff the 14th of *May* 1705. The defendant, after an imparlance with *ſalvis ſibi omnibus et omnimodis exceptionibus ad billam praedictam* prayed *oyer* of the bond and condition. The bond appeared to be entred into to the ſaid *Thomas Fox*, as warden of the *Fleet* priſon; and the condition was, if the defendant do ſome time within the ſpace of two years next enſuing the date hereof indemnify and ſave harmleſs the ſaid *Thomas Fox* from all actions, that are already brought againſt the ſaid *Thomas Fox*, for the eſcape of any priſoners, that have eſcaped out of the *Fleet* priſon, then the obligation to be void, *&c.* Then the defendant prayed *oyer* of the plaintiff's letters of adminiſtration, and had it; and then pleaded in abatement, that this bond was at the time of the making, and yet is, a ſecurity entred into to the ſaid *Thomas Fox*, as warden of the *Fleet* priſon, and relating to the ſaid office of warden of the *Fleet*; and that before the granting the ſaid adminiſtration to the plaintiff, the archbiſhop the 6th of *February* 1704 granted letters of adminiſtration *bonorum jurium et creditorum dicti Thomae Fox defuncti, quoad et quatenus omnia redditus pro cameris debita et ſecuritates per obligationes judicia ſive aliter quomodocunque tunc intratas dicto Thomae Fox, ut guardiano de le Fleet, acetiam tota beneficia advantagia ſummam et ſummas monetae, quae obtineri poterint ea ratione de et ab aliqua perſona ſive aliquibus perſonis quibuſcunque, et omnia beneficia exinde habenda, cuidam Johanni Clements, &c. prout, &c.* and then he avers, that *John Clements* took on him the adminiſtration, and is alive, and thoſe letters of adminiſtration in full force, *&c.* To which plea the plaintiff demurred. And exception was took to it by Mr. *Pengelly*, that this was matter in bar, and could not be pleaded in abatement, becauſe it perfectly deſtroys all right of action in the plaintiff; whereas in a plea in abatement, the defendant ought always to give the plaintiff a better writ: and the difference is, where it is pleaded in the plaintiff or defendant himſelf, or in a ſtranger; as if the ſuit is againſt the defendant as executor, the defendant pleads, that *J. S.* died inteſtate, and adminiſtration was granted to him, this is no bar, but pleadable only in abatement. 2 *Lev.* 190. *Granwell verſ. Selby*, 2 *Cro.* 15. But where the plea is, that a ſtranger is executor or adminiſtrator, it is a bar. *Dier* 202. *p.* 69. 5 *Co. Robinſon's* caſe. And all theſe books, *viz.* 21 *Hen.* 6. 8. *n.* 18. 1 *Brownl.* 97. *Yelv.* 115. 7 *Hen.* 6. 13. 3 *Hen.* 7. 14. 4 *Hen.* 7. 17. 31 *Hen.* 6. 13. 9 *Hen.* 6. 7. *Cro. El.* 102. 2 *Roll.* 3, 20. warrant this difference. See *Cro. El.* 111.

Againſt which Mr. *Raymond* urged for the defendant, that though this might be pleaded in bar (which he admitted) yet it might be pleaded in abatement too; and that there were ſeveral caſes in the books, where it was held, that matter in bar might be pleaded in abatement. 10 *Hen.* 7. 11. *Br. Brief* 543. If a man pleads a plea in abatement, and he cannot come to the matter which goes in abatement, without ſhewing the matter in bar, the plea in abatement ſhould be took, as outlawry. So in waſte in the *tenet*, I may plead a ſurrender in abatement, and yet that is a bar. So in replevin, property in a ſtranger may be pleaded in bar or abatement. 2 *Roll.* 2. 64. *Cro. Jac.* 519. *Salkill verſ. Skelton, Winch* 26. *Hil.* 31 *Hen.* 6. 12. *b. pl.* 1. 1 *Ventr.* 249. *Wildman verſ. Norton. Hale* chief juſtice ſaid, property in the defendant may be pleaded in bar or abatement. 2 *Mod.* 214. *Major & Stebbing verſ. Bird & Harriſon.* 34 *Hen.* 6. 1. Receipt of part of the debt is pleadable in abatement, yet it may be pleaded in bar.

But *per totam curiam*, the plea is only in bar, and cannot be pleaded in abatement, for the reaſons mentioned by *Pengelly*; and therefore a *reſpondes ouſter* was awarded.

Plea in abatement after imparlance.

Note, this plea was pleaded after imparlance. See for that 3 *Lev.* 330. 2 *Lutw.* 963. *Hunlock verſ. Petre*, general non-tenure pleaded after ſpecial imparlance; otherwiſe after general imparlance, 3 *Lev.* 55. But ſee that record 53. that it is a ſpecial imparlance. Privilege is not pleadable after ſpecial imparlance. 1 *Sid.* 318. *Truſſel verſ. Maddin.* 22 *Hen.* 6. 7.

Newton & uxor *verſ.* Hatter.

Aſſault and battery by *baron* and *feme* for battery on both. Sty. 134.

THE plaintiffs brought an action of aſſault and battery, for a battery committed on them both: judgment by default, and a writ of inquiry was executed 17 of *May* 1705. and intire damages, *viz.* 7*l.* 10*s.* was given. And on the return of the writ of inquiry judgment was arreſted, becauſe the wife cannot be joined in an action with the huſband for a battery on the huſband, *Eaſter* term laſt. After which they brought a new action, only for the battery

Aſſault and battery by *baron* and *feme* for battery on the feme, *ad damnum ipſius.*

battery committed on the wife, and laid it *ad damnum ipſius Johannis* the huſband. On not guilty pleaded, verdict was given for the plaintiff. And Mr. *Ketelbey* moved in arreſt of judgment, becauſe it ought to have been *ad damnum ipſorum*, the damages in ſuch caſe ſurviving to the wife, if the huſband dies before they are received; and cited 1 *Sid.* 387. *Hoffin verſ. Byles.* And of that opinion was the court. And Mr. *Raymond* moved to arreſt their own judgment for expedition.

Gravely *verſ.* Ford.

Trover *de duobus equis*, evidence of geldings.

THE plaintiff brought an action of *trover* againſt the defendant *de duobus equis*, and on not guilty pleaded, the iſſue was tried before the lord chief juſtice *Holt*, laſt ſummer aſſiſes at *Horſham* in *Suſſex*. And on evidence it appeared, that they were geldings: whereon Mr. *Conyers* counſel for the defendant inſiſted, that the plaintiff ought to be nonſuited for this variance; he having declared *de duobus equis*, whereas he ought to have declared *de duobus ſpadonibus*. And on the importunity of the defendant's counſel, the chief juſtice ordered the jury to give a verdict for the plaintiff; and he ſaved this as a point, but ſtrongly inclined for the plaintiff. Afterwards, after *Michaelmas* term, 40, *viz. Dec.* 10, 1705, Mr. ſerjeant *Hall* attended the chief juſtice at his chamber in *Serjeants Inn* in *Chancery-lane*, for the defendant; and Mr. *Raymond* attended for the plaintiff. And ſerjeant *Hall* cited *Lutw.* 1354, *Mellor verſ. Borking*, treſpaſs for taking *vaccam*; the defendant juſtified the ſeiſure *de una juvenca*, and though in other reſpects the juſtification was good, judgment for the plaintiff. But the chief juſtice held it clearly good, and ſaid it was the ſame *ſpecies*, and that *ſpado* did not ſignify a gelding any more than any other creature gelt; and that in treſpaſs for a treſpaſs done *cum equis, bobus, vaccis, &c.* evidence of a treſpaſs with geldings maintained the declaration; and therefore ordered the *poſtea* to be delivered to the plaintiff without any difficulty. Note, if the writ contains leſs than the count, it is ill; as if the writ is, *Quare clauſum fregit*, and the declaration, *Quare clauſa, &c. Cro. El.* 185. *Edwards verſ. Watkins.* So if the writ contains more than the count; as replevin *de averiis*, declaration of a horſe, *Cro. El.* 330. *Haſlop verſ. Chaplin.* So in *Lutw.* 1181. *Gins verſ. Dams*, 2 *Ventr.* 153. *Cro. El.* 829. *Norton verſ. Palmer.* See 2 *Lutw.* 1537, 8. *Aden verſ. Harris.*

Variance.

Regina *verſ.* Gulſton, Stubbs, et alios.

Mich. 3 *Ann.* B. R. n. 26.

Indictment for *riotoſe* **aſſembling together,** *ad quoddum illicitum faciendum.*
1 Hawk. P. C. c. 65.

False Latin.

THE defendants were indicted at the general quarter-ſeſſions of the peace held for the county of *Norfolk* 18 of *July* 1704 by adjournment, for that they the 25th of *May* 1704 *vi et armis, viz. gladiis baculis et cultellis, apud Eaſt Bradenham in comitatu praedicto, riotoſe et routoſe ſeipſos congregaverunt et aſſemblaverunt cum intentione ad aliquid illicitum ibidem agendum et perpetrandum, et pacem dictae dominae reginae perturbandum; et ſic aſſemblati exiſtentes ad quendam locum in Eaſt Bradenham praedicto, in venella, Anglice* the lane, *ibidem ducente ab Eaſt Bradenham praedicto ad S. in comitatu praedicto, quo quoddam quercus Edw. Beagham armigeri ad valentiam* 100*s. adtunc ſtetit et crevit, riotoſe et routoſe acceſſerunt, et quercum illud ipſius E. B. vi et armis, &c. riotoſe, routoſe, illicite, et manu forti, ſucciderunt et proſtraverunt; in malum exemplum, &c.* In *Trinity* term laſt Mr. ſerjeant *Weld* moved, this indictment might be quaſhed, becauſe to make it a riot, it ought to be ſhewn what unlawful act they aſſembled to do, and it was too general to ſay, *quoddam illicitum agendum.* Secondly, it was perfectly falſe *Latin, quoddam quercus, et quercum illud*; ſo that it does not appear any oak grew there at all. And the court made a rule to ſhew cauſe this term, *&c.* Whereupon Mr. *Raymond* urged, 1. That it was not neceſſary to ſhew what unlawful act they aſſembled to do, ſo that they did aſſemble to do an unlawful act; for if they aſſembled to do one, and did another, it would be a riot. 2. It appeared they did do an unlawful act, for they cut down an oak, and the falſe *Latin* could not vitiate. *Sed non allocatur*; for *per curiam*, it is too general, and the act ought to be ſhewn, that the court might judge, whether the act was unlawful or not. Beſides, they ſaid they would not encourage ſuch ill-drawn indictments, *&c.* and therefore it was quaſhed.

Pond *verſ.* Underwood.

Indebitatus aſſumpſit againſt a perſon who received money by authority of an adminiſtration, where there was a will made and executor appointed.

IN an *indebitatus aſſumpſit* brought by the plaintiff *Armanuell Pond* as executor of *Charles Pond* deceaſed, for money received by the defendant, owing to the teſtator for wages (he being a ſeaman) after the teſtator's death. On not guilty pleaded, it appeared on evidence at the trial, that before the will was found, adminiſtration, *&c.* was granted to *Anne Pond* a ſiſter of *Charles Pond*, and that ſhe made a warrant of attorney to the defendant to receive this money, being 21 *l.* by virtue of which warrant he did receive it, and paid it to *Anne* before any notice given of this will. And by the direction of the lord chief juſtice *Holt*, before whom it was tried at *Guildhall* the ſittings after *Michaelmas* term 1705. the plaintiff was nonſuited: for by him, though all acts done by an adminiſtrator where there is a will are void, and ſuch an action in this caſe would lie againſt *Anne Pond*; yet it is hard to make the defendant liable, having paid the money over, before he knew of the will, to the adminiſtrator.

Burdett *verſ.* Newell.

Practice. On a motion for a prohibition there muſt be an *affidavit*, that the matter ſuggeſted to be pleaded, was pleaded in the Spiritual Court.

A Rule was made to ſhew cauſe why a prohibition ſhould not be granted to ſtay a ſuit againſt the plaintiff, in the court of the archdeacon of *Litchfield*, for not going to his pariſh church, nor any other church, on *Sundays* or holidays, nor receiving the ſacrament thrice a year; upon ſuggeſtion of the ſtatute of *Eliz.* and the toleration act, and then qualifying himſelf within that act, and alleging that he pleaded it below, and they refuſed to receive his plea. And Mr. *Raymond* ſhewed for cauſe, that this fact was falſe, and that the plaintiff was not a diſſenter, nor had qualified himſelf *ut ſupra*, and therefore hoped the court would not allow the rule to ſtand, unleſs he had an *affidavit* of the fact; for by that means any perſon might come and ſuggeſt a falſe fact, and ouſt the Spiritual Court of their juriſdiction. *Quod curia conceſſit*, and therefore the rule was diſcharged. Mr. *Carter* counſel for the plaintiff having no *affidavit*.

Wiggins *verſ.* Ingleton.

Seaman ſhould recover wages *pro rata*, if he is preſſed, *&c.*

IN an action brought for mariners wages for a voyage from *Carolina* to *London*, it appeared, that the plaintiff ſerved three or four months, and before the ſhip came to *London*, which was the delivering port, he was impreſſed into the Queen's ſervice; and afterwards the ſhip arrived at the delivering port. And ruled by *Holt* on evidence at *Guildhall*, that the plaintiff ſhould recover *pro tanto* as he ſerved, the ſhip coming ſafe to the delivering port. Afterwards in another cauſe, the ſittings after this term at *Guildhall*, between *Chandler* and *Meade*, in ſuch an action it appeared, that the plaintiff was hired by the defendant at *Carolina* to ſerve on board the *Jane* ſloop, whereof the defendant was maſter, from *Carolina* to *England*, at 3 *l.* *per* month: that he ſerved two months, then the ſhip was took by a *French* privateer and ranſomed; and juſt as ſhe came off of *Plymouth*, the plaintiff was impreſſed, *&c.* and

Chandler verſ. Meade.

Ship ranſom'd and then the mariner preſſed.

and then the ſhip came ſafe into the river of *Thames*, where ſhe diſpoſed of her cargo: and by *Holt*, the plaintiff can have no wages, the ſhip having been took by the enemy and ranſomed. Mr. *Raymond* inſiſted, that in that caſe he ſhould recover *pro rata*, and that the uſage among merchants was ſo; which *Holt* ſaid, if he could prove, it would do; but wanting proof of it, the plaintiff was nonſuited.

Maitland *verſ.* Taylor.

12 Mod. 7.
Jo. 82.
3 Keb. 654, 675, 691.
Sid. 325.
Lev. 207.
Carth. 448.

AN action was brought in *Middleſex* on an obligation, the condition was to pay a ſum of money at ſuch a place in *London*. The defendant, after *oyer* of the bond and condition, pleaded payment at the day, *&c.* And on iſſue joined, it was tried in *Middleſex* before the lord chief juſtice *Holt*, and verdict for the plaintiff. And the laſt day of the term Mr. *Harris* moved in arreſt of judgment, that this ought to have been tried in *London*. But held, that according to the caſe of *Croft* and *Boite* in 1 *Saund*. 246. and *Jew verſ. Brigs*, 3 *Lev*. 394. and dame *Calverley verſ. Leving*, it was aided after verdict; by the judges *Powell*, *Powys*, and *Gould*, *Holt* being abſent. *Antea*, 330.

Tyſon *verſ.* Paſke.

S. C. Salk. 209, 333.

Action lies for fees for executing an *elegit*.

The action was laid in *Cambridgeſhire*, and tried at *Cambridge*.

AN action of debt was brought by the ſheriff of *Cambridgeſhire*, upon the 29 *Eliz. cap*. 4. for his fees for executing an *elegit*; and upon *nil debet* pleaded, there was a verdict for the plaintiff. And Mr. *Page* and Mr. ſerjeant *Cheſhyre* took ſeveral exceptions in arreſt of judgment. Firſt, that no fees were due for executing an *elegit* within the ſtatute, and conſequently that the action lay not; for the land extended may be of little value, and therefore it is unreaſonable that the ſheriff ſhould have poundage of the whole debt. And where the land lies in ſeveral counties, a man may pay more in fees than his debt. And the caſe of *Bridge* and *Cage*, 2 *Cro*. 103. was cited: an *aſſumpſit*, in conſideration that the plaintiff would execute a writ of *elegit* for a friend of the defendant's, to pay, *&c.* and held, that no action would lie, though the money promiſed to be paid was no more than his ſhilling pence came to. In anſwer to this exception ſerjeant *Parker* cited the caſe of *Spring verſ. Eedes*, which was *intr. Hil.* 28 *&* 29 *Car*. 2. *C. B. Rot*. 1410. where in the very ſame action judgment was given for the plaintiff, and that judgment affirmed in the King's Bench, the record of which affirmance is *Hil.* 29 *&* 30 *Car*. 2. *B. R. Rot*. 386. As to the objection, where the land ſhould happen to lie in ſeveral counties, there

2 Mod. 240.

there was nothing of that in the preſent caſe. The reaſon of the caſe in 2 *Croke* he ſaid was, becauſe in that time the judges held no action would lie upon the ſtatute; but that has been held otherwiſe ſince, 1 *Cro.* 286, 287. *Jones* 307. where actions are maintained by ſheriffs for fees for executing *capias ad ſatisfaciendum.*

Holt chief juſtice ſaid, that there was no reaſon why the ſheriff ſhould not have fees, as well for executing an *elegit*, as an extent upon a ſtatute. Upon the writ of *elegit*, the ſheriff returns, that he has taken an inquiſition, and extended the defendant's land, and delivered it to the plaintiff. And there is a *liberate* in the body of the writ of *elegit*, otherwiſe in caſe of an extent upon a ſtatute there muſt be a *liberate*. And in the caſe of the *elegit*, upon the return of delivery, the plaintiff may enter; and he can do no more in caſe of a ſtatute after a *liberate* executed, for he muſt not enter by force. The return of *liberari feci* is a full execution of the writ of *elegit*, and by that the plaintiff becomes tenant by *elegit*, and may maintain an ejectment; and he may enter and aſſign his intereſt upon the land, and the aſſignment will be good. For the defendant's continuing in poſſeſſion after the return of the writ, turns the plaintiff's eſtate to a right, and therefore he muſt enter before he can aſſign it over.

Powell juſtice ſaid, that the like caſe with this was adjudged in the Common Pleas, while he ſat there; that all the objections, that are here made to the action, were made there, and over-ruled: that the court there reſolved, that the ſtatute of *Eliz.* mentioning extents, that ſhould not be confined to extents upon ſtatutes only, but ſhould be carried to extents upon *elegits*, eſpecially when they were both equally liable to the ſame exceptions. As to the objection how it ſhould be, when ſeveral *elegits* were to go into ſeveral counties, they ſaid, they would give their reſolution in that, when it came in queſtion; and therefore he was of opinion, that the ſheriff ſhould have his fees for executing an *elegit*. The other two judges agreed.

In an inquiſition took on an *elegit*, want of naming the place, aided after a verdict, in an action for fees.

The ſecond exception, and which was the only one that ſtuck with the court, was, that the plaintiff had laid in his declaration, that the inquiſition was taken *apud villam Cantabrigiae praedictae*; and there was no *Cambridge* mentioned before. And this objection was inforced two ways: Firſt, that there was no *venue* where this fact, which was ſo material, and the very ground and foundation of the action, was done: Secondly, that it did not appear, that this inquiſition was taken within the county of *Cambridge*, as it ought to do, to intitle the plaintiff to his action. For as *Powell* juſtice ſaid, there are more towns in *England* of that name beſides that where the univerſity is, and for ought appears it might be one of them, where this inquiſition was taken, and conſequently out of the county, and ſo the execution void, and conſequently the plaintiff has no cauſe of action.

After conſideration as to the firſt part of the objection, it was reſolved by *Holt* chief juſtice (to which the others agreed) that this was helped after verdict by the ſtatute 17 *Car*. 2. *cap*. 8. as no *venue*, the cauſe having been tried by a jury of the proper county. And he compared it to the caſe in 1 *Lev*. 207. upon an iſſue joined in an action of covenant, whether *J. S.* had any title to *Shrob-walk* in the foreſt of *Whittlewood* in the county of *Northampton*: the action was laid in *London*, and the *venire facias* was from *Shrob-walk*. And though it was agreed, that a walk in a foreſt was but a liberty, and no place from which a *venue* could ariſe, yet this want of a *venue* was aided by the 17 *Car*. 2. the iſſue having been tried by a jury of the county, where the matter in iſſue aroſe. As to the ſecond, it was anſwered by the counſel for the plaintiff, and reſolved by the court, that that was helped by the verdict, for the iſſue being upon *nil debet*, if the *elegit* had been executed out of *Cambridgeſhire*, it had been a void execution, and conſequently againſt the plaintiff, and the jury muſt have found for the defendant, *quod nil debet*. And therefore a verdict being now found for the plaintiff, it muſt be intended that *Cambridge* is in the county of *Cambridge*; for it muſt be intended that a record was given in evidence of an inquiſition taken within the County of *Cambridge*.

Note, this ſtatute has been confined ſince to the letter, *viz.* county where the action is laid; but that is not this caſe, becauſe the action here is laid in the proper county, and tried there alſo, and ſo within both the letter and meaning of the ſtatute.

Judgment was given for the plaintiff.

Billings *verſ.* Eeds.

Intr. *Mich.* 1 *Ann.* B. R. Rot. 170.

S. C. Salk. 612.
5 & 6 Will. & Mar. c. 22.

UPON a ſpecial verdict in an action of treſpaſs for taking the plaintiff's horſes, the caſe was, a gentleman here in town had a chariot and harneſs of his own, and contracted with the plaintiff to furniſh him with a pair of horſes and a coachman whenever he ſhould have occaſion, and paid him for it 100*l. per annum*. But the plaintiff had no licence from the commiſſioners of hackney coaches to keep hackney coaches. And whether any perſon could let coach horſes here in town to a gentleman, to drive him about town, except he had a licence to keep a hackney coach, was the queſtion upon the 5 & 6 *Will.* & *Mar. cap*. 22. And the caſe was argued by *Darnall* King's ſerjeant, and Mr. Attorney General for the defendant, but manifeſtly againſt the ſtream; the court from the beginning conceived it a clear caſe for the plaintiff. And upon the ſecond argument the court gave judgment for the plaintiff, becauſe though in the beginning of the licencing clauſe, *ſect.* 3. and alſo in the prohibitory clauſe, *ſect.* 5. hackney coach or coach horſes are mentioned in the disjunctive, yet that muſt be underſtood coach horſes to be uſed with a hackney coach. For all the other proviſions in the act are reſtrained to hackney coaches, as the number to be licenced, the fine to be paid, and the annual rent; and if the act had intended that keeping hackney horſes, diſtinct from hackney coaches, ſhould have been licenced, it would have made ſome proviſion about it, and have reſerved ſome revenue out of it. And *Holt* and *Powell* ſaid, that the forfeiture of 5*l.* being for keeping a hackney coach or horſes without licence, could be extended to no keeping of coach horſes, but ſuch as the commiſſioners had power to licence, and might have been licenced by the commiſſioners; but for the reaſons beforementioned hackney coach horſes diſtinct from a hackney coach cannot be licenced to be kept by the commiſſioners, and therefore the keeping them without licence is not within the reſtraining clauſe. And they ſaid this would be a very hard conſtruction, for at this rate, if a gentleman's horſe fell lame he could not hire another, but muſt either buy another or lie ſtill: that this trade of letting out horſes had been uſed a long time, and was lawful for any man to do by the common law, and therefore the ſubject ought not to be reſtrained from it without expreſs words: that this particular manner of keeping a coach and hiring the horſes, was a method known and in uſe before this act was made.

Note, upon the argument of this caſe *Powell* ſaid, and the chief juſtice agreed, that if *A.* kept a pair of horſes, and *B.* had a coach, and let them to *B.* who drove them about with the coach as hackney, that this would be keeping a hackney coach without licence in both of them.

Judgment was given for the plaintiff.

Wallis *verſ.* Lewis.

See 2 Saund. 207.
If an executor brings an action as executor, where he need not name himſelf executor, he need not plead with a *profert in curia* of the letters teſtamentary.
Now ſee 4, 5 Ann. c. 16.

IN an action upon the caſe the plaintiff declared as executrix, and the declaration ſet forth, that the defendant was indebted to her *ut executrici* for monies of the teſtator received after his death by the defendant to the plaintiff's uſe *ut executricis*; and being ſo indebted promiſed to pay, *&c.* The plaintiff had judgment by *nil dicit*, and a writ of inquiry of damages returned. And Mr. *Dee* moved in arreſt of judgment, that the plaintiff had not in the declaration made any *profert* of the letters teſtamentary.

Holt chief juſtice. This declaration being grounded on a promiſe to the executrix herſelf, the naming her executrix was but ſurpluſage. For if an executor gives an authority to another to receive

Ante, 436. 865.

ceive money of the teſtator's, payment to that perſon is payment to the executor. So where *J. S.* receives money of the teſtator's of his own head, the executor may if he pleaſes allow the receipt; and then it is money received to the uſe of the executor. So if an executor be poſſeſſed of goods of his teſtator's, and they are taken out of his poſſeſſion, and the executor brings *trover* or treſpaſs, he may in the declaration name himſelf executor if he will, but he need not produce the will in court, becauſe he is ſufficiently intituled to the action upon his poſſeſſion.

And *Powell* ſaid, that he might bring the action in his own name, though he never had actual poſſeſſion.

And afterwards at another day upon the motion of Mr. *King*, judgment was given for the plaintiff.

Lamine *verſ.* Dorrell.

Indebitatus aſſumpſit by an adminiſtrator againſt the former adminiſtrator, whoſe adminiſtration was repealed, for money received, *&c.* 1 Salk. 27. 6 Mod. 151, 161.

IN an *indebitatus aſſumpſit* for money received by the defendant to the uſe of the plaintiff as adminiſtrator of *J. S.* on *non aſſumpſit* pleaded, upon evidence the caſe appeared to be, that *J. S.* died inteſtate poſſeſſed of certain *Iriſh* debentures; and the defendant pretending to a right to be adminiſtrator, got adminiſtration granted to him, and by that means got theſe debentures into his hands, and diſpoſed of them: then the defendant's adminiſtration was repealed, and adminiſtration granted to the plaintiff, and he brought this action againſt the defendant for the money he ſold the debentures for. And it being objected upon the evidence, that this action would not lie, becauſe the defendant ſold the debentures as one that claimed a title and intereſt in them, and therefore could not be ſaid to receive the money for the uſe of the plaintiff, which indeed he received to his own uſe; but the plaintiff ought to have brought *trover* or detinue for the debentures: the point was ſaved to the defendant, and now the court was moved, and the ſame objection made.

Powell juſtice. It is clear the plaintiff might have maintained detinue or *trover* for the debentures; but when the act that is done is in its nature tortious, it is hard to turn that into a contract, and againſt the reaſon of *aſſumpſits*. But the plaintiff may diſpenſe with the wrong, and ſuppoſe the ſale made by his conſent, and bring an action for the money they were ſold for, as money received to his uſe. It has been carried thus far already. *Howard* and *Wood's* caſe is as far: there the title of the office was tried in an action for the profits.

2 Lev. 245.

Holt chief juſtice. Theſe actions have crept in by degrees. I remember, in the caſe of Mr. *Aſton*, in a diſpute about the title to the office of clerk of the papers in this court, there were great counſel conſulted with; and Sir *William Jones* and Mr. *Saunders* were of opinion, an *indebitatus aſſumpſit* would not lie, upon meeting and conferring together, and great conſideration. If two men reckon together, and one overpays the other, the proper remedy in that caſe is a ſpecial action for the money overpaid, or an account; and yet in that caſe you conſtantly bring an *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe. Suppoſe a perſon pretends to be guardian in ſocage, and enters into the land of the infant, and takes the profits, though he is not rightful guardian, yet an action of account will lie againſt him. So the defendant in this caſe pretending to receive the money the debentures were ſold for in the right of the inteſtate, why ſhould he not be anſwerable for it to the inteſtate's adminiſtrator? If an action of *trover* ſhould be brought by the plaintiff for theſe debentures after judgment in this *indebitatus aſſumpſit*, he may plead this recovery in bar of the action of *trover*, in the ſame manner, as it would have been a good plea in bar for the defendant to have pleaded to the action of *trover*, that he ſold the debentures, and paid to the plaintiff in ſatisfaction. But it may be a doubt if this recovery can be pleaded before execution. This recovery may be given in evidence upon not guilty in the action of *trover*, becauſe by this action the plaintiff makes and affirms the act of the defendant in the ſale of the debentures to be lawful, and conſequently the ſale of them is no converſion.

If two men reckon, and one overpays the other, *indebitatus aſſumpſit* lies, or account.

Account againſt a tortious guardian.

Former recovery in *indebitatus aſſumpſit* bar in trover.

Afterwards the laſt day of the term, upon motion to the court, they gave judgment for the plaintiff. And *Holt* ſaid, that he could not ſee how it differed from an *indebitatus aſſumpſit* for the profits of an office by a rightful officer againſt a wrongful, as money had and received by the wrongful officer to the uſe of the rightful.

Courtenay *verſ.* Strong.

ASſumpſit, the plaintiff declared, that the defendant, in conſideration that the plaintiff at the requeſt of the defendant had agreed with him, that he *quaſdam terras cum pertinentiis in L.* then in the poſſeſſion of the defendant, *et onerabiles una cum aliis terris cum ſolutione cujuſdam annualis redditus 40 l. tunc nuper con-*

S. C. Salk. 364.
6 Mod. 265.

Conſideration of an *aſſumpſit*, that whereas the defendant had lands in poſſeſſion, out of which *J. S.* had an annuity, that the defendant ſhould enjoy without diſturbance from the plaintiff by reaſon of that annuity, no conſideration.

ceſſi cuidam Johanni Courtenay, pro termino annorum tunc et adhuc venturorum, quiete occuparet durante vita cujuſdam M. L. abſque moleſtatione ipſius Jacobi Courtenay (the plaintiff) *ratione ejuſdem annualis redditus*, promiſed to pay the plaintiff, *&c.* and alſo that the defendant in conſideration, that the plaintiff at the requeſt of the defendant had agreed with the defendant, that he *quaſdam alias terras cum pertinentiis in L. praedicto*, then in the poſſeſſion of the defendant *durante vita cujuſdam M. L. quiete occuparet*, promiſed to pay the plaintiff, *&c.* Upon *non aſſumpſit* pleaded there was a verdict for the plaintiff. And Mr. *Eyre* in *Michaelmas* term laſt moved in arreſt of judgment, that here was no conſideration, for the rent charge appears to be *John*'s and not *James*'s.

Mr. *Squib* moved ſeveral times for judgment, and cited 1 *Roll.* 22. *n.* 22. *aſſumpſit* in conſideration that the plaintiff at the requeſt of the defendant would permit the defendant to have and hold a meſuage and land then in the occupation of the defendant to his own uſe, the defendant aſſumed to the plaintiff to pay the plaintiff 13*l.* at *Michaelmas* after, for rent for the premiſſes; and held a good conſideration, although it did not appear, that the plaintiff had any eſtate in the meſſuage at the time of the promiſe, and it did appear that the defendant was then in poſſeſſion of it. And 1 *Roll.* 29. *n.* 61. 3 *Cro.* 703. *aſſumpſit*, that where *A.* was indebted to *B.* and *A.* came to *C.* and intreated him to pay *B.* and promiſed to repay him again, and thereupon *C.* promiſed to pay the debt to *B.* and after did not pay it; *A.* may have an action againſt *C.* on the promiſe, becauſe of the mutual promiſe from *A.* to *C.* whereby *C.* may be indemnified: and an action will lie for *C.* againſt *A.* upon it, even without averring payment to *B.* (And it ſeems to me, that *B.* alſo may have an action againſt *C.* being the perſon for whoſe benefit the promiſe was made.) So here, the plaintiff might maintain an action againſt the defendant, without any other conſideration than the mutual promiſe from the plaintiff to the defendant.

To the firſt caſe Mr. *Eyre* anſwered, that the contrary had been adjudged, 3 *Cro.* 859. And if it had not been ſo, yet this caſe differed from that, becauſe here the title to the rent charge, of the plaintiff's own ſhewing, was in another, *viz. John Courtenay*, and muſt be intended to continue ſo, unleſs it had been ſhewn to have been granted out of him: in that caſe the thing only ſtood indifferent.

Holt chief juſtice. You ſhould have ſaid, that the rent charge was aſſigned by *John* to *James* the plaintiff. You would have us intend it, but we cannot.

Powell juſtice agreed, that when it is ſaid in the declaration, that the rent was granted to *John Courtenay*, it muſt be taken to be his rent. After this caſe had depended a long time, now this term judgment was given for the defendant.

Holt chief juſtice. The quiet enjoyment is no conſideration, for the plaintiff had no right to charge or moleſt the defendant; that right appears of their own ſhewing to be in *John Courtenay* a ſtranger. And a promiſe not to do a thing, which the perſon that makes the promiſe cannot do, is nothing, no conſideration; but the promiſe granted on that, is merely *nudum pactum*.

Mr. *Squib* urged, that it was helped by the verdict, for now it muſt be intended to have been proved in evidence, that the plaintiff had a title to the rent-charge.

Holt. The verdict cannot help it. You muſt allege a ſufficient promiſe in your declaration.

Powell juſtice. If the plaintiff proved the promiſe in the declaration, he muſt have had a verdict.

Powell and the others agreed. Part of this caſe is of the report of Mr. *Pengelly*.

Knight *verſ.* Barker.

TRover was brought for 400 *peciis*, *Anglice* ends, of deal-boards: not guilty being pleaded, verdict was for the plaintiff; and Sir *James Mountague* moved in arreſt of judgment, that it was uncertain, what an end of board meant; it ſhould ſhew, how many foot or inches they were. And after ſeveral motions, judgment was given for the plaintiff, becauſe ends of boards ſeem to be a term of art, and are ſufficiently known among workmen. *Stile* 75. 1 *Keb.* 34. *Walcott verſ. Tappin.*

S. C. Rep. Q. A. 66. 11 Mod. *Trover* for 400 ends of deal-boards.

Hilary Term

4 Annae Reginae, B. R. 1705.

Regina *verſ.* Highmore.

In a conviction for ſelling coals contrary to 16 & 17 Car. 2. the place where, ought to be ſhewn. See theſe ſtatutes 30 Car. 2. cap. 8. 6, 7 W. c. 10. 3 Ann. c. 28. 12 Ann. ſt. 2. c. 17. 3 Geo. 2. c. 26. 4 Geo. 2. c. 30. 11 Geo. 2. c. 15. 17 Geo. 2. c. 35. 19 Geo. 2. c. 35. 23 Geo. 2. c. 26.

THE defendant was convicted before the lord-mayor of *London*, upon the 16 & 17 *Car.* 2. *c.* 2. for ſelling coals contrary to that act, *viz.* leſs than 36 buſhels to the chaldron, &c. And the conviction being removed into the King's Bench by *certiorari*, it was quaſhed, becauſe there was no place mentioned, where the coals were ſold; which ought to have been, in regard that the power of the lord-mayor is only in caſe of coals expoſed to ſale in the city of *London* and liberties thereof. If the coals were expoſed to ſale in any other county, then the power of convicting is in the juſtices of peace of that reſpective county. And therefore the lord-mayor, to have intituled himſelf to a juriſdiction, ought to have ſhewn in the conviction, that the coals were ſold within the city of *London* or the liberties thereof; and for want of that, the conviction is naught.

Rhodam *verſ.* Watſon.

Variance. See the Stat. 5 Geo. 1. c. 13. ſ. 1. whereby variance is amendable.

A Writ of error of a judgment in the court of *Berwick:* the writ of error was, *in redditione judicii loquelae quae fuit, &c. de quodam debito quinquaginta librarum, quod idem W. a praefato R. exigit, &c.* and the record returned was, a *loquela pro* 54 *l.* debt. And for this variance the writ of error was quaſhed by the whole court.

The judgment was for 50 *l.* and therefore ſerjeant *Broderick* would have had the words in the writ of error *de quodam debito* 50 *l.* refer to *judicii*, and not to *loquelae*, and ſo being *judicii de quodam debito* 50 *l. loquelae quae fuit, &c.* But *Holt* ſaid, that could not be, becauſe of the following words, *quod idem W. a praefato R.*

exigit, which ties up the words, *de quodam debito* 50*l.* to the word *loquela*; for that only is a demand, and not the judgment, the demand by the judgment being transferred *in rem judicatam*.

Regina *verſ.* Deman.

THE defendant was indicted of perjury, and the indictment ſet forth a trial had before the lord chief baron, *aſſociato ſibi J. S.* by *niſi prius* in *Middleſex*; and that the defendant, being ſworn before the lord chief baron upon the holy Evangeliſts, depoſed ſo and ſo, which was falſe, *et ſic* the defendant *commiſit voluntarium perjurium coram* the lord chief baron, *aſſociato ſibi J. S.* Judgment was given againſt the defendant by *nihil dicit*. And now the defendant appearing in court, ſerjeant *Broderick* moved the court in his behalf in arreſt of judgment; and it being doubted, whether he were not too late, *Holt* chief juſtice ſaid, that after judgment by *nihil dicit* judgment has been arreſted, but never after judgment upon demurrer. Then ſerjeant *Broderick* took exception, that this oath could not be at the trial ſet forth in the indictment, for the trial was before the lord chief baron and the aſſociate, but the oath before the chief baron without the aſſociate; and the aſſignment of the perjury differs from the oath, for that is *coram* the chief baron and aſſociate, where the oath was before the chief baron only, and that is a material part of the indictment. And for this variance he prayed, that judgment might be ſtayed.

Perjury aſſigned before the lord chief baron, and aſſociate.

Hawk. P. C. Abr. 203. cap. 69.
1 Inſt. 176.
Goldſ. 191. pl. 140.
Freem. 506.

After judgment by *nihil dicit* in indictments judgment may be arreſted, but never after judgment on demurrer.

Holt chief juſtice. The trial is not ſaid to have been before the chief baron, *aſſociato ſibi*, &c. And the aſſociate need not be mentioned in every part of the indictment, where the chief baron is mentioned: but this is according to the conſtant form; in the *niſi prius* proceſs, the *diſtringas*, and the *jurata*, and in the continuances, the aſſociate is never mentioned, but only in the entry of the *poſtea*. And by the 18 *Eliz. c.* 12. which erects the *niſi prius* in *Middleſex*, there is no direction, that the judge ſhould have any aſſociate.

Powell juſtice. It ſhall be intended, that the aſſociate did continue with the chief baron all the trial, having been mentioned to have been there at the beginning.

Mr. *Eyre* for the proſecutor ſaid, that the oath was ſaid to be *adtunc et ibidem in eadem curia.*

Judgment was given, that the defendant ſhould be ſet in the pillory.

Vaughan *verſ.* Lucking.

What ſhall be a ſufficient averment, in a ſpecial action on the caſe on promiſe.

AN action upon the caſe: the plaintiff declared, that the defendant was paymaſter of   , and in conſideration, of, *&c.* promiſed the plaintiff, that he ſhould be his clerk, ſo long as the defendant ſhould be paymaſter; and avers, that he the plaintiff continued to ſerve him *in ſervitio praedicto* till ſuch a time; and then the defendant the plaintiff *extra ſervitium ſuum penitus dimiſit et expulſit.* After verdict for the plaintiff it was moved in arreſt of judgment, that the plaintiff had not averred, that the defendant continued paymaſter at the time he turned the plaintiff out of his ſervice, and conſequently the plaintiff had not ſet out a good cauſe of action; for the defendant was to continue the plaintiff his clerk, only ſo long as the defendant continued paymaſter.

But it was anſwered and reſolved by the court, that it was averred in the declaration, that the defendant was once paymaſter; and he ſhould be intended to continue ſo, unleſs the contrary did appear. Alſo that it was ſaid, that the defendant the plaintiff *extra ſervitium ſuum penitus dimiſit et expulſit*; which could not be, if the defendant were not paymaſter. But to that anſwer it was objected for the defendant, that it was *extra ſervitium ſuum* generally, and not *extra ſervitium ſuum praedictum*, and ſo might be ſome other ſervice.

But *Holt* ſaid there was no other ſervice mentioned, and it would be a foreign intendment to intend any other. And *Powell* ſaid, that in the words next preceding, there was *ſervitio praedicto*, *viz.* that the plaintiff ſerved the defendant *in ſervitio praedicto*; and then, when he comes and ſays, he turned him *extra ſervitium ſuum*, that muſt be intended the ſervice the plaintiff ſerved him in. And all the court agreed, that no other ſervice could be intended. Alſo, if the defendant's office had not continued at the time of his turning away the plaintiff, he could never have had a verdict.

Judgment was given for the plaintiff.

Moverly *verſ.* Lee.

ASſumpſit, in conſideration the plaintiff would provide, meat, drink, *&c.* the defendant promiſed to pay him ſo much as the plaintiff *habere meruit*, and avers in fact, that he *habere meruit* ſo much, *&c.* Upon *non aſſumpſit* pleaded, there was a verdict for the plaintiff. There were other counts in the declaration.

S. C. Salk. 558. *Vide* Farr. 106.

Mr. *Mountague* laſt term moved in arreſt of judgment, that the promiſe was void, to pay ſo much as the plaintiff *habere meruit*, which is the præterperfect tenſe, and denotes the time paſt, and conſequently could be nothing; for a man could not have deſerved any thing, for a thing to be done *in futuro:* and conſequently intire damages being given, judgment ought to be arreſted.

Mr. *Acherley* ſaid, that it was but falſe *Latin*, and that was aided after a verdict by 18 *Eliz. c.* 14. Secondly, that it wanted only a daſh to make it *meruerit*, and that would have been well; and the court would ſupply the daſh: thirdly, that if the count by reaſon of that word was inſenſible and impoſſible, the court would reject it, and intend that no damages were given for it, and give judgment on the reſt of the promiſes. To the firſt it was anſwered and agreed by the court, that this was not falſe *Latin*, but falſe ſenſe, that there might be ſuch a promiſe made, but it was void in its operation. And *Powell* ſaid, that nothing could be given in evidence on the declaration, but meat and drink found after the promiſe, for which it was impoſſible for the plaintiff to have deſerved any thing at the time of the promiſe. And *Holt* chief juſtice ſaid, that a verdict cannot help nonſenſe, that the words of the 18 *Eliz.* were, "that after a verdict the judgment "ſhould not be ſtayed or reverſed, by reaſon of any default in "form, or lack of form, touching falſe *Latin*;" but that the act did not ſay, that a judgment ſhould not be ſtayed or reverſed after a verdict for nonſenſe. Secondly, that the court could not ſupply the daſh, for that would be to make it quite another word. Thirdly, that there never was any caſe, where an inſenſible or impoſſible count was rejected, and aided after verdict. And upon theſe exceptions the cauſe reſted till the laſt day of this term, and then upon motion the court held, that they would take the words in the declaration to be the very words of the promiſe. And as if the words of the declaration had been in writing under the party's hands, they muſt have conſtrued the promiſe according to the intent of the parties, and not have put ſuch a con-

Stat 4 Geo. 2. c. 26. for turning all legal proceſs into *Engliſh*, extends all the ſtatutes of jeofails to *Engliſh* proceedings.

conſtruction upon it, as to make the promiſe void: ſo here upon this declaration they would conſtrue it according to the intent of the parties, which muſt be to pay the plaintiff ſo much as he ſhould deſerve for the meat, drink, *&c.* found, and not conſtrue it ſo as to make it a void contract. That indeed according to the grammatical conſtruction of the words, the promiſe was nonſenſe and void; but yet the parties certainly meant ſomething by it, and that meaning they the court muſt endeavour to find out, and underſtand the promiſe accordingly, rather than by purſuing the grammatical conſtruction of the words of the promiſe, make it void.

Judgment for the plaintiff. The queſtion ſeems to me to be, if the plaintiff ought not to have purſued the intent and meaning of the promiſe in his declaration.

Miſtake of the ſtyle of the King and Queen fatal.

1 Salk. 181.

AFTER verdict in an action upon a penal ſtatute made 6th of the late King and Queen, it was moved in arreſt of judgment, that the ſtatute was laid to be made 12th of *November* 6 *Will.* 3. whereas at that time the Queen was alive, and the ſtile was *Will.* & *Mar.* and in regard there was no ſuch ſtile of the King at that time, for that miſtake of the ſtile the judgment was arreſted.

Mem. The queen did not die till *December* 28. that year.

Read *verſ.* Charnley.

Error upon judgment in the court of *Carliſle* in a *ſcire facias* againſt bail.

A Writ of error of a judgment in the court of *Carliſle*, upon a *ſcire facias* againſt bail, the *ſcire facias* was, that the defendant *ſecundum uſum et conſuetudinem ejuſdem curiae, ac civitatis praedictae a tempore, &c. uſitatam et approbatam manucepit pro eodem Thoma Kemp, quod ipſe dictus Thomas Kemp ſtabit rectus in curia, in et ſuper querela praedicta, et defalt. ad nullum diem ſibi inde dandum faciet, nec ſe retrahet, nec ſe abſentabit ab executione judicii ſi judicium inde verſus eum redditum fuerit, ſub poena incurrendi et ſubeundi executionem hujuſmodi judicii, ſi contingat ipſum Thomam Kemp in aliquo praemiſſorum defaltam facere, et inde legitimo modo convinci.*

Mr. *Ward* took exception to the recogniſance, that it differed from the recogniſances taken in this court, and conſequently was illegal and void, this recogniſance being poſitive, that the defendant

dant ſhould render himſelf, but thoſe in this court, only if the defendant do not pay the money, that then he ſhould render his body to priſon.

Holt chief juſtice. They are both the ſame: the words in this recogniſance are, that the defendant ſhall not withdraw nor abſent himſelf from the execution of the judgment. Now if the defendant pays the money, that is an execution of the judgment, and conſequently the recogniſance is performed. If a *capias ad ſatisfaciendum* be returned, *non eſt inventus*, and the money be not paid, then the defendant hath withdrawn and abſented himſelf from the execution. And the bail may plead payment by the principal.

Ante 157, 216, 233. Cro. El. 132. 2 Leon. 213. Vent. 262. 3 Keb. 349. 2 Lev. 212. 12 Mod. 112.

Powell juſtice agreed. Judgment affirmed.

Crowther *verſ.* Oldfield.

A Writ of error of a judgment in the Common Pleas, in an action upon the caſe, wherein the plaintiff declared, *quod cum* he the 1ſt of *May*, &c. *ſeiſitus fuiſſet, et adhuc ſeiſitus exiſtit, de et in uno meſuagio et decem acris terrae cum pertinentiis in N. parcella manerii de W. ac tentis per copiam rotuli curiae manerii illius, ut tenens cuſtumarius eorundem in feodo ſimplici, ſecundum conſuetudinem ejuſdem manerii: cumque etiam idem* the plaintiff *habeat et habere debeat, ipſeque et omnes tenentes cuſtumarii dictorum tenementorum ſuorum cum pertinentiis per conſuetudinem infra manerium praedictum a tempore*, &c. *uſitatam et approbatam habuere, et habere conſueverunt, communiam paſturae in quodam loco, paſtura ſive mora vocata Warmlees, parcella etiam ejuſdem manerii, et continente* 40 *acras in Northwroine, pro omnibus averiis ſuis communicalibus ſuper tenementa cuſtumaria ſua praedicta levantibus et cubantibus, quolibet anno, omni tempore anni, ad libitum ſuum, tanquam ad eadem tenementa cum pentinentiis ſpectantem et pertinentem: praedictus tamen* the defendant intending to deprive the plaintiff, &c. incloſed the common, *per quod in tam amplo*, &c. Upon not guilty pleaded there was a verdict for the plaintiff, and a penny damages; but upon a motion in arreſt of judgment, judgment was given for the defendant in the Common Pleas.

S. C. Salk. 170, 364. S. C. 6 Mod. 19. Lutw. 125.

Mr. *Eyre* and Mr. *Ward* for the defendant in error, to maintain the judgment below, took theſe exceptions to the declaration. Firſt, that the plaintiff in his declaration had not intituled himſelf ſufficiently to this common. For it did not appear what ſort of eſtate it was he had, to which he claimed common. It could not be taken to be a copyhold eſtate, becauſe it was not ſaid to be *ad voluntatem domini*, which is eſſential to a copyhold eſtate; for freeholds may be granted and held by copy of court-roll, but then they are not *ad voluntatem domini*, which makes the difference between them and copyholds. And for this were cited 1 *Cro.* 229. where it was laid in a declaration, that ſuch lands were granted to *J. S.* and his heirs by copy of court-roll, *tenendum ſecundum conſuetudinem manerii* of *O.* and that they deſcended to *J. N.* heir of *J. S.* and charged the defendant with the receipt of the profits as guardian to *J. N.* And it being objected, that theſe appeared to be copyhold lands, and that againſt one, that occupies copyhold lands, no account lies, it was reſolved, that it not being ſaid *ad voluntatem domini*, it muſt be intended a freehold. 2 *Ventr.* 143. Where in replevin for taking his cattle in a place called *Underway*, the defendant made conuſance for rent arrear, and ſhewed, that *J. S.* was ſeiſed in fee of a cloſe called *Underway*, parcel of the manor of *L.* of which the place where was and is parcel, according to the cuſtom of the ſaid manor, and made a leaſe to the plaintiff rendring rent: and *J. S.* afterwards, *ſecundum conſuetudinem manerii praedicti tiel jour* at a court of the manor then held, ſurrendered into the hands of the lord of the manor *ſecundum conſuetudinem manerii praedicti* the reverſion and rent to the uſe of *J. N.* and his heirs: and the lord of the manor at the ſame court granted the reverſion and rent to *J. N.* to hold to him and his heirs, according to the cuſtom of the manor, *&c.* And upon demurrer the conuſance was held to be inſufficient; for that the lands being to be taken to be freehold, they ought to have a ſpecial cuſtom to paſs them by ſurrender in court, and it was not enough to ſay, that he ſurrendred them *ſecundum conſuetudinem manerii*; but the cuſtom ſhould have been fully ſet forth, *viz. quod infra manerium praedictum et tempore, &c. talis habebatur conſuetudo, &c.* and that they muſt be taken to be freehold, though it is ſhewn that *J. S.* was ſeiſed according to the cuſtom of the manor, becauſe it is not ſaid at the will of the lord. 2 *Lutw.* 1165, 1166, 1171, 1174. Where in replevin the defendant avowed as grantee of the manor of *W.* for rent arrear, and ſhewed that the place where time whereof, *&c.* was *parcella manerii de W. et per totum tempus ſupradictum tenementa cuſtomaria dicti manerii et dimiſſa et dimiſſibilia per copiam rotulorum curiae manerii praedicti* by the lord of the manor, or his ſteward *cuicunque perſonae, &c. ea capere volenti, &c. ad terminum vitae, &c. ſecundum conſuetudinem manerii praedicti*: and that the lord of the manor at his court of the manor *tiel jour per copiam rotulorum curiae ejuſdem manerii* granted the place where, to one *J. S. pro* 99 *annis ſecundum conſuetudinem manerii praedicti* rendring rent, *&c.* and upon demurrer the avowry was held to be ill, becauſe it was not ſaid *ad voluntatem domini*, and ſo muſt be taken to be freehold. 3 *Bulſtr*. 230. There in *aſſumpſit* the plaintiff declared, *quod cum ſeiſitus fuit in dominico ſuo ut feodo ſecundum conſuetudinem manerii de R.* of a houſe, in conſideration the plaintiff would ſurrender the ſame to the uſe of the defendant, the defendant promiſed, *&c.* and the plaintiff averred, that he did ſurrender; and the court reſolved that this could not be taken to be copyhold land, but yet gave judgment for the plaintiff. For freehold land might paſs by ſurrender by cuſtom, and it was not neceſſary to ſhew the cuſtom in the declaration. And in pleading a copyhold eſtate, you always ſay *ad voluntatem domini*. *Co. intr.* 9. An action by a commoner copyholder, for depaſturing the common: there he ſhews, that the tenement, to which he claimed his common, was time whereof, *&c. parcella manerii de B.* and by all that time *dimiſſum et dimiſſibile per copiam rotulorum curiae manerii praedicti* by the lord or his ſteward, to any perſon that would take it *in feodo ſimplici, &c. ad voluntatem domini ſecundum conſuetudinem manerii praedicti*. And when he comes to ſhew the grant to himſelf, he purſues that form. So is *Raſt. intr.* 627. 2. It cannot be taken to be a freehold eſtate, becauſe it is ſaid to be parcel of the manor, and a freehold eſtate cannot be parcel of a manor. 2 *Roll. Abr.* 120. So that there can be no ſuch caſe as is ſet out in this declaration, and conſequently the plaintiff cannot recover. Secondly, ſuppoſing upon this declaration the court can take the eſtate to be either freehold or copyhold, yet the common is not ſufficiently claimed. For if you take it for a copyhold eſtate, the cuſtom ought to have been alleged expreſly and ſpecially, *quod infra manerium talis habetur, necnon a tempore cujus, &c. habebatur, conſuetudo quod, &c.* and not as here, *per conſuetudinem infra manerium praedictum a tempore, &c. uſitatam et approbatam habuere et habere conſuevere, &c.* as in the caſe before. And ſo it is laid in 4 *Co.* 31. *b. Vaugh.* 251, 253. where in treſpaſs, the defendant juſtified under a cuſtom for the copyhold tenants of a manor to have *ſolam et ſeparalem paſturam* in the place where; and the cuſtom was laid with a *per conſuetudinem in eodem manerio, &c. uſitatam et approbatam habuere et habere conſuevere, &c.* And my lord *Vaughan* ſays, it is double, including both the cuſtom of the manor, and the claim by reaſon of the cuſtom, which ought to be ſeveral. And the court ſhould judge, whether the claim be according to the cuſtom alledged. 3 *Cro.* 185. In debt upon an eſcape, the plaintiff declared, that he recovered a judgment againſt *J. S.* in *London*, and ſued a *capias ad ſatisfaciendum* againſt him; upon which *non eſt inventus* was returned: upon which one of *J. S.*'s ſureties being in priſon upon a plaint there, was detained in execution *ſecundum conſuetudinem civitatis praedictae*: and upon demurrer the declaration was held to be ill, becauſe it was not expreſly ſaid, that there was ſuch a cuſtom; but only *ſecundum conſuetudinem:* and according to that way of laying the cuſtom mentioned before out of 4 *Co.* 31. *b.* are the precedents in the books of entries, *Co. intr.* 123. *b. Raſt. intr.* 627. and beſides, the common is claimed here *tanquam ad tenementa cuſtumaria ſpectantem*, which cannot be in caſe of a copyhold; for a copyholder hath common by reaſon of the cuſtom, which annexeth the ſame to his cuſtomary eſtate; and therefore, if the copyholder purchaſe the freehold of his copyhold eſtate of the lord, and thereby infranchiſeth the ſame, his common is deſtroyed. And ſo is the caſe of *Marſham verſ. Hunter*, 2 *Cro.* 253. and in 2 *Brownl. intr.* 96. that clauſe is left out. Indeed the greateſt part of the precedents are as this is, but they paſſed *ſub ſilentio*, and therefore now it comes to be diſputed, the reaſon of the thing ought to prevail. If it be taken to be a freehold eſtate, then the declaration is much worſe; for then the plaintiff ought to have preſcribed in a *que eſtate*, and cannot make a title by cuſtom: and for that was cited 1 *Cro.* 418. where the plaintiff declared, that he was poſſeſſed of a cloſe in the pariſh of *M.* for years, and that within the ſaid pariſh there is, and time whereof, *&c.* was a cuſtom, that *omnes occupatores* of the plaintiff's cloſe, time whereof, *&c. habuerunt et habere conſueverunt* a way, *&c.* After a verdict for the plaintiff upon not guilty pleaded, the judgment was arreſted, becauſe he ought to have preſcribed in him that had the inheritance, and could not claim it by way of cuſtom. To the objection, that this was a poſſeſſory action, and therefore the plaintiff had no need to ſet out any title, according to the caſes of *Stroud verſ. Birt*, *&c.* it was anſwered, that where the plaintiff in his declaration undertakes to ſet out a title, and ſets it out inſufficiently, the declaration will be ill, though the ſetting out the Salk. 363. title was more than needed. And the caſe of *Dorne verſ. Caſhford*, *Mich.* 9 *Will.* 3. *B. R.* was cited, where leſſee for years brought an action upon the caſe, for ſtopping his way, and preſcribed in a *que eſtate:* and after verdict for the plaintiff, judgment was arreſted, becauſe, though it had been enough to have ſaid *habuit et habere debuit* (which were part of the words of the preſcription, and, as was urged, ought only to ſtand, and the reſt be rejected) yet when the plaintiff has laid a preſcription, which is ill, it will vitiate his declaration: and the court cannot reject one part of an intire ſentence, and retain the reſt. And the ſame anſwer was given to the objection, that the verdict would make this declaration good, it being found by that, that the lands were parcel of the manor, and that there was ſuch a cuſtom for common, neither of which could be, unleſs it was a copyhold eſtate. And the caſe of *Dorne verſ. Caſhford* cited to that: and it was obſerved, that the caſe cited out of 1 *Cro.* 418. was after a verdict. And the caſes alſo of 2 *Cro.* 315. debt upon a bond: condition, that the plaintiff ſhould enjoy ſuch lands without eviction: the breach was aſſigned, that the plaintiff had the lands recovered from him by verdict in ejectment upon a leaſe made by one *E.* but did not ſhew what title *E.* had to make the leaſe, but only that he had good title: and upon a rejoinder that the recovery was by covin, and iſſue upon the covin, and a verdict for the plaintiff; yet the judgment was arreſted for the inſufficiency of the breach, becauſe it was not ſaid, that *E.* had a prior title before the plaintiff's title, for it might be, *E.*'s title was under the plaintiff. 2 *Saund.* 136. *aſſumpſit*, in conſideration the father of the defendant, whoſe ſon and heir he is, was bound to the plaintiff, *&c.* the plaintiff intending to ſue the defendant, he promiſed in conſideration of forbearance, to pay, *&c.* and on *non aſſumpſit* pleaded there was a verdict for the plaintiff, but the judgment was arreſted, becauſe it was not ſaid, that the father bound himſelf and his heirs, and ſo there was no conſideration for the promiſe. And from theſe caſes it was obſerved, that where the plaintiff in his declaration, *&c.* ſets out his title inſufficiently, or aſſigns an inſufficient breach, a verdict will not help it: that the caſes before cited of *Stroud verſ. Birt*, *&c.* were not adjudged upon the verdict, for thoſe declarations would have been good upon demurrer.

2 Saund. 180. 1 Mod. 294. the ſame caſe with 2 Cro. 315. Covenant *verſ.* a *feme covert* on a fine *ſur conceſſit*, and warranty againſt all men, and breach aſſigned, that *J. S. habens legale jus et titulum* to the tenements entred, *&c.* and iſſue upon ejecting, and a verdict for the plaintiff, and yet judgment arreſted.

Broderick and *Cheſhyre* ſerjeants, for the plaintiff in error argued, that the declaration was good enough. And as to the firſt exception they ſaid, that this muſt be taken to be copyhold, for it is ſaid to be *parcella manerii*, which freehold land cannot poſſibly be, and alſo that it is *tenta per copiam rotulorum curiae manerii illius*, and farther that the plaintiff is ſeiſed of it, *ut tenens cuſtumarius ejuſdem in feodo ſimplici ſecundum conſuetudinem ejuſdem manerii.* And in 4 *Co.* 24. *b.* 31. *b.* it is reſolved, that the two main pillars, upon which copyhold eſtates ſtand, are, that the land is parcel of the manor, and that it has time out of mind been demiſed and demiſable by copy of court-roll. The words, that he is ſeiſed *ut tenens cuſtumarius*, neceſſarily imply, that it is copyhold; for this is the phraſe which is uſed where a lord of a manor preſcribes for common for him and his copyhold tenants in the ſoil of another, *viz. pro ſe et tenentibus ſuis cuſtumariis*, and no more. *Co. intr.* 9. *a.* and in *Raſt. intr.* 131. *b.* where a cuſtom is pleaded for copyhold tenants to ſurrender out of court: they are called only *tenentes cuſtumarii.* In *Co. intr.* 123. where a cuſtom to grant by copy is ſet out in an action of debt for rent againſt the leſſee of a copyholder, and alſo a grant purſuant to it; in both, the words *ad voluntatem domini* are omitted, and no more in effect ſaid than here. So in *Co. intr.* 373. where grants by copy were found in a ſpecial verdict, the ſame words were omitted, and only ſaid *ſecundum conſuetudinem*

tudinem manerii. And as to the caſes that have been cited, they do not come up to the caſe in queſtion. In the caſe in 1 *Cro.* 229. there were not the words *tenens cuſtumarius*, nor *parcella manerii*. In the caſe in 2 *Ventr.* there were indeed the words *parcella manerii*, but there were not the words *tenta per copiam rotulorum curiae manerii illius*, nor *ut tenens cuſtumarius*: that the caſe in 3 *Bulſtr.* was rather for them, becauſe the court there went upon the want of *tenta per copiam rotulorum*, which is ſaid in this caſe. To the ſecond objection, that the cuſtom ought to have been ſet out ſpecially, and not with a *per conſuetudinem*, it was anſwered; that the cuſtom was well enough laid in ſubſtance, and the informality of laying it would be cured by the verdict. If a man makes title as couſin and heir, and does not ſay *coment*, yet that is well upon a general demurrer. Where a man preſcribes for common without number, the want of *levant* and *couchant* is helped after a verdict, though it is the very meaſure of the common. *Sty.* 428. 1 *Mod.* 7, 75. 2 *Sid.* 87. In action upon the caſe for ſtopping his way to his houſe, the plaintiff preſcribed in a *que eſtate* to a way to his houſe, but did not ſay, that his houſe was *antiquum*, but the want of *antiquum meſuagium* was helped by the verdict. *Latch* 110. *Palm.* 420. And as to the objection, that the common was claimed as appurtenant to the cuſtomary tenements, whereas it was appurtenant to the cuſtomary eſtate; they anſwered, that the precedents were all ſo, though it muſt be confeſſed, that according to the caſe in 2 *Cro.* the common is in ſtrictneſs appurtenant to the cuſtomary eſtate. And for precedents were cited 9 *Co.* 113. the entry of that caſe, *Co. intr.* 9. *Dyer* 363. *b.* 1 *Saund.* 349. 2 *Saund.* 321. *Co. intr.* 574. *Winch intr.* 931, 1026, 1111. *Herne* 81. *Brownl. red.* 428, 430. The court agreed, that if it did not ſufficiently appear to them on this declaration, whether this were common belonging to a copyhold or a freehold eſtate, it would be ill, becauſe they could not give judgment for they knew not what. And the chief juſtice put the caſe of an action for ſtopping the plaintiff's lights: it would be a good declaration to ſay, that the plaintiff was poſſeſſed of a houſe, in which were ancient lights, and that the defendant ſtopped them. But in treſpaſs for abating the nuſance the defendant in his juſtification muſt have preſcribed for the lights, and ſhewed the commencement of his term. And in the caſe of a declaration, if the defendant plead *liberum tenementum*, the plaintiff muſt reply, and ſet out his title. They did alſo agree the difference between a declaration, and an avowry: that a declaration being againſt a wrong doer is good without ſetting forth a title; otherwiſe of a bar to an avowry, or a juſtification. And therefore if this plea had been in a juſtification in treſpaſs, or in a bar to an avowry *damage feaſant*, it would have been unqueſtionably ill. But the chief juſtice and *Powell* differed, whether in this declaration the plaintiff had ſet out a title *tiel quel*, or no. The chief juſtice held, that it was only a deſcription of his eſtate, and not any ways a ſetting out of a title. He ſays indeed, that he and all the cuſtomary tenants of his tenements ought and uſed to have common; but if he would have ſet out a title, he ſhould have ſaid *quod conſuetudo talis eſt*, for all the copyhold tenants to have common: and then he ſhould have ſhewed a grant from the lord to himſelf, and that the tenements were demiſed and demiſable, *&c.* as muſt have been done in a bar to an avowry. *Powell* thought, that when in his declaration he mentioned the cuſtom, that ſhewed that he intended to have ſet out a title. And though in poſſeſſory actions the plaintiff may declare upon his poſſeſſion, without ſetting out his title; yet if he undertakes to ſet out a title, and ſets it out inſufficiently, the declaration will be ill. Which rule the chief juſtice agreed. As to the objection of *ad tenementa cuſtumaria pertinentem*, the chief juſtice ſaid, that if the common belonged to the copyhold eſtate, it did belong to the tenements, and that all the precedents were ſo.

The chief juſtice ſaid, that the great difference between copyholds and cuſtomary freeholds which paſs by ſurrender is, that the copyholder is in by demiſe from the lord; but in caſe of thoſe cuſtomary freeholds the lord is only an inſtrument: and in pleading one's title to a copyhold eſtate, it is enough to ſhew a grant from the lord. But that will not be a good title in caſe of thoſe cuſtomary freeholds; but you muſt ſhew, that the ſurrenderor was ſeiſed in fee, and made a ſurrender to the lord, who granted it to the ſurrenderee.

What is before reported was ſaid by the court upon the argument of the caſe.

After great deliberation the court this term reverſed the judgment in the Common Pleas, and gave judgment for the plaintiff.

Holt chief juſtice. The fault in this declaration is helped by the verdict. It is fully enough expreſſed to ſhew it to be copyhold eſtate, though it be not ſo formally done. It is ſaid to be parcel of the manor, and that by the cuſtom of the manor the plaintiff is intitled to common, and all this is found by the verdict. It ſhould have been ſaid indeed, that the tenements were held at the will of the lord according to the cuſtom of the manor, to have them appear fully to have been copyhold; but unleſs they were copyhold, it is impoſſible this finding can be true. I mentioned a caſe this term between *Bickerſtaffe* and *Perkins*, which is reported 1 *Sid.* 218. where an action was brought by an executor upon a demiſe by his teſtator rendering rent, for rent accrued after the death of the teſtator; and upon *non detinet* pleaded there was a verdict for the plaintiff: and it was moved in arreſt of judgment, becauſe the plaintiff had not ſhewed what eſtate the teſtator, that made the demiſe, had; for the intendment *prima facie* is, that a man that makes a leaſe for years is tenant in fee ſimple, by his carving out a particular eſtate; and if ſo, then the reverſion and rent could not come to the plaintiff: and therefore the plaintiff ought to have ſhewed, that his teſtator was poſſeſſed of a term for years, and made an under-leaſe, the reverſion to himſelf, *&c.* and for want of that it was agreed of all hands, the declaration would have been ill upon demurrer: and yet this declaration was held to be well after verdict, becauſe the verdict had found the plaintiff's title; for now that had found, that the eſtate the leſſor of the teſtator had, was a term for years, and not only ſo, but alſo that it was larger than the term demiſed to the defendant, ſo as a reverſion of the term was in the teſtator; for if that had not been ſo, the plaintiff could never have had a verdict. Now that was a greater defect than this in this caſe, the intendment being againſt the plaintiff, and the defect in the plaintiff's title.

Powell juſtice retained his former opinion, that this was a defect in the title, and that the plaintiff had undertaken to ſhew a title. He agreed alſo the former difference between declarations and avowries; and that though in declarations it is not neceſſary to ſhew a title, yet if you do ſhew a title, and ſhew it inſufficiently, it will be ill upon demurrer. But he held, that it was cured by the verdict, for a defect of title in a declaration may be helped by verdict. And he put the common caſe, that an aſſignee of a reverſion brings debt for rent, and in his declaration does not ſhew an attornment; on *nil debet* pleaded, and a verdict for the plaintiff, the defect is helped. And unleſs theſe tenements had been copyhold, this verdict could never have been found, becauſe unleſs they had been ſo, they could never have been parcel of the manor.

See 1 Lut. 126. the report of this caſe in the Common Pleas.

Powys juſtice ſaid, that he had ſpoke with judge *Blencowe*, and he had informed him, that they did not conſider in the Common Pleas of the verdict's finding the tenements to be parcel of the manor.

Gould juſtice ſaid, that in the caſe of *St. John* againſt *Moody* old *Hale* ſaid, that however it might have been upon demurrer, it was helped by the verdict; for all defects of title are helped by a verdict. And he put the caſe of the want of attornment put by *Powell*.

Regina *verſ.* ballivos, burgenſes et communitatem villae de Gippo.

A *Mandamus* to reſtore Mr. ſerjeant *Whitaker* to the place and office of recorder of the town of *Ipſwich*; they made a ſpecial return, which as to the matters which were debated in court upon the return, was this: the writ was directed to them by the name of *ballivi, burgenſes, et communitas willae de Gippo in comitatu Suffolk:* then the return was: *reponſio ballivorum, burgenſium, et communitatis villae ſive burgi Gippwici in comitatu Suffolk ad breve huic ſchedulae annexum. Nos ballivi, &c. villae ſive burgi Gippwici in comitatu Suffolk, &c.* And then returned, *quod villa de Gippwico eſt et tempore cujus, &c. fuit antiqua villa et antiquus burgus, ac burgenſes et inhabitantes ejuſdem villae* are, and by all the time aforeſaid were, a body corporate, *tamen diverſis temporibus per varia nomina cognitum et nuncupatum:* and then ſet out the charter of confirmation of King Charles II. in which, among other things, are theſe clauſes; that they ſhould have *unum virum diſcretum et in legibus Angliae peritum,* who ſhould be their recorder, and that *J. S.* ſhould be their preſent recorder *continuandus in eodem officio pro et durante vita ſua naturali, niſi interim pro malegeſtura in officio illo, ſive aliqua alia rationabili cauſa, abinde amotus eſſet per ballivos, burgenſes, et communitatem, &c. pro tempore exiſtentes, vel per majorem partem eorum, quorum ballivos, &c. duos eſſe voluit; ac etiam ballivis, burgenſibus et communitati, &c. et majori parti eorundem pro tempore exiſtentibus, quorum ballivos, &c. pro tempore exiſtentes duos eſſe voluit, talibus et conſimilibus caſu et caſibus plenam proteſtatem et authoritatem idem nuper Rex dedit et conceſſit, &c. tam praefatum J. S. quam aliquem alium recordatorem, &c. in poſterum eligendum pro tempore exiſtentem ab hujuſmodi officio recordatoris, &c. totaliter expellere et amovere:* and that whenever the office of recorder ſhould happen to be vacant by death, &c. the bailiffs, burgeſſes and commonalty for the time being, or the major part of them, of whom the bailiffs ſhould be two, ſhould chuſe another *pro vita ſua vel aliter,* at the pleaſure of the bailiffs, burgeſſes and commonalty, *ita quod* ſuch recorder ſhould be removeable and removed as aforeſaid *pro malegeſtura,* or any other juſt cauſe: and that the recorder ſhould take an oath well and truly to execute all things belonging to the ſaid office; and that the recorder for the time being, together with the bailiffs and four of the burgeſſes to be elected out of the portmen ſhould be juſtices of the peace of the ſaid borough: and that if any burgeſs or freeman ſhould be elected into the office of one of the bailiffs, one of the portmen, &c. and after notice of ſuch election ſhould refuſe to execute the ſaid of-

S. C. 2 Salk. 434.
Poſt. 1283.
2 Salk. 452.
6 Rep. 65.
W. Jones 262.
10 Rep. 125. b.
9 Rep. 48.
Cro. Car. 416.
2 Ro. Abr. 136. p. 11.
Yelv. 116.

fices, the common council of the town ſhould have power to fine ſuch perſon ſo refuſing; and that the bailiffs, burgeſſes and commonalty ſhould have power to levy ſuch fines by diſtreſs and ſale of his goods. Then they return, that upon the death of *J. S.* ſerjeant *Whitaker* was duly choſe by the bailiffs, burgeſſes, and commonalty for the time being, the bailiffs for the time being being actually preſent, recorder, to hold the office *ad libitum* of the bailiffs, burgeſſes and commonalty: and that he took the oath of recorder, which they returned *in haec verba*, in the latter end of which is this clauſe, "you ſhall at all times to the beſt of your learning give "your advice and counſel to the bailiffs of the ſame town for the "time being, how they ſhall order and execute their proceſſes and "judgments according to the form of law, and to the moſt ho"nour and profit of the ſame town:" and that afterward and in the ſame manner ſerjeant *Whitaker* was confirmed recorder for his natural life. And then they return, that ſerjeant *Whitaker*, the bailiffs, and one of the juſtices elected out of the portmen, on the 6th of *January* 1702. *appunctuabant quod ipſi tenerent ſeſſionem pacis* for the borough in the *Motehall* there upon the 14th of *January* following, at two in the afternoon: and that a precept was iſſued out by the ſame perſons accordingly the ſame day to the ſerjeants at mace, to return a grand jury, and ſummon all officers, whoſe attendance was neceſſary, and to proclaim the ſeſſions: and that the ſeſſions was proclaimed accordingly by the crier: and that ſerjeant *Whitaker* had notice of all the premiſſes: and that the bailiffs and the other juſtice, and the jury, and all other perſons neceſſary to the holding a ſeſſions, except the ſerjeant, aſſembled at the day and place appointed, and there remained ſeveral hours, and were ready to have held a ſeſſions of the peace for the borough, if ſerjeant *Whitaker* had been preſent; but the ſerjeant did not come at the hour appointed, nor all the afternoon, to the place appointed, *licet ſolemniter exactus*, but voluntarily and without any reaſonable cauſe abſented himſelf, ſo that by reaſon of his abſence the ſeſſions could not be held according to the appointment and notice, to the great detriment of the bailiffs, burgeſſes, and commonalty, and againſt the duty of the ſerjeant's office. Then they return another ſeſſions of the peace, appointed to be held on the firſt of *April* 1703. and the ſerjeant's default as before, *mutatis mutandis*. Then they return farther, that the ſerjeant had ſeveral court-rolls, books, writings, and deeds, concerning lands belonging to the bailiffs, burgeſſes, and commonalty, and likewiſe letters patent, whereby divers franchiſes were granted to them by *Edw.* 4. in his hands and poſſeſſion, which belonged to the bailiffs, burgeſſes, and commonalty: and that thereupon they made an order, that the ſerjeant ſhould deliver them to the clavigers of the corporation upon notice of the order; but the ſerjeant, though he had notice of the order, refuſed to deliver them to them, to the great detriment of the bailiffs, burgeſſes and commonalty. And they return further, that one *Edward Gaell* being choſen one of the portmen, and refuſing to accept of the office, and qualify himſelf, pretending that he was a diſſenter from the church, the bailiffs and common council being aſſembled to conſider, whether they could compel him to hold the office, and concerning the ſetting a fine upon him, and levying it, and diſtraining for it, for not taking the office upon him, the bailiffs aſked the ſerjeant's advice about it, and he, though he was then in the common council, refuſed to give the bailiffs his advice, againſt the tenor of his oath, and the duty of his office of recorder. And they alſo return another refuſal to other bailiffs upon the ſame matter. Then they return that upon the 9th of *June* 1704. the bailiffs, burgeſſes and commonalty being aſſembled, the bailiffs actually preſent, they had notice of the ſeveral miſdemeanors before alleged and committed by the ſerjeant in the execution of his office of recorder; and upon conſideration thereof they ordered, that the ſerjeant ſhould have notice of the premiſſes objected to him. Then they return the notice *in haec verba*, which took notice of the ſeveral miſdemeanors before alleged, and required him to anſwer them if he could; and as to the not holding the ſeſſions of the peace, was in theſe words: "Why you did not by your attendance aſſiſt Mr. Bailiffs, and other her Majeſty's juſtices of the peace, for this town at the *Motehall* in *Ipſwich*, on the 14th of *January* 1702. and alſo on the 8th of *April* following, at which times and place there ſhould have been the general quarter-ſeſſions of *oyer* and *terminer* and gaol-delivery holden for this town, according to the ſeveral uſual proclamations publickly made for that purpoſe, you knowing that by the charters of this town no ſeſſions of the peace could be holden for this town without the actual preſence of the bailiffs and recorder thereof:" and to ſhew cauſe why he ſhould not be diſcharged of his office of recorder for the ſaid miſdemeanors. Then they returned, that they ordered that notice to be delivered to him, and that notice ſhould be given him to anſwer to the ſaid matters ſo as aforeſaid objected to him, and to ſhew cauſe on the 8th of *September* next following to the bailiffs, burgeſſes, and commonalty, why he ſhould not be diſcharged from his office of recorder, for the ſaid miſdemeanors in his ſaid office: and that the ſeveral notices in writing were delivered to the ſerjeant on the 10 of *Auguſt* 1704. And then they return, that upon the 8th of *September* aforeſaid, the ſerjeant appeared before the bailiffs, burgeſſes, and commonalty, the bailiffs being actually preſent at the *Motehall*, and then and there *praedictae ſeparales malegeſturae praedicto Carolo in officio ſuo recordatoris, &c. in praeſentia et auditu praedicti Caroli per curiam illam ei objectae fuerunt:* the ſerjeant anſwered, *quoad ſuas non attendencias ad ſeſ-*

ſiones pacis praedictas, he expected to have been ſent for, when they were ready: and as to the other articles, declared that he was not bound to anſwer to them, and refuſed, and did not anſwer any thing to them. Whereupon *adtunc et ibidem auditis et plene intellectis per eoſdem ballivos, burgenſes, et communitatem, &c. praedictis ballivis, &c. pro tempore exiſtentibus tunc et ibidem actualiter praeſentibus*, all the matters and miſdemeanors objected to the ſerjeant in his office of recorder, &c. and heard proof of them by divers credible witneſſes, and heard all the matters alleged by the ſerjeant in his defenſe, *adtunc et ibidem conſideratum fuit et adjudicatum per ballivos, burgenſes et communitatem, &c. praedictis ballivis, &c. pro tempore exiſtentibus tunc et ibidem actualiter praeſentibus*, that the ſerjeant was guilty of all and each of the miſdemeanours objected to him as aforeſaid in his office of recorder, *modo et forma prout, &c.* and that for the miſdemeanors aforeſaid he ſhould be removed: and then and there, *per eoſdem ballivos, burgenſes, et communitatem, &c. pro malegeſturis illis in officio ſuo praedicto* the jerjeant *debito modo amotus fuit*, and that he was never elected into the office ſince; and therefore they had not, nor ought to reſtore him: *et ulterius certificamus quod burgenſes, et inhabitantes villae ſive burgi praedicti, aut aliqui eorum, nunquam incorporati fuerunt, nec ullo tempore legitime nuncupati fuerunt, per nomen ballivorum, burgenſium et communitatis villae de Gippo in comitatu Suffolk, prout in breve huic ſchedulae annexo mentionatum eſt.* Several exceptions were taken to this return. Firſt, an exception ſtirred by the chief juſtice, that in the power given in the charter to the bailiffs, burgeſſes, and commonalty, or the major part of them, to turn out a recorder *pro malegeſtura*, the bailiffs are made of the *quorum*, and therefore the bailiffs conſent was neceſſary to the doing of it; and here in the return they had only ſaid, that the bailiffs were preſent, but not that they did conſent, as they ought.

Two anſwers were given to this exception. Firſt, that this muſt be underſtood like the like clauſes in commiſſions of *oyer* and *terminer*, peace, &c. which require the preſence of the perſons named in the *quorum*; but it was never yet thought, that their actual conſent was neceſſary to every act that was done, and that if they diſſented the majority could not act; but there conſent has been always taken to be included in the conſent of the majority. Secondly, that it was returned here, that he was *debito modo amotus per ballivos, burgenſes, et communitatem*, which muſt be underſtood of them all, and conſequently both bailiffs conſented.

This exception was over-ruled by the court, partly upon the ſecond anſwer, and alſo becauſe the *quorum* the bailiffs ſhould be two, was like the *majori parti eorum*, no more than the law implied. For as in all corporate acts, the act of the majority is the act of the whole, ſo the bailiffs being the head of the corporation, nothing can be done without their preſence; and this is ſo, though no ſpecial proviſion be made for it by the charter. And ſo it comes within the rule of *expreſſio eorum quae tacite inſunt nihil operatur*, and conſequently their expreſs conſent is not neceſſary, but is involved in the conſent of the major part.

Acc 1. Barnad. 305. 2. Barnad. 370. Comp. 538. & the Bristol case in 3. Mod. 3.

To the cauſe of forfeiture aſſigned in not holding a ſeſſions of the peace, two exceptions were taken. Firſt, that a ſeſſions of the peace might be held without him, he not appearing to be of the *quorum*, and two juſtices of the peace may hold a ſeſſions of the peace. And ſecondly, admitting it could not, yet firſt, they ought to have ſent for him; and ſecondly, they ought to have ſhewn ſome ſpecial damage to the corporation by the not holding the ſeſſions. To this it was anſwered and reſolved by the court, firſt, that admitting the preſence of the recorder were not neceſſary by the charter to the holding a ſeſſions of the peace (though the chief juſtice obſerved, that it did not appear by this return, that there was any *quorum* of the juſtices of peace; and where a commiſſion is granted to twenty perſons to be juſtices of peace, and there is no *quorum*, they muſt all attend at the holding a ſeſſions, and if ſo, then the ſerjeant's abſence muſt be a forfeiture) yet he muſt attend, for it was the intent of the charter in making ſuch an officer, that he ſhould aſſiſt the corporation in matters of law; and the juſtices of peace, though they had power, yet they might be afraid to proceed to the holding of a ſeſſions without their recorder. And ſecondly, this office being a publick office concerning the adminiſtration of juſtice, the officer is bound to attend at his peril, and non-attendance is a cauſe of forfeiture of his office, though no inconvenience enſue by his non-attendance. And the difference is between publick and private offices. And ſo is *Co. Li.* 233. *a.* 9 *Co.* 50. Though, as the chief juſtice ſaid, in this caſe the corporation might be disfranchiſed for neglecting to hold ſeſſions of the peace, and ſo his non-attendance was a damage to them.

Thirdly, it was objected, that it did not appear in the return, that the ſeſſions of the peace was well appointed to be held; for they ſhould have ſhewed, that the juſtices iſſued a warrant under their hands and ſeals. To this it was anſwered, that it was not abſolutely neceſſary to the holding of a ſeſſions, that a precept ſhould be iſſued out under the hands and ſeals of the juſtices; but if the jury and all perſons neceſſary to hold a ſeſſions appeared, it would be well held, though no warrant had been iſſued out. And ſo is *Lamb.* 367. But if it were neceſſary, it appeared ſufficiently

6 K

here, that it was done, for ſo much was implied here under the *praeceptum eſt*. And ſo is the conſtant form of pleading writs. And the court over-ruled this objection.

And the chief juſtice ſaid, that *appunctuabant* muſt be underſtood a legal appointment; and he agreed that matter of holding a ſeſſions without an appointment by warrant, or otherwiſe than by agreement between the juſtices to meet and hold it; but ſaid, that the uſual way of appointing a ſeſſions was by iſſuing out a precept to ſummon it, and that without ſuch a precept no body could be compelled to appear.

Fourthly, as to the ſerjeant's refuſing to deliver the books, *&c.* to the clavigers, it was objected, that that was no cauſe of forfeiture of his office; becauſe the corporation might reſort to them, and make uſe of them in his hands, and he was the proper officer, in whoſe cuſtody they ought to be.

The chief juſtice and *Powell* ſeemed to think this no cauſe of forfeiture. And *Powell* ſaid, they might bring an action of detinue for them.

Fifthly, as to the not giving advice, the chief juſtice ſaid, he was not bound to give advice to the bailiffs, but only to the whole corporation: that indeed he was their adviſer, and ought to adviſe them; but he might do it in a reaſonable manner, and was not bound to give any poſitive opinion. It was pretended on the behalf of the corporation, that this refuſal was againſt his oath; but that was held to be otherwiſe, the advice there mentioned being reſtrained to ordering and executing their proceſſes and judgments according to law.

Sixthly, it was objected on the part of the corporation, that the writ was miſdirected, and therefore ought to be quaſhed, they having returned expreſly, that they were never incorporated, nor named by the name of bailiffs, burgeſſes, and commonalty *de Gippo*, as they are named in the writ.

And Mr. *Raymond* cited the caſe *Paſch.* 10 *Will.* 3. *Rex verſ. Morris*, where a writ was directed to the mayor and burgeſſes of the city of *Lincoln* in the county of *Lincoln*, where it ſhould have been in the county of the city of *Lincoln:* and the corporation took advantage of it in their return as here; and though the return was inſufficient, the plaintiff could not get a peremptory *mandamus*, but the writ was quaſhed. He cited alſo the caſe *Paſch.* 12 *Will.* 3. *Rex verſ.* the mayor of *Rippon*, where the like miſtake was made, and advantage taken of it in the return: [But according to my notes, in that caſe the return was allowed upon the merits, and the writ never quaſhed] and that there was a material difference between *Gippus* and *Gippwicus*; the firſt being but half the name, and *wick* ſignifying according to *Spelman verbo wic*, a port or bay, and ſo probably added to diſtinguiſh this from ſome other *Gippus:* and that *Gippus* and *Gippwicus* was no more the ſame name, than *Ips* and *Ipſwich*. And he cited *Camden's Britannia* 372. that the ancient name of the place was *Gippewich*, and that they never were named in one charter by the name of *Gippus*.

The chief juſtice doubted, whether to have taken advantage of this miſtake they ſhould not have returned it poſitively at firſt, and relied upon it. For he ſaid by their own return it appeared, that they were called and known by divers names, and ſo the writ and the return were conſiſtent: and then, when they by making a return admit themſelves the perſons to whom the writ is directed, for they call the return *executio iſtius brevis*, which it is not, if they are not the parties to whom it is directed, and the return not being inconſiſtent with the writ, though in the end of the return they do poſitively aver, they are not, nor ever were incorporated, nor named by the name of *Gippus*, yet if that will be ſufficient againſt their own admittance?

Powell juſtice was on the contrary againſt the chief juſtice: but upon looking into the record it appeared, that *Gippo* in the return was writ with a daſh, and *Gippo* in the writ was without a daſh, and ſo not *ad idem*, and ſo this point was put out of the caſe.

The chief juſtice took this difference; where a corporation by one name is incorporated anew by another name, where they ſhall loſe their firſt name, and where not, *viz.* where the new charter alters the conſtitution of the corporation, and new models it, there they ſhall loſe their old name: otherwiſe, if the conſtitution as to all the integral parts of it remains the ſame; though the new charter gives them a new name, the old one remains. For the purpoſe, if a mayor be added, or a mayor and maſters are made mayor and aldermen, or an abbot and convent a dean and chapter; there they loſe their old name, becauſe new integral parts of the corporation are added. But if the inhabitants *Gippwici* were incorporated by the name of bailiffs, burgeſſes, and commonalty *Gippwici*, and then a new charter is granted to them that they ſhall be called by the name of bailiffs, burgeſſes and commonalty of *Gippwici*, yet they may uſe the firſt name, becauſe the town is the ſame, and the old conſtitution remains.

When all theſe matters were got over, the notice was objected againſt. Firſt, that there was no time appointed by the notice, when he ſhould appear to anſwer to the matters charged in the notice. Secondly, that he was not charged in the notice with not holding a ſeſſions of the peace, but *oyer* and *terminer*, and gaol-delivery. To theſe objections it was anſwered, and reſolved, that the ſerjeant appearing, and being charged, and anſwering, ſupplied the want of notice, both of the time, and of the offenſe. And for that was cited *Palm.* 453. *Harris*'s caſe, which caſe was agreed by the court. And the chief juſtice ſaid, that in juſtice convenient notice ought to be given for the party to prepare for his defenſe, but he might waive that, if he would. Secondly, it was anſwered, that it appeared by the return, that notice of the day was given, and that in writing, it being ſaid, *quod ſeparales notitiae in ſcriptis* were delivered to him; though the chief juſtice ſaid, the notice of the day might be well enough given by the officer by word of mouth. But then it was objected, that he was not charged for not holding a ſeſſions of the peace, but *oyer* and *terminer* and gaol delivery: and if he was not charged with it, though he did anſwer to it, his anſwer was impertinent, and will not help the want of notice: he was charged with one thing, and anſwered to another. For the *praedictae ſeparales malegeſturae* muſt be underſtood thoſe in the notice, or at leaſt it may be underſtood of them, and that will be ſufficient to vitiate the return; which being to turn a man out of his freehold, ought to be preciſely certain, and cannot be aided by intendment. Which the court agreed, and granted a peremptory *mandamus*, but directed that it ſhould be awarded according to the firſt writ, *ballivis, &c. de Gippo*; for they ſaid it muſt purſue the firſt writ, and they could not grant it different from that.

The Sollicitor General oppoſed granting a peremptory *mandamus*, becauſe the recorder was an officer *ad libitum* of the corporation; and cited 1 *Sid.* 14. *Rex verſ. Campion.* But that objection was contrary to the return, whereby he appeared to have been confirmed for life. And *Holt* ſaid, that if he had been an officer *ad libitum*, the corporation ought to have returned that, and relied upon it, and it would have been a good return; but they could not take advantage of that, when they had returned a cauſe, if the cauſe were not ſufficient; for it appeared, that they had not gone upon their power, and determined their will, but put him out for a miſdemeanour.

The chief juſtice alſo ſaid, that the court could not take notice of towns any otherwiſe than they appeared to them on the record, though they did of counties.

Seignorett

Seignorett *verſ.* Noguire.

3 Keb. 304.
1 Mod. 113.
Freem. 368.
Ante 683.
Poſt. 1419.

AN action of covenant brought on articles of partnerſhip, whereby it was agreed, that the three defendants ſhould contract for 336 ſhares of the royal luſtring company, for which the plaintiffs were to pay the money, and to have the ſhares delivered to them; and the plaintiffs were to have intereſt for their money; that the plaintiffs and defendants were to manage the ſhares in partnerſhip, and in caſe of difference in opinion the moſt voices to carry it: the plaintiffs to be but one voice: that when any of the ſhares ſhould be ſold, the money ſhould go to ſatisfy the plaintiffs the principal and intereſt of what they advanced; the partnerſhip to continue for four years, to begin with the day of the date of the contract for the ſhares: that after the expiration of the ſaid four years, the plaintiffs ſhould not be obliged to keep any of the ſaid ſhares, which ſhould then remain unſold any longer, but might ſell them to make an end of the account of the partnerſhip; and if there ſhould be any loſs, the ſame ſhould be born, one fourth part by the plaintiffs, and the other three fourths by the defendants. The contract for the 336 ſhares is ſaid to be made 13 *April* 1693. and for breach the plaintiffs ſhew, that after the four years elapſed, the plaintiffs ſold 174 ſhares, which were what were then remaining of 336 ſhares, for 2921 *l.* 10 *s.* and no more, which was the beſt price could be got for them: ſo that the damage came to ſo much, three fourths of which was ſo much, for which the plaintiffs brought this action. The defendants craved *oyer* of the articles, and they were entred *in haec verba*; and it appeared, that the commencement of the four years was to be from the day of the date of the contract. The defendants pleaded, that before the ſale of the 174 ſhares, *viz.* the 23d of *November* 1698. the plaintiffs *vendidere et tranſtulere* the ſaid 174 ſhares, *viz.* 90 ſhares to *R. L.* and 84 ſhares to *W. S.* and that at the time of ſelling and transferring aforeſaid, *currens et vendibile pretium* of the ſaid 174 ſhares was ſo much: and ſo there was no loſs. The plaintiffs replied, and traverſed the ſale of the 174 ſhares, *modo et forma*, and thereupon iſſue is joined; and the jury found a ſpecial verdict, that the plaintiff *Seignorett* at the ſeſſions of parliament 9 & 10 *Will.* 3. was impeached for miſdemeanours, and *R. L.* and *W. S.* became his bail: and that the plaintiffs 30 *May* 1698 aſſigned over the 174 ſhares to *R. L.* and *W. S. viz.* 90 to *L.* and 84 to *S. pro eorum ſecuritate et ad ſecurandum et indemnificandum* of and from the recogniſances: that afterwards the 28th of *October* 1698 *L.* and *S.* were diſcharged from their recogniſances, and that they were no ways damnified thereby; but whether this aſſignment were in law a ſale or not, they leave to the diſcretion of the court.

After this cauſe had been very long depending, the three judges gave judgment the latter end of this term; but the chief juſtice was not ſatisfied. It was agreed by the three judges, that if this partnerſhip had been concerning chattels that had been aſſignable, that then this aſſignment to *L.* and *S.* would have been a ſale within the meaning of the covenant, and would have been with the defendants, becauſe the legal intereſt being out of the plaintiffs, they had diſabled themſelves to perform the truſt. But they ſaid, this aſſignment was not like a conveyance in law; that they could not tell what it was; that by it they were not ſatisfied, that though the ſhares were put out of the plaintiffs power, but they might have executed the truſt notwithſtanding. And *Powell* ſaid, the conſcience of the cauſe was with the plaintiffs.

The chief juſtice doubted, for he thought there was no difference between the caſes, for that ſuch aſſignments muſt be taken to be within this agreement as the nature of the thing is capable of, whether they were or were not effectual aſſignments in point of law. So if a man aſſigns a bond to *J. S.* and afterwards receives the money of the obligor, if he do not immediately pay it over to the aſſignee, the aſſignee may maintain an action of covenant againſt him upon the word *aſſignavit:* and that was the caſe of *Deering verſ.* . So if the obligee covenant to aſſign a bond to *J. S. tiel jour*, and will not aſſign it, or before the day receives the money of the obligor, by which means he has diſabled himſelf to aſſign it; in either of theſe caſes it is a breach of covenant, and yet in ſtrictneſs a bond is not aſſignable.

The three judges were giving judgment for the plaintiffs, and Mr. *Raymond* ſtood up, and put them in mind of ſome exceptions he had taken for variances between the declaration and the articles; and particularly of that of the commencement of the four years for the continuance of the partnerſhip, which in the declaration was ſaid to be *with* the day of the date of the contract, in the articles *from* the day of the date of the contract. [The others were mentioned at this time; and I have loſt my note-book, in which they were contained.] The court ſaid, that the variances were not material. And the chief juſtice ſaid, that *a datu* does not exclude the date, and ſo was the ſame with *cum datu*; but that *a datu* and *a die datus* were not the ſame. But *Powell* ſaid, that *a datu* and *a die datus* had been adjudged to be the ſame in the Common Pleas. Judgment was given for the plaintiff.

Dobbins *verſ.* Burley.

DEBT on an obligation. The defendant pleaded want of a ſpecification in bar. On demurrer adjudged for the plaintiff that it is not a bar.

Specification. *Ante* 1056.

Pie *verſ.* Cooper.

IN caſe, the defendant pleaded in abatement, that the plaintiff was an alien enemy, and laid no *venue:* and on demurrer adjudged that it was well pleaded, and the plaintiff might have replied, that he was born in *England* generally. But if ſuch a matter is pleaded in bar, it muſt be pleaded with a *venue*, and the plaintiff ſhould reply, that he was born in ſuch a place in *England*. And in the principal caſe judgment was given, *quod billa caſſetur*.

Alien enemy pleaded in abatement without a *venue*. *Ante* 853, 1014, 1173.

Eaſter Term

5 Annae reginae, B. R. 1706.

Regina *verſ.* Majorem et Aldermannos Norwici.

S. C. Salk. 432, 436.

A *Mandamus* to admit one *Dunch* alderman of *Norwich*, and ſwear him. To this they returned a charter of *Edw.* 4. that the aldermen of *Norwich onerarentur et exonerarentur* as the aldermen of *London*; and that in *London* if a perſon be elected alderman by the ward, the court of aldermen may refuſe him; and that *Dunch* was elected by the ward, but was refuſed by the mayor and aldermen, becauſe he had not qualified himſelf according to the corporation act, he not having received the ſacrament according to the rites of the church of *England*, within a year next before his election; and that he was a turbulent perſon and factious, and that he procured his election by bribery: and then at the end of the return they returned, *quod non fuit electus.*

Poſt. 1379 & 1405.

It was admitted of all hands, that the matter of *Dunch*'s not having received the ſacrament within the year before his election made his election void, and had been a ſufficient return, if it had ſtood by itſelf. But in regard the return was repugnant and contradictory, the court granted a peremptory *mandamus.* The chief juſtice ſaid, the court could not believe them, when by their return, firſt they admit an election and avoid it, and then deny that *Dunch* was elected. A return may contain as many cauſes as the perſons that make the return pleaſe, but then they muſt be diſtinct independent matters. So here a refuſal might be well returned, and alſo that *Dunch* had not received the ſacrament; both which make the election void: but then you come and contradict all the former part of your return, and ſay *Dunch* was never elected. To avoid this contradiction, it is urged, that the election by the ward is no election; becauſe it is not conſummate, till it is approved by the mayor and aldermen. But this chuſing by the ward is an election, for they have ſeveral perſons to chuſe out of; but the mayor and aldermen have no choice, but only approbation; for they cannot chuſe. The election and approbation are diſtinct acts to be done by ſeveral parties. And if the election be conſummate before the approbation, then the return is contradictory, in returning an excuſe why *D.* was not approved, and then returning, that he was never elected.

Powell juſtice. If the return be not contradictory, it is very inveigling; the court cannot tell what you rely upon. The election and approbation are two different things, and the election is conſummate without the approbation. The power of the biſhop to approve the preſentee, is different from the preſentation. And ſo is the nomination of one (where the caſe is, that *J. S.* is to preſent ſuch an one as *J. N.* ſhall nominate) from the preſentation: and the preſentation is over before the approbation, and the nomination before the preſentation. So here the election is over before the approbation. *Non fuit electus* in the return, muſt be underſtood, that *Dunch* was never elected by the ward.

Powys and *Gould* agreed. But *Powys* thought (upon the caſe which had been cited out of 1 *Sid.* 286. where, though the return was inſufficient, yet the court would not grant a peremptory *mandamus*, becauſe the right was againſt the perſon, that ſued the *mandamus*; but ordered the right to be tried) that it appearing to them upon the return, that *Dunch*'s election was void on the corporation act, they ought not to grant a peremptory *mandamus*.

But the chief juſtice ſaid, it did not appear; for the court could not tell what to believe, when the return was contradictory to itſelf. And he ſaid, a peremptory *mandamus* would not make the election good, but upon an information, the election might be avoided, and *Dunch* turned out. 1 Sid. 286.

Powell. The return can never be made good.

Upon the argument of this caſe the chief juſtice ſaid, that as to the procuring his election by bribery, it would be a queſtion whether that would make the election void, unleſs it were to an office within the ſtatute of *Edw.* 6. for though elections ought to be free, yet an elector might uſe his liberty to vote for him that had given him money. And he remembred a caſe between *Blancard* and *Galley*, where in an action of debt upon a bond conditioned for paying part of the profits of the office of provoſt marſhal within the iſland of *Barbadoes*, it was reſolved, that if it had concerned the ſame office in *England*, the bond had been void by Salk. 411.

the ſtatute of *Edw.* 6. but the office being in *Barbados*, the bond was held good, though it was concerning the adminiſtration of juſtice.

He ſaid, the method of chuſing aldermen in **London** was thus. The inhabitants of the ward chuſe two, and if the court of aldermen think them inſufficient, they may reject them, and order the ward to chuſe again. And he ſaid, that in the lord chief juſtice *Kelynge*'s time in the caſe of one Mr. *Swallow*, the cuſtom of *London* was certified to be, that if a man be choſen alderman, and refuſe to ſerve, the court of aldermen may commit him to *Newgate* as for a contempt; but if he fines, then the way is to ſwear him alderman, and then diſcharge him by conſent.

1 Sid. 287.

Sheriff of Middleſex's caſe.

12 Mod. 336.
11 Mod. 234.
2 Vern. 697.
10 Mod. 346.
Barnes 307-8.
Mic. 6 Geo. 2.

A *Latitat* iſſued out of the King's Bench to the ſheriff, to arreſt a man, and the ſheriff returned, that the man was liſted according to the act 4 & 5 *Ann. c.* 10. *et ea occaſione capere non poſſum.*

Mr. ſerjeant *Broderick* moved againſt the ſheriff, becauſe, as he pretended, he ought to have arreſted the man; becauſe by the act the plaintiff had liberty to go on to judgment and execution againſt any thing but the defendant's body, and then the court ſhould diſcharge him on common bail, if he appeared to them to be liſted regularly; but the ſheriff ſhould not take upon him to determine whether he was regularly liſted. But the court upon conſideration held it to be a good return, and that this act worked by way of a *ſuperſedeas* to any proceſs to be iſſued againſt perſons liſted, and that if the ſheriff ſhould arreſt ſuch a perſon, he would be liable to an action of falſe impriſonment. And they ſaid it appeared, that the act did not intend, that the man ſhould be arreſted, and then diſcharged on common bail, by the *proviſo*, "that the plaintiff upon leaving notice in writing at the defendant's laſt place of abode, or giving to the defendant ſuch notice "in writing of the plaintiff's cauſe of action, might file common "bail for the defendant, and proceed to judgment, &c." That in caſe the man were not regularly and fairly liſted, this was a falſe return, and the plaintiff had his remedy againſt the ſheriff by action for the falſe return.

My

My lord Banbury's caſe.

S. C. Salk. 512. Parliament Caſes 2, 3, &c. Farreſ. 15, 38.

A Motion was made on his behalf for a *ſuperſedeas* to a *latitat*, which was iſſued out of the King's Bench againſt him, and on which he had been taken; and to induce the court to grant it, they offered to produce an exemplication of the judgment in the indictment againſt my lord in this court, and the letters patent of creation, and the *affidavit* that my lord was the ſame perſon in the record of the judgment. And it was alſo pretended, that if my lord ſhould put in bail, he would be eſtopped to plead his peerage. But the court denied the motion, and the chief juſtice ſaid, they could not take notice, that this *Charles Knollys* is earl of *Banbury*; that there was a difference between this caſe, and the caſe of a peer, that had ſat in the houſe of lords. If my lord had been ever ſummoned to parliament, and had a writ to ſhew, and there were no diſpute about the identity of the perſon, it would have been reaſonable to have granted a *ſuperſedeas*; but in this caſe of a lord, that has never ſat there, they could not do it, for they could not try peerage upon a motion, but his lordſhip might plead it, and pray a *ſuperſedeas*.

The court will not try whether one is a peer or not on a motion. 2 Stra. 987-8.

Powell ſaid, that if in the *capias* my lord had been named peer, it ſhould have been ſuperſeded. For the law would never intend, but a peer had ſomething to anſwer the action, and the body is made liable only in defect of that, and that was the ground of that privilege of peers. And the abbots of *England* had the ſame privilege, for the ſame reaſon. But here the writ is againſt *Charles Knollys*, and we cannot take notice of his peerage.

1 Ventr. 298.

Brown *verſ.* Benn et alios.

Juriſdiction of the admiralty in caſe of ſeamens wages.

A Motion was made for a prohibition to the court of admiralty, in a ſuit there by ſeamen for their wages, upon a ſuggeſtion that the court refuſed to allow the defendant's allegation, that the place, upon the arrival at which the plaintiffs intitled themſelves, was not a port of delivery; and that they refuſed to receive the allegation, unleſs the defendant would bring the money demanded into court.

But the chief juſtice and *Powell* held, that the admiralty court were the judges of that matter, and that if they did not do the defendant right, his only remedy was by appeal; but it was no ground for a prohibition: that the juriſdiction of the court of admiralty in caſe of ſeamens wages was an ancient concurrent juriſdiction, as ancient as the conſtitution of the admiralty court here: that you cannot appeal in the court of admiralty before definitive ſentence, for a *gravamen*, as you may in the eccleſiaſtical court.

The ſuit here was for wages, upon the arrival of the ſhip at *Guinea*. *Powell* juſtice ſaid, he remembred a caſe of the like nature, where a ſuit was commenced in the court of admiralty by ſeamen for their wages, upon the arrival of the ſhip at *Newfoundland*; and though the merchants all held it no port of delivery, yet the court of admiralty held the contrary. And ſo did the court of Common Pleas upon a motion for a prohibition.

Regina *verſ.* Atkinſon et alium.

S. C. Salk. 382.
2 Ro. Abr. 81. (N.) pl. 6.

ATkinſon and another perſon were indicted, for that they being receivers of the Queen's tax, did extort money out of ſeveral perſons *colore officii*. It was moved in arreſt of judgment, that they could not be indicted jointly. And to prove it was cited 2 *Roll. Abr.* 81. an indictment againſt four perſons for uſing of a trade, and the indictment was, that they four, *et uterque eorum*, uſed the trade; and the indictment was quaſhed, becauſe the uſing by the one could not be the uſing by the other. 1 *Ventr.* 302. The ſame caſe agreed. But note, the principal caſe there was upon the ſtatute of maintenance, an indictment upon that ſtatute againſt two, and one only found guilty: and it was moved in arreſt of judgment, that the verdict did not maintain the indictment, and the caſe of the trade before cited and agreed; but reſolved that that was an offence two might join in, or it might be ſeveral, as in treſpaſs: otherwiſe of exerciſing a trade.

But note, by ſerjeant *Broderick*, if two perſons employ a man in a trade, that is a joint exerciſing the trade, and they muſt be indicted jointly.

Holt chief juſtice. For battery or extortion, which are crimes at common law, two perſons may be indicted jointly; but the exerciſing of a trade not having been educated in it as an apprentice ſeems to differ, becauſe the forfeitures are diſtinct, and that which makes the crime is ſeveral, *viz.* the not having been apprentices. He ſaid alſo, that *baron* and *feme* could not be indicted for exerciſing a trade not being qualified, becauſe it is the exerciſe of the huſband. If the wife be qualified, that qualifies the huſband, but ſtill it is the exerciſe of the huſband.

Serjeant *Broderick* cited another caſe inforcing the objection, *viz.* an indictment againſt ſix perſons for opening their ſhops upon a day appointed to be kept holy by proclamation, and it was quaſhed, becauſe the ſix defendants could not be joined in one indictment: it was a caſe in the chief juſtice's time, and was now agreed by him. Judgment was given for the Queen.

Facquire *verſ.* Kynaſton.

ACTION upon ſeveral promiſſes, the defendant pleaded in abatement that the promiſſes in the declaration were made *tiel jour*, which was after the action brought, and traverſed that they were made before, and the plaintiff demurred.

Property in a ſtranger, or *pris in autre lieu*, may be pleaded in bar or abatement in replevin.

Mr. *Branthwayte* to maintain the plea argued, that though this matter was pleadable in bar, yet many things that might be pleaded in bar, might alſo be pleaded in abatement; as property in a ſtranger, or *pris en auter lieu*, may be pleaded either in bar or abatement in replevin. The chief juſtice agreed the caſes, but ſaid they differed from this, firſt, becauſe thoſe matters could not be given in evidence upon *non cepit*, the general iſſue in replevin, as this might upon *non aſſumpſit*, and that if there had been any fact to ſupport this plea, the defendant would have pleaded the general iſſue: ſecondly, becauſe the matter of this plea is new matter out of the compaſs of the plaintiff's action. And the defendant was ordered to anſwer over.

Queen *verſ.* the juſtices of peace of the liberty of St. Peter's in York.

Touching the repairs of bridges.

A *Mandamus* was directed to them, reciting, that whereas an ancient bridge called *Tadcaſter* bridge, ſituate partly in the county of the city of *York*, and partly in the weſt-riding of the county of *York*, was lately fallen down, and that it ought to be repaired by the inhabitants of the county of the city, and of the weſt-riding of the county reſpectively; and that it was ſo done by them, except only the inhabitants of the liberty of *St. Peter's* in the city and county of the city: and that the inhabitants of the city laid out in the repair of their part 1449 *l.* and that the ſhare of the inhabitants of the liberty of *St. Peter's* came to 30 *l.* which they had refuſed to pay, and the juſtices refuſed to make a rate for it according to the form of the ſtatute; and therefore commanded them to make and impoſe a rate upon the inhabitants within the liberty in the city and county of the city, for ſuch their part of the charges about the building and repairing of the bridge according to the form of the ſtatute, and cauſe it to be collected and levied and paid to the mayor and citizens, or their attorney or treaſurer to their uſe, *&c.* To this the juſtices returned,

turned, that the city of *York* is an ancient city, and the citizens and inhabitants of, time out of mind have been a body politic; and that the city of *York* and ſuburbs and precincts of the ſame, 11 *February* 27 *Hen.* 6. and long before, were a county by itſelf, and called the county of the city of *York*; and that the hundred of *Aniſtie* was part of the weſt-riding of the county of *York*, and that *Hen.* 6. 11 *February* 27th of his reign, by his letters patent granted, that the hundred of *Aniſtie* ſhould be annexed to the county of the city of *York*, and that the city and ſuburbs of *York*, and the precincts of the hundred of *Aniſtie*, ſhould be the county of the city of *York*, divided from the county of *York*, ſaving to the church of *York*, and the archbiſhop, dean and chapter of the ſame, and to all communities eccleſiaſtical and temporal, and all other perſons, all manner of franchiſes, privileges, rights, commodities, and cuſtoms, to them or any of them of right belonging, *ita quod* by that grant no prejudice in any manner ſhould be done to them, *in poſſeſſione, ſeu proprietate* of any liberties, franchiſes, privileges, rights, commodities, or cuſtoms, of which they were then ſeiſed or poſſeſſed, or which did then belong to them: that the liberty of *St. Peter's* in *York* in the city and county of the ſaid city is, and at the making of the ſaid letters patent and long before was, an ancient liberty, of which the dean and chapter of *York* is ſeiſed in fee, and that by all that time they had juſtices of peace there, and that the juſtices of the peace of the county of *York*, or of the county of the city of *York*, had nothing to do there: that the part of the bridge in queſtion at the making of the letters patent lay in the hundred of *Aniſtie*, out of the liberty of *St. Peter's*, and out of the juriſdiction of the juſtices of peace of that liberty, and before that time was, and ought to be, repaired by the inhabitants of the weſt-riding of the county of *York*, and from that time and at the time of making the act of 22 *Hen.* 8. and ever ſince was uſed, and ought to be repaired by the inhabitants of the city and of the hundred of *Aniſtie* without any contribution from the inhabitants of the liberty, and that it was known, and could be eaſily proved at the time of making the ſaid act, and is known and can be eaſily proved to be ſo, *&c.*

In this caſe it was reſolved, firſt, that the return was ill in ſubſtance, becauſe this charge came upon the city by uniting the hundred of *Aniſtie* to it, and conſequently the liberty of *St. Peter's*, which is part of the city, muſt be ſubject to the charge as well as the reſt of the city. That the act of *Hen.* 8. had taken away all exemptions, and franchiſes, and made them all liable to be charged: that there can no reaſon be given for exempting the liberty of *St. Peter's*, which would not as well hold for exempting

2 Inſt. 704.

ing all the reſt of the city, and lay the whole burden on the hundred of *Aniſtie*.

Powell agreed. And he ſaid, that as to the perſons, who of right ought to repair bridges, the act of 22 *Hen.* 8. was only declaratory of the common law; which *Holt* chief juſtice agreed, and ſaid, that the charge of repairing bridges was incumbent on the 6 Mod. 307. county by common law, unleſs where particular perſons were charged with it by tenure or preſcription. What was new it it, was the appointing the method of doing it, that a hundred might be charged with the repair of a bridge by preſcription, but that was not the caſe here; for the hundred had not uſed to repair the bridge, but the weſt-riding of the county: that upon the annexing of this hundred to the county of the city, there might have been an agreement made between the corporation and the dean and chapter, that they ſhould have been exempted from the charges of repairing this bridge; but if there were any ſuch, that ought to have been returned: that there had been no inſtance of the liberties contributing, becauſe this bridge had never been repaired before.

Serjeant *Wynne* againſt the return ſaid, that the latter part of it, that it was known, that the county of the city ought to repair it, was ill; becauſe it did not ſay, how they were obliged to repair it, by tenure or preſcription; for that was what was meant by the *ought* in the act of parliament.

But then the writ was quaſhed, becauſe by the act the juſtices of the liberty had no power to aſſeſs or rate the inhabitants of the liberty, or to intermeddle in this matter; but the juſtices of the county of the city. And the chief juſtice ſaid, that the juſtices of the county of the city had power in this caſe, to ſummon the conſtables of the pariſhes within the liberty, out of the liberty; and ſo the juſtices of a county had, conſtables within a corporation, where corporations are part of a county; for it is they muſt put this act in execution, and not the juſtices of the corporation.

There was another objection taken to the writ, that it would not lie in this caſe, becauſe the money was laid out firſt; whereas by the act of parliament the rate ought to have been made firſt, like the caſe of overſeers of the poor on the 43 *Eliz.* and *Tawney*'s Salk. 53[illegible]. caſe cited, where a writ of *mandamus* to make a rate to reimburſe an overſeer of the poor was quaſhed, becauſe the rate ought to have been made firſt.

The court ſeemed to be of opinion, that the money might be laid out, before a rate made; and that the juſtices of peace might make a rate to reimburſe the money. But then the chief juſtice ſaid, that the perſons that were to be charged to the repair of the bridge, ought to be made privy to the laying out of the money; and the rate to be made, ought to be for the repairing the bridge, and not for reimburſing money laid out in the repair of a bridge: and that in the caſe of an overſeer of the poor the juſtices might order a rate to be made for the relief of the poor, and out of that the overſeer might be reimburſed the money he had laid out, and that that was the regular way; but the rate muſt not be for reimburſing the overſeer.

I did not take this to be ſo certainly reſolved, but the other being a plain exception, the court, as I apprehended, went upon that.

Atwood *verſ.* Burr.

Ante, 821 & 1142.

THIS cauſe was not ſtirred in from *Michaelmas* 1 of this Queen till *Hilary* 4° being laſt term. And then ſerjeant *Broderick* took the old exception, that there was a diſcontinuance, becauſe there was no return to the firſt *ſcire facias*. But Mr. *Eyre* for the defendant in error inſiſted upon it, that this was good as an *alias ſcire facias*, though the firſt was not returned; and cited *Raſt. entr.* 326. *b.* 327. And the lord chief juſtice *Holt* ſaid, that the firſt writ, when awarded, ſhould be entred on the roll, for the defendant has a day by the roll; and therefore the writ is depending before the return of it: and therefore in this, if there had been ſuch an entry it had been good, with this award of another, *ſicut prius*, &c. And it was, with very little ſaid more, adjourned till this term. And now this term, *Paſch.* 5 *Ann.* ſerjeant *Broderick* inſiſted, that the judgment ought to be reverſed for the prolixity of the pleadings, becauſe they had ſent the record and proceedings againſt the principal, and then the record and proceedings againſt the bail was made dependant upon the other, and not ſeverable from it, which he ſaid was not to he countenanced in an inferior court: and cited *Cro. Car.* 164. *Fryer verſ. Fawkenor*, where judgment of an inferior court was reverſed for the abſurdities and prolixities in the pleadings. But the court anſwered, that there all the reaſons and arguments were entred at large, and therefore that caſe differed much from this. Then he took another exception, that here was no warrant of attorney to appear to the *ſcire facias*, and the party appeared *per attornatum praedictum*.

To which Mr. *Eyre* anſwered, that this was only a fault in certifying the record by them below, for which the plaintiff ſhould not ſuffer. But the lord chief juſtice *Holt* ſaid, that the plaintiff might pray a *ſcire facias* without an attorney; but when he comes to pray judgment upon it, he does it by attorney, and there is no warrant of attorney before, and therefore that is error. And of that opinion was all the court, and judgment was reverſed, *niſi, &c. die Lunae Apr.* 22. *Paſch.* 5 *Annae reginae.*

Knight *verſ.* Barnaby.

Clerk of aſſiſe has privilege to lay the *venue* in *Middleſex.*

THE plaintiff brought an action of treſpaſs, aſſault and battery againſt the defendant in *Middleſex.* The defendant upon the common *affidavit* had a rule to change the *venue* into *Kent, niſi, &c.* And now Sir *James Mountague* moved to ſet aſide that rule, becauſe the plaintiff was clerk of the aſſiſes of the *Norfolk* circuit, and by conſequence an officer of this court. And the court was of that opinion, becauſe the King's Bench frequently makes rules on clerks to return *poſteas, &c.* and therefore that rule was diſcharged.

Adams *verſ.* the terretenants of Savage.

Intr. *Paſch.* 3 *Ann.* B. R. Rot. 281.

S. C. Salk. 40, 601, 679. Lilly Entr. 398.
A *ſcire facias* on a judgment by an adminiſtrator.
2 Roll. Rep. 54.
6 Mod. 134. S. C.

JOHN *Adams* adminiſtrator of *Sarah Adams,* who died inteſtate, ſued out a *ſcire facias* bearing *teſte* the 19th of *May,* the third year of this Queen, and returnable *die Lunae proxime poſt craſtinum aſcenſionis Domini* next following, upon a judgment given for the ſaid *Sarah Adams* in this court *die Sabbati proxime poſt tres ſeptimanas Paſchae* 34 *Car.* 2. againſt Sir *George Savage* of *Bloxworth* in the county of *Dorſet* for 200*l.* debt and 40*s.* damages and coſts, againſt the terretenants of the lands of which Sir *George Savage* was ſeiſed in fee the day of the judgment given.

At the day of the return of the *ſcire facias* as well the plaintiff *John Adams* as *Daniel Sadler* and *Philippa* his wife, and ſeveral other perſons returned by the ſheriff to be tenants of the land of which Sir *George Savage* was ſeiſed in fee the day of the judgment, ſummoned, and they appear by their attornies: and in particular the ſaid *Daniel Sadler* and *Philippa* his wife, who were returned tenants of the capital manſion-houſe with the appurtenances called *Bloxworth houſe,* and of the manor of *Bloxworth, &c.* in the ſaid county, of which the ſaid Sir *George Savage* was ſeiſed in

Suggeſtion of the death of the inteſtate and grant of adminiſtration.

Profert in curia.

Nontenure pleaded by implication.

ſee the day of the judgment given. *Et ſuper hoc idem Johannes Adams dicit, quod poſt judicium praedictum in forma praedicta redditum, ſcilicet* 10 *die Maii anno regni Domini W.* 3. *nuper regis Angliae, &c.* 12 *apud Bloxworth praedictum in comitatu praedicto, praedicta Sara Adams obiit mortem, et adminiſtratio omnium et ſingulorum bonorum et catallorum jurium et creditorum quae fuerunt praedictae Sarae tempore mortis ſuae, per Thomam providentia Divina Cantuarienſem archiepiſcopum totius Angliae primatem et metropolitanum* 18 *die Maii anno Domini* 1704. *apud London eidem Johanni debita legis forma commiſſa fuit. Et praedictus Johannes Adams profert in curia literas adminiſtratorias praedictae Sarae, per quas ſatis liquet curiae hic ipſum Johannem Adams fore adminiſtratorem, et inde habere adminiſtrationem, &c. Et petit idem Johannes Adams executionem verſus praefatum Danielem Sadler,* and the other perſons returned terretenants, *de debito et damnis praedictis de terris et tenementis praedictis levandis ſibi adjudicari, &c. Et praedictus Daniel Sadler et Philippa uxor ejus,* and the reſt of the terretenants, at the day of the return of the *ſcire facias ſolemniter exacti per P. T. attornatum ſuum praedictum veniunt et petunt judicium de brevi de ſcire facias praefato vicecomiti Dorſet directo in forma praedicta retornato: quia dicunt quod quidam Georgius Trenchard armiger eſt, et die impetrationis ejuſdem brevis de ſcire facias et antea fuit, tenens ut de libero tenemento de manerio de Bloxwoath cum pertinentiis in comitatu praedicto in retorno praedicto mentionato, et hoc parati ſunt verificare, unde ex quo praedictus Georgius Trenchard in retorno praedicti brevis de ſcire facias non nominatus ſeu retornatus eſt tenens ejuſdem manerii de B. praedicti cum pertinentiis, iidem Daniel Sadler et Philippa uxor ejus,* and the reſt of the terretenants, *petunt judicium de brevi illo, et quod breve illud caſſetur. J. Darnall.* To which plea the plaintiff demurred, and the defendant joined in demurrer.

The exception which was took to this plea by the plaintiff's counſel Mr. *Eyre*, was, that it concluded ill, for it ought to conclude *ſi* the defendants *reſpondere compelli debeant*; and could not be pleaded in abatement, unleſs the defendants give the plaintiff a better writ, which in this caſe they do not, for a new writ muſt be the ſame, and the fault is in the ſheriff, in omitting ſome of the terretenants in the return. So is *M.* 40 *&* 41 *Eliz. Clerk verſ. Hardwick. Cro. Eliz.* 740. *M.* 16. *Jac.* 1. *Michel verſ.* Sir *John Crofts* and others. *Cro. Jac.* 506. 2 *Ro. rep.* 41, 53. *Moore* 524.

Mr. ſerjeant *Darnall* for the defendant inſiſted upon it, that the precedents were both ways, and relied on *Co. Intr.* 624.

How a plea of another tenant not returned in a *ſcire facias* ought to conclude.

The cauſe being in the paper for judgment, *Mich.* 3. of this Queen, the judges did not ſeem to be altogether unanimous as to the exception abovementioned. *Powell* juſtice took it to be a ſettled rule, that the defendant ſhould never abate the plaintiff's writ without giving him a better, which in this caſe he cannot do, there being no defect in the writ, but in the ſheriff's return; but becauſe execution ought to be awarded againſt all the terretenants equally, which cannot be done till all of them are returned warned, and before the court, therefore this is a good plea in delay of the execution, and ought to be pleaded *ſi reſpondere compelli debeant*; but cannot be pleaded in abatement of the writ. For the court cannot give judgment, that the writ for this defect ſhall abate, but the court muſt award another writ, and the terretenants returned upon the firſt writ muſt have the ſame day given them with the return of the new writ. So is 11 *E.* 2. *Fitzh. Brieſe* 266. 2 *Saund.* 8, 9. *Jeffreſon* and *Dawſon*. And *Mich.* 1 *Will. & Mar. B. R.* *Prynne verſ. Slaughter*. 2 *Ventr.* 105.

Writ in that caſe cannot abate.

Difference where the tenant is tenant of lands in the ſame, and where in another county.

Holt chief juſtice ſaid, that where the terretenant omitted is tenant of lands in another county, ſuch a plea can never be pleaded in abatement; becauſe the ſheriff has perfectly done his duty in execution of the firſt writ, and could do no more but ſummons the terretenants in his county: and therefore in ſuch caſe the plaintiff muſt ſue out a new writ directed to the ſheriff of that other county, where the other lands, *&c.* lie. And therefore in ſuch caſe to plead that matter in abatement would be very improper, but it ought to be pleaded with a *ſi reſpondere compelli debeant, &c.* And ſo are the caſes of 2 *Saund.* 8, 9. and 2 *Ventr.* 105. the terretenants not named being of lands in another county. But where the terretenants not returned are of lands in the ſame county, the precedents are both ways; though it muſt not be intended that the King's Bench can give judgment to abate the writ, but only to ſtay till the other terretenant is brought in. [See *Moore* 429. *Cro. Eliz.* 506. *Goldſb.* 160. *pl.* 92. Dame *Greſham*'s caſe.]

In a *ſcire facias* only he which is returned tenant can plead as to thoſe lands, of which he is returned tenant.

But then the lord chief juſtice *Holt* took an exception to the plea, which he ſaid muſt be fatal, which was, that *Sadler* and his wife were returned tenants of the manor of *Bloxworth*, then no body but they can plead any thing in reſpect of that manor, of which they are returned tenants. For if in a *ſcire facias, &c. A.* is returned tenant of *Blackacre*, and *B.* of *Whiteacre*, *A.* can plead nothing as to *Whiteacre*, nor *B.* as to *Blackacre*; then in this caſe, when all the terretenants returned join in this plea with *Sadler* and his wife, it vitiates the whole plea. Indeed if *Trenchard* had been jointenant with *Sadler* and his wife, and not returned nor ſummoned;

moned; *Sadler* and his wife might have pleaded it, but the other terretenants could not join in ſuch plea, becauſe they have nothing to do with the manor of which *Sadler* and his wife are returned tenants.

General *nontenure* no plea in *ſcire facias* on a judgment, in a perſonal action.

2. If *Sadler* and his wife had pleaded this, it had been naught; becauſe it had been but a plea of general *nontenure*, and that too but by implication. In a *ſcire facias* on judgment in a real action, ſpecial *nontenure* may be pleaded 8 *Edw.* 4. 19. 9 *Hen.* 5. 11. But in a *ſcire facias* on a judgment in a perſonal action the terretenant cannot plead *nontenure* by implication. To all which the other three judges, *viz. Powell*, *Powys*, and *Gould* agreed, and therefore a *reſpondes ouſter* was awarded.

Queſtion whether tenant for years is not a ſufficient tenant to be returned in ſuch a *ſcire facias*.

Note, the lord chief juſtice *Holt* ſaid further in this caſe, that it was a queſtion whether a tenant for years was not a ſufficient terretenant to be returned by the ſheriff in a *ſcire facias* on a judgment in a perſonal action. In *Owen* 134. *Kemp et alii verſ. Lawrence*; a tenant for years pleads in bar of a *ſcire facias*, and as that caſe is reported in 2 *Brownl.* 244. it is doubted whether it is good or not. And in 2 *Saund.* 20, 21. a leaſe for years in the terretenant returned in the *ſcire facias* is pleaded in bar. Now if the law is ſo, that a tenant for years is a ſufficient tenant in ſuch a caſe, this plea is ill; becauſe, notwithſtanding *Trenchard* might be tenant of the freehold, yet *Sadler* and his wife might be tenants for years. But as to that neither he nor the other judges gave any poſitive opinion. Mr. *Rob. Eyre* counſel for the plaintiff, Mr. ſerjeant *Darnall* for the defendants.

Parkins *verſ.* Wilſon.

Intr. *Hil.* 2 *Annae.* B. R. Rot. 261.

Debt in the King's Bench on the recogniſance of the bail.

Middleſex, ſſ. *MEmorandum quod alias ſcilicet die Lunae proxime poſt quindenam ſancti Martini in termino ſancti Michaelis ultimo praeterito, coram domina regina apud Weſtmonaſterium, venit Thomas Parkins per Franciſcum Hutchinſon attornatum ſuum, et protulit hic in curia dictae dominae reginae tunc ibidem quandam billam ſuam verſus Mattheum Wilſon in cuſtodia marreſchalli, &c. de placito debiti, et ſunt plegii de proſequendo ſcilicet J. D. et R. R. quae quidem billa ſequitur in haec verba: ſcilicet Middleſex, ſſ. Tho. Parkins queritur de Mattheo Wilſon in cuſtodia marreſchalli marreſchalciae dominae reginae coram ipſa regina exiſtente, de placito quod reddat ei* 25 *l. et* 15 *s. legalis monetae Angliae, quas ei debet et iniuſte detinet, pro eo videlicet quod cum praedictus Thomas Parkins*

alias ſcilicet hoc inſtanti termino in curia dominae reginae corum ipſa regina apud Weſtmonaſterium (eadem curia apud Weſtmonaſterium in comitatu Middleſex tunc exiſtente) per billam ſine brevi dictae dominae reginae, ac per judicium ejuſdem curiae, recuperaſſet verſus quendam Jonathanem Woollaſton generoſum 25 l. et 15 s. pro damnis ſuis, quae ſuſtinuiſſet tam occaſione non performationis quarundam promiſſionum et aſſumptionum eidem Thomae per praefatum Jonathanem nuper factarum, quam pro miſis et cuſtagiis ſuis per ipſum circa ſectam ſuam in ea parte appoſitis, unde idem Jonathan convictus eſt, prout per recordum inde in curia dictae dominae reginae coram ipſa regina apud Weſtmonaſterium praedictum reſidens plenius liquet et apparet: ac cum praedictus Mattheus Wilſon et quidam B. C. per nomina Matthei Wilſon de parochia ſancti Pauli Covent Garden coqui, et B. C. de parochia ſancti Clementis Dacorum generoſi, alias ſcilicet termino Paſchae ultimo praeterito, in eadem curia dictae dominae reginae coram ipſa regina apud Weſtmonaſterium, perſonaliter veniſſent et deveniſſent plegii et manucaptores, et uterque eorum pro ſe deveniſſet plegius et manucaptor, pro praefato Jonathane, quod ſi contingeret ipſum Jonathanem in placito praedicto convinci, tunc iidem M. et B. conceſſiſſent, et uterque eorum pro ſe conceſſiſſet, omnia hujuſmodi damna, miſa, et cuſtagia, quae praefato Thomae Parkins in ea parte adjudicarentur, de terris et catallis ſuis et eorum utriuſque fieri, et ad opus praefati Thomae Parkins proprium levari, ſi contingeret damna illa praefato Thomae ſolvere, aut ſe priſonae marreſchalli marreſchalciae dictae dominae reginae coram ipſa regina ea occaſione non reddere: et idem Thomas dicit quod praedictus Jonathan damna illa praefato Thomae nondum ſolvit, nec ſeipſum priſonae marreſchalli marreſchalciae dictae dominae reginae coram ipſa regina ea occaſione reddidit; per quod actio accrevit eidem Thomae ad exigendum et habendum de praefato Mattheo praedict. 25 l. et 15 s. praedictus tamen Mattheus licet ſaepius requiſitus, &c. praedictas 25 l. et 15 s. eidem Thomae nondum ſolvit; ſed illos ei ſolvere hucuſque omnino contradixit, et adhuc contradicit, ad damnum ipſius Thomae 30 l. et inde producit ſectam, &c. Cum hoc quod idem Thomas verificare vult, quod praedictus Mattheus Wilſon unus plegiorum et manucaptorum pro praedicto Jonathane deveniſſe ſuperius mentionatus, et praedictus Mattheus Wilſon modo defendens, ſunt una et eadem perſona, et non alia, neque diverſa; quodque praedictus Thomas in recordo praedicto mentionatus, et praedictus Thomas modo querens, ſunt una et eadem perſona, et non alia, neque diverſa; quodque judicium praedictum in ſuis pleno robore, vigore, et effectu adhuc remanet minime reverſatum, annihilatum, ſive ſatisfactum.

The judgment againſt the principal in caſe.

The bail's recogniſance in the King's Bench.

Averments.

The defendant *Wilſon* pleaded in bar, that after the giving the ſaid judgment againſt the ſaid *Jonathan Woollaſton*, and before the day of the exhibiting the plaintiff's bill, no *capias ad ſatisfaciendum*

No *capias ad ſatisfaciendum* pleaded.

upon the ſaid judgment againſt the ſaid *Woollaſton* was proſecuted and returned in the Queen's Bench, *&c.*

Replication of a *capias ad ſatisfaciendum*, ſued and returned.

The plaintiff *Parkins* replied, that after the giving the ſaid judgment againſt the ſaid *Woollaſton*, and before the exhibiting this bill, *viz.* 10 of *November* the ſecond of this Queen, the ſaid plaintiff did ſue out of the King's Bench a *capias ad ſatisfaciendum* againſt the ſaid *Woollaſton*, returnable *die lunae proxime poſt octabas ſancti Martini*, *&c.* at which day the ſheriff returned, that the ſaid *Jonathan Woollaſton non fuit inventus in balliva ſua, prout per breve de capias ad ſatisfaciendum, et praedictam retornam brevis illius* in the ſaid Queen's Bench *apud Weſtmonaſterium, de recordo reſidentia plenius liquet et apparet; et hoc, &c.*

Rejoinder that the defendant in the principal action ſued error on the judgment before the *capias ad ſatisfaciendum* was proſecuted, returned, and filed.

The defendant rejoined in this manner: *Et praedictus Mattheus Wilſon dicit quod poſt redditionem judicii praedicti in narratione praedicta ſpecificati, et ante praedictum breve de capias ad ſatisfaciendum de vel ſuper judicio praedicto verſus praefatum Jonathanem Wilſon proſecutum retornatum et affilatum fuit in curia dictae dominae reginae nunc coram ipſa regina apud Weſtmonaſterium praedictum, ſcilicet 20 die Novembris anno regni dictae dominae reginae nunc ſecundo, ipſe idem Jonathan pro reverſione judicii praedicti proſecutus fuit extra curiam* Cancellariae *dictae dominae reginae apud Weſtmonaſterium praedictum in comitatu Middleſexiae tunc exiſtentem, quoddam breve dictae dominae reginae de errore corrigendo in recordo et proceſſu, acetiam in redditione judicii illius, directum dilecto et fideli dictae dominae reginae Johanni Holt militi tunc et adhuc capitali juſticiario ipſius dominae reginae ad placita coram ipſa regina tenenda aſſignato, per quod quidem breve dicta domina regina praefato capitali juſticiario ſuo mandavit, quod ſi judicium inde redditum fuit, tunc recordum et proceſſum loquelae praedictae cum omnibus ea tangentibus coram juſticiariis ſuis de communi banco et baronibus ſuis de ſcaccario de gradu de la coiſe in camera ſcaccarii dictae dominae reginae apud Weſtmonaſterium die Sabbati, videlicet 27 die tunc inſtantis menſis Novembris, venire faceret, ut dicti juſticiarii de communi banco et barones de ſcaccario, viſis et examinatis recordo et proceſſu praedictis, ulterius inde in ea parte fieri facerent, quod de jure et ſecundum formam ſtatuti in hujuſmodi caſu editi et proviſi foret faciendum, virtute cujus quidem brevis de errore corrigendo idem capitalis juſticiarius poſtea, ſcilicet eodem 27 die Novembris praedicti, tranſcriptum recordi et proceſſus loquelae et judicii praedictorum cum omnibus ea tangentibus coram praefatis juſticiariis dictae dominae reginae de communi banco et baronibus de ſcaccario de gradu de la coiſe in camera ſcaccarii apud Weſtmonaſterium praedictum tranſmiſit, ubi eadem adhuc remanent, et quod praedictum breve de errore corrigendo in eadem camera ſcaccarii praedicti adhuc pendet indeter-*

indeterminatam, et judicium praedictum in eadem curia dictae dominae reginae nunc coram ipſa regina adhuc in pleno ſuo robore remanet minime adnullatum, prout per recordum inde in eadem curia dictae dominae reginae nunc coram ipſa regina plenius liquet et apparet: et idem Mattheus ulterius dicit, quod poſt proſecutionem praedicti brevis de errore corrigendo, et ante retornam inde, necnon ante praedictum breve de capias ad ſatisfaciendum de vel ſuper judicio praedicto verſus praefatum Jonathanem Wilſon proſecutum retornatum et affilatum fuit in curia dictae dominae reginae nunc coram ipſa regina apud Weſtmonaſterium praedictum, ſcilicet 22 *die Novembris anno regni dictae dominae reginae nunc ſecundo, idem Mattheus Wilſon, et quidam Booth Chadderton, et Richardus Woollaſton, per nomina Booth Chadderton de Stanhop ſtreet in parochia ſancti Clementis Dacorum in comitatu Middleſexiae generoſi, Matthei Wilſon de York ſtreet in parochia ſancti Pauli Covent Garden in comitatu praedicto coqui, et Richardi Woollaſton de Wormley in comitatu Hertford armigeri, in propriis perſonis ſuis venerunt in praedictam curiam dictae dominae reginae nunc coram ipſa regina apud Weſtmonaſterium, et ſecundum formam ſtatuti pro evitatione minime neceſſariarum dilationum executionum inde editi et proviſi, recognoverunt ſe debere, et quilibet eorum recognovit ſe debere, praedicto Thomae Parkins* 51 *l. et* 10 *s. legalis monetae Angliae, ſolvendos eidem Thomae, executoribus vel aſſignatis ſuis, et niſi fecerint, iidem B. M. et R. conceſſerunt, et quilibet eorum conceſſit pro ſe, praedictos* 51 *l. et* 10 *s. de terris et catallis ſuis, et eorum cujuſlibet, fieri et ad opus dicti Thomae levari; ſub conditione tamen, quod ſi praedictus Jonathan proſequeretur praedictum breve de errore cum effectu, ac ſi judicium praedictum affirmatum foret verſus praedictum Jonathanem, tunc ſi idem Jonathan ſatisfaceret et ſolveret dicto Thomae damna praedicta, acetiam omnia talia cuſtagia et damna qualia adjudicata forent dicto Thomae occaſione dilationis executionis ſuae ſuper judicio praedicto praetextu proſecutionis dicti brevis de errore, tunc recognitio illa vacua foret, et nullius effectus; prout per recordum inde in praedicta curia dictae dominae reginae nunc coram ipſa regina apud Weſtmonaſterium remanens plenius apparet: et hoc idem Mattheus paratus eſt verificare, unde (ut prius) petit judicium, et quod praedictus Thomas P. ab actione ſua praedicta inde verſus eundem Mattheum habenda praecludatur, &c.*

Bail in error.

Ri. Acherley.

To this rejoinder the plaintiff demurred generally, and the defendant joined in demurrer, and adjudged for the plaintiff *Eaſter* term 3 *Ann. B. R.* becauſe the rejoinder is a departure from the bar. *Cro. Car.* 76. This term a motion was made by *Woollaſton* the defendant in the principal action, to ſet aſide this *capias ad ſatisfaciendum* as irregular, becauſe it was ſued out returnable *die lunae*

1 Salk. 321.
6 Mod. 130, 139.
See before, 342.
Trin. 10 W. 3. C. B. Ward v. Bendall.

lunae proxime poſt octabas ſancti Martini, which was the 22d of *November*, and that very day the writ of error ſued out by *Woollaſton* the 20th was allowed: after which the *capias ad ſatisfaciendum* was filed, but returned the ſame day. And adjudged, this *capias ad ſatisfaciendum* was well ſued out to charge the bail, and the motion was denied *May* 5. *Paſch.* 3 *Ann. B. R. Parkins verſ. Woollaſton. Raymond* for the plaintiff, *Acherley* for the defendant.

And ſo it was held in B. R. Eaſter 16 Geo. 2. between Smith and Nicholſon.

The principal Officers in the Law,

Paſch. 5 Annae reginae, *A. D.* 1706.

THE right honourable William Cowper *eſquire, lord keeper of the great ſeal of* England, *which was delivered to him by the Queen in council at* St. James's, October 2, 1705. *being then one of her Majeſty's counſel at law.*

Sir John Trevor *knight, maſter of the Rolls.*

Sir John Holt *knight, chief juſtice.*
Sir John Powell *knight,*
Sir Littleton Powys *knight,*
Sir Henry Gould *knight,*
} *juſtices of the King's Bench.*

Sir Thomas Trevor *knight, chief juſtice.*
Sir John Blencowe *knight,*
Robert Tracy *eſquire,*
Robert Dormer *eſquire,*
} *juſtices of the Common Pleas.*

Henry Boyle *eſquire, chancellor.*
Sir Edward Ward *knight, chief baron.*
Sir Thomas Bury *knight,*
Robert Price *eſquire,*
John Smith *eſquire,*
} *barons of the Exchequer.*
Sir Richard Simpſon *knight, curſitor baron.*

The right honourable John *lord* Gower, *baron of* Sittenham, *chancellor of the duchy of* Lancaſter.

Sir Thomas Powys *knight*,
Sir Salathiel Lovell *knight*, } *Queen's chief ſerjeants.*

Sir Edward Northey *knight*, *attorney general.*

Sir Simon Harcourt *knight*, *ſolicitor general.*

Sir John Darnall *knight*,
Sir Joſeph Jekyll *knight*,
Nicholas Hooper *eſquire*, } *Queen's ſerjeants.*
Sir Thomas Parker *knight*,

John Conyers *eſquire*,
Sir William Whitlock *knight*,
Aglionby *eſquire*, } *Queen's counſel.*
William Jennings *eſquire*,
Sir James Mountague *knight*,

Sir Edward Northey *knight*, *attorney general of the duchy of* Lancaſter.

Robert Starkie *eſquire*, *attorney general of the county palatine of* Lancaſter.

Mr. ſerjeant Bennett, *judge of the* Marſhalſea.

Welſh *judges.*

Sir Joſeph Jekyll *knight*, *chief juſtice*,
Sir Salathiel Lovell *knight*, } *juſtices of* Cheſter, &c.

Mr. ſerjeant Hook,
Stephen Harvey *eſquire*, } *juſtices of* North Wales.

Mr. ſerjeant Neve,
Mr. ſerjeant Webb, } *juſtices of* Weſt Wales.

Mr. ſerjeant Baniſter,
Charles Cocks *eſquire*, } *juſtices of* South Wales.

Turner *verſ.* Beale.

Paſch. 5 *Ann.* B. R. *Apr.* 10, 1706.

S. C. Salk. 521. p. 24, 25.

Caſe on an *indebitatus* for goods ſold and delivered for 100 *l.* 1 *June* 1705.

Plea as to all but 37 *l.* part of the 100 *l.* *non aſſumpſit*.

As to the 37 *l.* confeſſes the action.

But in ſtay of execution as to his perſon, &c. he pleads the ſtatute of 2 Ann. c. 16. for inſolvent debtors, &c.

That he was in priſon on and before the 8 *Nov.* 1702. for debt.

That at the general quarter-ſeſſions of the peace 13 *July* 1704.

THE plaintiff brought an action upon the caſe againſt the defendant, upon an *indebitatus aſſumpſit* fur 100 *l.* for goods ſold and delivered by the plaintiff to the defendant, *June* 1, 1705. upon a *quantum meruit*, and an *inſimul computaſſent*: to the laſt promiſes, and to the whole ſum of 100 *l.* in the firſt promiſe mentioned beſides 37 *l.* part thereof, the defendant pleaded *non aſſumpſit*; upon which iſſue was joined. *Et quoad eaſdem triginta et ſeptem libras de dicta ſumma centum librarum in eadem prima promiſſione et aſſumptione mentionatas, idem Abrahamus* [*viz.* the defendant] *dicit quod ipſe non poteſt dedicere, quin ipſe ante octavum diem Novembris anno domini milleſimo ſeptingenteſimo tertio indebitatus fuit praedicto Johanni Turner in eiſdem triginta et ſeptem libris, pro ovibus et agnis* [*viz.* the goods in the declaration] *eidem Abrahamo per praefatum Johannem Turner ante tempus illud venditis et deliberatis, ac ante eundem octavum diem Novembris in conſideratione inde ſuper ſe aſſumpſit et promiſit ſolvere dicto Johanni Turner eaſdem triginta et ſeptem libras; et ſic non poteſt dedicere, quin praedictus Johannes Turner damna ſua occaſione non ſolutionis earundem triginta et ſeptem librarum verſus ipſum Abrahamum recuperare debeat: idem tamen Abrahamus petit quod perſona ſua, nec non ejus apparatus, Anglice* wearing apparel, *toralia, Anglice* bedding, *ac inſtrumenta neceſſaria pro ejus occupatione, quae non excedunt decem libras in valore, ſint ſemper exonerata et libera de et ab omni executione per praefatam Johannem in hac parte habenda, juxta formam ſtatuti in parliamento dominae reginae nunc apud Weſtmonaſterium in comitatu Middleſex, nono die Novembris anno regni ſui ſecundo per prorogationem tento editi, intitulati,* An act for the diſcharge out of priſon ſuch inſolvent debtors as ſhall ſerve, or procure a perſon to ſerve, in her Majeſty's fleet, or army; *quia dicit, quod ipſe idem Abrahamus praedicto octavo die Novembris anno domini* 1703. *in eodem ſtatuto mentionato, nec non antea et poſtea, fuit priſonarius actualiter in priſona et gaola dominae reginae de marreſcalcia ejuſdem dominae reginae coram ipſa regina, ſub cuſtodia Franciſci Southard armigeri cuſtodis priſonae illius, de et ſuper actione ad ſectam Edmundi Warnford pro debito (dicta priſona tunc et adhuc apud Southwark in comitatu Surrey exiſtente) quodque ad generalem quarterialem ſeſſionem pacis dictae dominae reginae tentam apud Guilford, in et pro eodem comitatu Surrey, die Jovis* 13 *die Julii anno regni dictae dominae reginae nunc tertio, coram Johanne Fulham et Johanne Lade armigeris, et aliis ſociis ſuis juſticiariis ipſius dominae reginae ad pacem in dicto comitatu Surrey conſer-*

conſervandam aſſignatis, ipſe dictus Abrahamus priſonarius in forma praedicta tunc etiam exiſtens, per eoſdem juſticiarios pacis in aperta curia illa, virtute ac juxta formam ſtatuti praedicti de et ab impriſonamento ſuo praedicto debito modo relaxatus et exoneratus fuit; abſque hoc, quod idem Abrahamus ſuper ſeu poſt praedictum octavum diem Novembris anno domini 1703 *ſupradicto aſſumpſit ſuper ſe quoad eaſdem* 37 *l. modo et forma, prout praedictus Johannes ſuperius inde ſupponit, et hoc paratus eſt verificare; unde petit judicium, ſi praedictus Johannes Turner aliquam executionem in hac parte ad onerandum perſonam ipſius Abrahami, aut ejus apparatum, toralia vel inſtrumenta neceſſaria praedicta habere debeat, &c. Et profert hic in curia idem Abrahamus duplicationem ordinis exonerationis illius, manibus et ſigillis dictorum duorum juſticiariorum pacis ſuperius nominatorum ſignatam et ſigillatam, quae praemiſſa teſtatur, cujus datus eſt in dicta generali quarteriali ſeſſione pacis apud* Guilford, *praedicto* 13 *die Julii anno tertio ſupradicto, &c.* L. Agar.

he was diſcharged out of priſon.

Traverſe of the time of the debt.

Et praedictus Johannes Turner dicit, quod ipſe per aliqua, per praedictum Abrahamum ſuperius placitando allegata, ab executione ſua pro damnis ſuis in hac parte recuperandis occaſione non ſolutionis praedictarum 37 *l. verſus perſonam praedicti Abrahami et omnia bona et catalla ſua habenda praecludi non debet; quia dicit, quod placitum praedictum per praedictum Abrahamum ſuperius placitatum, materiaque in eodem contenta minus ſufficientia in lege exiſtunt, ad ipſum Johannem ab executione ſua inde verſus perſonam praefati Abrahami et omnia bona et catalla ſua habenda praecludendum, ad quod ipſe idem Johannes neceſſe non habet, nec per legem terrae tenetur aliquo modo reſpondere: et hoc paratus eſt verificare. Unde pro defectu ſufficientis reſponſi in hac parte idem Johannes petit judicium, et damna ſua occaſione premiſſorum per executionem verſus perſonam praedicti Abrahami, et omnia bona et catalla ſua ad libitum ipſius Johannis fiendam et levandam ſibi adjudicari, &c.* T. Pengelly.

Demurrer.

Et praedictus Abrahamus dicit, quod placitum praedictum per ipſum Abrahamum modo et forma praedictis ſuperius placitatum, materiaque in eodem contenta bona et ſufficientia in lege exiſtunt, ad praedictum Johannem ab executione ſua inde verſus perſonam ipſius Abrahami et ejus apparatum toralia ac inſtrumenta neceſſaria pro ejus occupatione, quae non excedunt 10 *l. in valore, habenda praecludendum; quod quidem placitum, materiamque in eodem contentam, ipſe idem Abrahamus paratus eſt verificare, et probare curiae, &c. Et quia praedictus Johannes ad placitum illud non reſpondet, nec illud hucuſque aliqualiter dedicit, ipſe idem Abrahamus, ut prius, petit judicium, et quod praedictus Johannes Turner ab omni executione quacunque in hac parte habenda, ad onerandum perſonam ipſius Abrahami, aut ejus apparatum toralia vel inſtrumenta praedicta praecludatur, &c.*

Joinder in Demurrer.

Turner *verſ.* Beale.

Paſch. 5 *Ann.* B. R. *Apr.* 10, 1706.

S. C. Salk. 521. p. 24, 25.

Caſe on an *indebitatus* for goods ſold and delivered for 100*l.* 1 *June* 1705.

Plea as to all but 37*l.* part of the 100*l.* *non aſſumpſit.*

As to the 37*l.* confeſſes the action.

But in ſtay of execution as to his perſon, *&c.* he pleads the ſtatute of 2 Ann. c. 16. for inſolvent debtors, *&c.*

That he was in priſon on and before the 8 *Nov.* 1702. for debt.

That at the general quarter-ſeſſions of the peace 13 *July* 1704.

THE plaintiff brought an action upon the caſe againſt the defendant, upon an *indebitatus aſſumpſit* fur 100*l.* for goods ſold and delivered by the plaintiff to the defendant, *June* 1, 1705. upon a *quantum meruit*, and an *inſimul computaſſent*: to the laſt promiſes, and to the whole ſum of 100*l.* in the firſt promiſe mentioned beſides 37*l.* part thereof, the defendant pleaded *non aſſumpſit*; upon which iſſue was joined. *Et quoad eaſdem triginta et ſeptem libras de dicta ſumma centum librarum in eadem prima promiſſione et aſſumptione mentionatas, idem Abrahamus* [*viz.* the defendant] *dicit quod ipſe non poteſt dedicere, quin ipſe ante octavum diem Novembris anno domini milleſimo ſeptingenteſimo tertio indebitatus fuit praedicto Johanni Turner in eiſdem triginta et ſeptem libris, pro ovibus et agnis* [*viz.* the goods in the declaration] *eidem Abrahamo per praefatum Johannem Turner ante tempus illud venditis et deliberatis, ac ante eundem octavum diem Novembris in conſideratione inde ſuper ſe aſſumpſit et promiſit ſolvere dicto Johanni Turner eaſdem triginta et ſeptem libras; et ſic non poteſt dedicere, quin praedictus Johannes Turner damna ſua occaſione non ſolutionis earundem triginta et ſeptem librarum verſus ipſum Abrahamum recuperare debeat: idem tamen Abrahamus petit quod perſona ſua, nec non ejus apparatus, Anglice* wearing apparel, *toralia, Anglice* bedding, *ac inſtrumenta neceſſaria pro ejus occupatione, quae non excedunt decem libras in valore, ſint ſemper exonerata et libera de et ab omni executione per praefatam Johannem in hac parte habenda, juxta formam ſtatuti in parliamento dominae reginae nunc apud Weſtmonaſterium in comitatu Middleſex, nono die Novembris anno regni ſui ſecundo per prorogationem tento editi, intitulati,* An act for the diſcharge out of priſon ſuch inſolvent debtors as ſhall ſerve, or procure a perſon to ſerve, in her Majeſty's fleet, or army; *quia dicit, quod ipſe idem Abrahamus praedicto octavo die Novembris anno domini* 1703. *in eodem ſtatuto mentionato, nec non antea et poſtea, fuit priſonarius actualiter in priſona et gaola dominae reginae de marreſcalcia ejuſdem dominae reginae coram ipſa regina, ſub cuſtodia Franciſci Southard armigeri cuſtodis priſonae illius, de et ſuper actione ad ſectam Edmundi Warnford pro debito (dicta priſona tunc et adhuc apud Southwark in comitatu Surrey exiſtente) quodque ad generalem quarterialem ſeſſionem pacis dictae dominae reginae tentam apud Guilford, in et pro eodem comitatu Surrey, die Jovis 13 die Julii anno regni dictae dominae reginae nunc tertio, coram Johanne Fulham et Johanne Lade armigeris, et aliis ſociis ſuis juſticiariis ipſius dominae reginae ad pacem in dicto comitatu Surrey conſer-*

conſervandam aſſignatis, ipſe dictus Abrahamus priſonarius in forma praedicta tunc etiam exiſtens, per eoſdem juſticiarios pacis in aperta curia illa, virtute ac juxta formam ſtatuti praedicti de et ab impriſonamento ſuo praedicto debito modo relaxatus et exoneratus fuit; abſque hoc, quod idem Abrahamus ſuper ſeu poſt praedictum octavum diem Novembris anno domini 1703 *ſupradicto aſſumpſit ſuper ſe quoad eaſdem* 37 *l. modo et forma, prout praedictus Johannes ſuperius inde ſupponit, et hoc paratus eſt verificare; unde petit judicium, ſi praedictus Johannes Turner aliquam executionem in hac parte ad onerandum perſonam ipſius Abrahami, aut ejus apparatum, toralia vel inſtrumenta neceſſaria praedicta habere debeat, &c. Et profert hic in curia idem Abrahamus duplicationem ordinis exonerationis illius, manibus et ſigillis dictorum duorum juſticiariorum pacis ſuperius nominatorum ſignatam et ſigillatam, quae praemiſſa teſtatur, cujus datus eſt in dicta generali quarteriali ſeſſione pacis apud Guilford, praedicto* 13 *die Julii anno tertio ſupradicto, &c.* L. Agar.

he was diſcharged out of priſon.

Traverſe of the time of the debt.

Et praedictus Johannes Turner dicit, quod ipſe per aliqua, per praedictum Abrahamum ſuperius placitando allegata, ab executione ſua pro damnis ſuis in hac parte recuperandis occaſione non ſolutionis praedictarum 37 *l. verſus perſonam praedicti Abrahami et omnia bona et catalla ſua habenda praecludi non debet; quia dicit, quod placitum praedictum per praedictum Abrahamum ſuperius placitatum, materiaque in eodem contenta minus ſufficientia in lege exiſtunt, ad ipſum Johannem ab executione ſua inde verſus perſonam praefati Abrahami et omnia bona et catalla ſua habenda praecludendum, ad quod ipſe idem Johannes neceſſe non habet, nec per legem terrae tenetur aliquo modo reſpondere: et hoc paratus eſt verificare. Unde pro defectu ſufficientis reſponſi in hac parte idem Johannes petit judicium, et damna ſua occaſione premiſſorum per executionem verſus perſonam praedicti Abrahami, et omnia bona et catalla ſua ad libitum ipſius Johannis fiendam et levandam ſibi adjudicari, &c.* T. Pengelly.

Demurrer.

Et praedictus Abrahamus dicit, quod placitum praedictum per ipſum Abrahamum modo et forma praedictis ſuperius placitatum, materiaque in eodem contenta bona et ſufficientia in lege exiſtunt, ad praedictum Johannem ab executione ſua inde verſus perſonam ipſius Abrahami et ejus apparatum toralia ac inſtrumenta neceſſaria pro ejus occupatione, quae non excedunt 10 *l. in valore, habenda praecludendum; quod quidem placitum, materiamque in eodem contentam, ipſe idem Abrahamus paratus eſt verificare, et probare curiae, &c. Et quia praedictus Johannes ad placitum illud non reſpondet, nec illud hucuſque aliqualiter dedicit, ipſe idem Abrahamus, ut prius, petit judicium, et quod praedictus Johannes Turner ab omni executione quacunque in hac parte habenda, ad onerandum perſonam ipſius Abrahami, aut ejus apparatum toralia vel inſtrumenta praedicta praecludatur, &c.*

Joinder in Demurrer.

Mr. *Pengelly* for the plaintiff took exceptions to the plea, becauſe the ſeveral facts, required by the act of parliament to be done, to intitle the juſtices of peace to a juriſdiction, were not averred to have been done: without which the juſtices had no power to make ſuch an order of diſcharge, as is ſet forth in the plea; and therefore that the defendant ought expreſly and particularly to have ſhewn, that he petitioned, that the creditor was ſummoned, that he liſted himſelf a ſoldier, *&c.* as the ſtatute has appointed.

Mr. *Eyre* for the defendant inſiſted upon it, that all thoſe omiſſions were ſupplied by the general allegation, that the defendant was diſcharged *ſecundum formam ſtatuti*; for if any of thoſe facts were omitted, he could not be ſaid to be diſcharged according to the form of the ſtatute; and for that purpoſe he cited *Cro. Jac.* 609. *Johnſon's* caſe, where 'tis ſaid, many of the faults in the indictment were aided by the concluſion, *contra formam ſtatuti in hujuſmodi caſu editi et proviſi*. 2. That if there had been any defect in the proceedings of the juſtices of peace in this matter, it ought to be ſhewn by the other ſide, and ſhould never be intended, as in the caſe in *Cro. Car.* 280. In a writ upon the ſtatute of *Weſtm.* 2. *c.* 46. for throwing down fenſes in the night, 'tis not neceſſary to ſet out that the landlord had right to improve; but if he has not, it ought to come on the other ſide. 3. He argued it was good upon a general demurrer, and cited ſeveral caſes of omiſſions in pleading, held good after a general demurrer. 1 *Lev.* 194. *Cutler verſ. Southerne.* 1 *Lut.* 545, 9. *Lee verſ. Elkin.* He relied alſo on 1 *Ventr.* 356. *Day verſ. Copleſton*, which though reported ſhort by the book, he took to be much ſuch a plea as this. For there it is ſaid the defendant pleaded the ſtatute for the diſcharge of poor priſoners, and that he had been diſcharged by that act. [But ſee the ſame caſe reported, Sir *Thomas Jones* 165. where 'tis ſaid, the defendant ſet out in good form all matters and circumſtances by the act neceſſary.]

The court were all clear of opinion that the plea was ill, even on a general demurrer; becauſe it did not appear to them, the neceſſary facts not being averred to intitle the juſtices of peace to a juriſdiction, that they had any juriſdiction in this caſe; and judgment was given for the plaintiff. Adjudged accordingly, *Hil.* 5 *Ann. B. R. inter Woodrington et Deverill*, *intr. Mich.* 5 *Ann. B. R. rot.* 34. and that it was naught on a general demurrer, as that caſe was, and not aided by the ſtatute for the amendment of the law.

Woodrington v. Deverill, Salk. 521.

Regina *verſ.* Baines.

Paſch. 5 *Ann.* B. R. 1706.

S. C. Salk. 680. 6 Mod. 192.

MR. *Baines* being removed by the juſtices of peace of the county of *Weſtmoreland*, from the office of clerk of the peace of the ſaid county, obtained a *mandamus* out of the King's Bench, to command them to reſtore him to that office, or to ſhew cauſe to the contrary; which writ follows *in his verbis:*

A *mandamus* to reſtore Mr. Baines to the office of clerk of the peace.

Anna dei gratia Angliae, Scotiae, Franciae et Hiberniae regina, fidei defenſor, &c. cuſtodibus pacis noſtrae, ac juſticiariis noſtris ad pacem in et pro comitatu illo conſervandam necnon ad diverſas felonias, tranſgreſſiones, et alia malefacta, in comitatu noſtro Weſtmorland perpetrata audiendum et terminandam aſſignatis, et eorum cuilibet ſalutem: Cum Richardus Baines generoſus per praehonorabilem Thomam dominum Wharton nuper cuſtodem rotulorum pacis noſtrae in comitatu noſtro Weſtmorland praedicto debite nominatus et appunctuatus fuit clericus pacis comitatus praedicti; qui quidem Thomas dominus Wharton plenam adtunc habuit poteſtatem et authoritatem (ut cuſtos rotulorum ejuſdem comitatus) ad nominandum et appunctuandum eundem Richardum Baines clericum pacis ejuſdem comitatus, habendum et tenendum officium clerici pacis comitatus praedicti, quamdiu ſe bene gereret; idemque Richardus in officium praedictum et exercitium inde debito modo et rite admiſſus fuit, virtute cujus idem Richardus ad exercitium officii praedicti, necnon ad proficua inde capienda juſte intitulatus fuit et exiſtit; vos tamen juſticiarii praedicti eundem Richardum ab executione officii praedicti minus rite amoviſtis, et ipſum ad exequendum officium praedictum recuſatis, ad grave damnum ipſius Richardi, ſicut ex querela ſua accepimus: Nos igitur eidem Richardo Baines celerem et feſtinam juſtitiam in hac parte fieri volentes, ut eſt juſtum, vobis mandamus firmiter injungentes, quod immediate poſt receptionem hujus brevis, eundem Richardum Baines ad executionem praedicti officii clerici pacis comitatus praedicti reſtituatis, et ipſum ad exequendum officium illud, et capiendum proficua inde permittatis, vel cauſam nobis ſignificetis in contrarium, ne in veſtris defectibus querela perveniat ad nos iteratim; et qualiter hoc praeceptum noſtrum fuerit executum conſtare faciatis nobis apud Weſtmonaſterium die Sabbati proxime poſt octabis ſancti Hilarii, hoc breve noſtrum nobis tunc remittentes. T. J. Holt, milite apud Weſtmonaſterium 24 die Novembris anno regni noſtri primo.

Per regulam curiae.

To which writ the juſtices of peace made this following return:

The return.

A complaint againſt Baines, at the quarter-ſeſſions, 14 July, 1 Ann.

Nos Chriſtophorus Muſgrave miles et baronettus, Chriſtophorus Philipſon miles, &c. cuſtodes pacis ac juſticiarii in brevi huic ſchedulae annexo infraſcripti, ſereniſſimae dominae reginae nunc in curia ipſius reginae coram ipſa regina apud Weſtmonaſterium humillime certificamus, quod Richardus Baines in eodem brevi nominatus, exiſtens clericus pacis pro comitatu Weſtmorland praedicto, praetextu inde ad generalem quarterialem ſeſſionem pacis dictae dominae reginae tentam apud Appleby in et pro comitatu Weſtmorland praedicto decimo tertio die Aprilis anno regni dictae dominae reginae primo coram tunc juſticiariis dictae dominae reginae ad pacem in et pro comitatu illo conſervandam, necnon ad diverſas felonias, tranſgreſſiones, et alia malefacta in comitatu Weſtmorland praedicto perpetrata audiendum et terminandum aſſignatis, durante tota ſeſſione illa, necnon ad generalem quarterialem ſeſſionem pacis dictae dominae reginae tentam apud Kirkby Kendall in et pro comitatu Weſtmorland praedicto decimo quarto die Julii anno primo ſupradicto, coram Chriſtophoro Muſgrave milite et baronetto, Richardo Sandford baronetto, Chriſtophoro Philipſon milite, Jacobo Grahme, Willielmo Flemming, Henrico Grahme, Edwardo Wilſon, ſen. Richardo Brathwaite, Jacobo Bird, et Thoma Dawes, armigeris, et Johanne Archer in medicinis doctore, tunc juſticiariis dictae dominae reginae ad pacem in et pro eodem comitatu conſervandam, necnon ad diverſa felonias, tranſgreſſiones, et alia malefacta in eodem comitatu perpetrata audiendum et terminandum aſſignatis, praedictum officium clerici pacis pro comitatu illo exercuit et executus fuit; quodque poſtea et ante adventum brevis praedicti, ſcilicet ad praedictam generalem quarterialem ſeſſionem pacis ſuperius ultimo mentionatam, quaedam querela et accuſatio in ſcriptis juſticiariis pacis in ſeſſione illa exhibita fuit, querens et accuſans dictum Richardum Baines de diverſis malegeſturis in executione praedicti officii clerici pacis pro eodem comitatu perpetratis, eo quod ad praedictam tunc ultimam quarterialem ſeſſionem pacis ipſe idem Richardus Baines coegit quendam Johannem Scott de Woodſide labourer *ad ſolvendum novem ſolidos legalis monetae Angliae, ultra feoda ſua debita; acetiam quod praedictus Richardus Baines decimo die Aprilis anno regni dictae dominae reginae nunc primo ſupradicto exegit de quodam priſonario Langhorne, et coegit eum ſolvere et expendere ſummam octo ſolidorum ſex denariorum conſimilis monetae Angliae, pro quodam proceſſu vocato ſubpoena ad ſummonendum quatuor teſtes ad evidentias dandum ex parte ipſius priſonarii in ſeſſione, qui quidem proceſſus, vocatus Subpoena, continebat duodecim lineas et non amplius; quodque ad eandem generalem quarterialem ſeſſionem pacis tentam eodem decimo quarto die Julii anno primo ſupradicto, ſuper plenam examinationem et debitam pro-*

bationem veritatis materiarum eidem Richardo Baines ut praefertur impoſitarum aperte in eadem ſeſſione factam et habitam in praeſentia praedicti Richardi Baines (qui exiſtens per ordinem ejuſdem ſeſſionis debite ſummonitus ad reſpondendum materiis illis ut praefertur ei impoſitis, ad eandem ſeſſionem in propria perſona ſua comperuit, et ſeſe per conſilium eruditum in lege defendit) praedictus Richardus Baines inde convictus fuit: ideoque conſideratum fuit per curiam generalis quarterialis ſeſſionis illius, quod praedictus Richardus Baines ab officio clerici pacis praedicti comitatus Weſtmorland amoveretur et exoneretur, et idem Richardus Baines ſuperinde ante adventum brevis praedicti in aperta et plena curia ſeſſionis illius per curiam illam ab officio illo amotus et exoneratus fuit: et praefati modo cuſtodes pacis ac juſticiarii in brevi praedicto infraſcripti ulterius certificant, quod praefatus Richardus Baines non fuit nominatus ſive appunctuatus eſſe clericus pacis pro comitatu Weſtmorland praedicto ad officium illud exquendum, ad aliquod tempus poſt praedictam amotionem et exonerationem ejuſdem Richardi Baines ab officio ſuo praedicto; et quod praehonorabilis Thomas comes Thanet, cuſtos rotulorum pacis dominae reginae nunc in et pro comitatu Weſtmorland praedicto exiſtens debito modo aſſignatus et conſtitutus, cui de jure pertinet nominare et appunctuare clericum pacis pro comitatu Weſtmorland praedicto, poſt amotionem et exonerationem praedicti Richardi Baines ab officio clerici pacis pro comitatu Weſtmorland praedicto, et ante adventum hujus brevis, nominavit et appunctuavit quendam Thomam Carleton generoſum fore clericum pacis comitatus praedicti, eodem Thoma Carleton adtunc exiſtente perſona habili et ſufficiente reſidente in dicto comitatu Weſtmorland, ad exequendum officium praedictum, quam diu ſe bene geſſerit: et ea de cauſa nos praefati cuſtodes pacis ac juſticiarii ut praefertur infraſcripti praefatum Richardum Baines ad locum et officium clerici pacis pro comitatu Weſtmorland praedicto reſtituere non poſſumus, prout per breve praedictum nobis praecipitur.

Judgment by the juſtices to remove Baines.

There was likewiſe a *certiorari* directed to the ſaid juſtices of peace, to command them to certify all orders againſt *William Atkinſon* and *Richard Baines*, made by the ſaid juſtices, or any of them, which writ of *certiorari* bore *teſte*, *June* 25. 1° of the Queen, and was returnable *a die ſancti Michaelis in unum menſem*; upon which the order againſt *Baines* only, reported hereafter at large, was returned.

Certiorari to remove orders againſt Baines and Atkinſon.

Exception was took to the return of the *mandamus*, that the offenſe was uncertainly alleged, *&c.* and therefore a peremptory *mandamus* was prayed; but the court ſaid, the order was a judg-

If on a return to a *mandamus*, a judgment by the juſtices of peace for removal of a clerk of the peace is returned, on a complaint to them made of offenſes, though uncertainly returned, no peremptory *mandamus* ſhall go, while the judgment is in force.

ment, till ſet aſide, and therefore adviſed the council for Mr. *Baines* to take exception to the order returned on the *certiorari*, but refuſed to grant a peremptory *mandamus*. Whereupon the council for Mr. *Baines* took the ſame exceptions to the order, as are hereafter mentioned at large. And when the court were ready to give their opinion, Mr. Attorney General *Northey* took exception to the *certiorari*, that the order was not thereby removed, becauſe the *certiorari* was to remove all orders againſt *Atkinſon* and *Baines*, and the order returned was againſt *Baines* only, whereupon the *certiorari* was quaſhed, *Mich.* 4 *Ann.* after having heard council on both ſides. [See the report of it before, 1199.] And on a new *certiorari* iſſued, the order following was returned up, made at the general quarter-ſeſſions of the peace for *Weſtmoreland*, held the 14th of *July* the firſt of this Queen.

The order of the juſtices.

Whereas by a complaint and charge in writing at this ſeſſions, held the ſaid 14th day of *July*, preferred and exhibited to this court, againſt *Richard Baines* of *Appleby* in this county of *Weſtmorland* gentleman, clerk of the peace for the ſaid county, who the 10th day of *April* laſt paſt, and during the whole laſt general quarter-ſeſſions of the peace held for this county, did claim and exerciſe the ſaid office of clerk of the peace for this county, the ſaid *Richard Baines* was charged with divers miſdemeanors by him committed in the execution of the ſaid office of clerk of the peace for this county, *viz.* that he the ſaid *Richard Baines*, the ſaid 10th day of *April* laſt, did exact from one priſoner *Langhorne*, and compel him to pay and expend the ſum of eight ſhillings and ſix pence, for a *ſubpoena* to ſummon four witneſſes to give evidence for him in the ſeſſions, which *ſubpoena* contained but twelve lines; and that the ſaid *Richard Baines* alſo did at the ſaid general quarter-ſeſſions held for this county exact of one *John Scott* of *Woodſide*, a poor labourer, and force him to pay, the ſum of nine ſhillings more than his juſt fees; and alſo that the ſaid *Richard Baines* had committed divers other exactions and extortions particularly mentioned in the ſaid charge in writing, and now at this general quarter ſeſſions, held by adjournment on the ſaid 28th day of *Auguſt*, upon due examination in open court of the ſaid matters alleged againſt the ſaid *Richard Baines*, who by order of this court hath been duly ſummoned to anſwer the ſame, and did attend in perſon, and had particular notice of each charge againſt him, and made defenſe by his council thereunto, and upon full proof of the premiſſes made in open court, it doth appear to this court, that the ſaid *Richard Baines* hath miſdemeaned himſelf in his ſaid office of clerk of the peace of this county, and in execution thereof, by exacting and extorting by colour of his ſaid office from the ſaid priſoner *Langhorne* the ſaid 10th day of *April* laſt

The miſdemeanors.

laſt paſt, the ſum of ſix ſhillings for the ſaid *ſubpoena*, to ſummon the ſaid four witneſſes, which is three ſhillings and ſix pence more than the accuſtomed fee of right due for the ſame, and by exacting and extorting by colour of his ſaid office at the ſaid laſt general quarter-ſeſſions from the ſaid *John Scott* nine ſhillings more than his juſt fees; and thereupon this court doth openly in court diſcharge and remove the ſaid *Richard Baines* from the office of clerk of the peace of this county of *Weſtmoreland*, and he is hereby by this court diſcharged from the ſame accordingly.

Per curiam, Thomas Carleton cleric. pacis.

Office of clerk of the peace.

Divers exceptions were taken by Mr. *Baines*'s council to this order, which were argued ſeveral times, and it was inſiſted upon by them that this order ought to be quaſhed. They ſaid, that though before the act of 1 *Will. & Mar. ſeſſ.* 1. *c.* 21. the clerk of the peace was removable by the *cuſtos rotulorum*, yet now by virtue of that ſtatute he has a freehold in his office, it being enacted by that ſtatute, that the *cuſtos rotulorum* ſhall appoint the clerk of the peace for ſo long time as he ſhall well demean himſelf in his ſaid office; and that freeholds are ſo much favoured by the law, that all acts which would avoid an eſtate of freehold muſt be taken ſtrictly, and executed preciſely, and therefore a man cannot avoid an eſtate of freehold for a condition broken, without an actual entry. 'Tis true the freehold the clerk of the peace has in his office is by the ſame act ſubjected to the juriſdiction of the juſtices of the peace, ſo that for a miſdemeanor committed by him in his office they may remove him in a ſummary way; for it is enacted in the ſame ſtatute, *ſect.* 6. that if any clerk of the peace ſhall miſdemean himſelf in the execution of his office, and thereupon a complaint and charge in writing of ſuch miſdemeanor ſhall be exhibited againſt him to the juſtices of the peace in their general quarter-ſeſſions, it ſhall be lawful for the ſaid juſtices, or the major part of them, from time to time upon examination and due proof thereof openly in their ſaid general quarter-ſeſſions to ſuſpend or diſcharge him from the ſaid office; and that then the *cuſtos rotulorum* ſhall appoint a new clerk of the peace. But then the juſtices of peace in caſe of ſuch removal muſt purſue the method which that act has preſcribed, and if they do not, all their proceedings will be void. And proceedings in caſes of this nature, which are to deprive a man of his freehold in a ſummary way, without letting him be tried by his peers, are always conſtrued ſtrictly, and never ſupplied by intendment of matter which don't appear on the face of them.

This ſtatute therefore gives the juſtices of the peace a power to remove the clerk of the peace.

1. For miſdemeanors in the execution of his office.

2. This removal muſt be upon a charge in writing before them of ſuch miſdemeanors. And this is but agreeable to common juſtice, that the party may know his charge, that he might have a fair opportunity to make his defenſe: but in this caſe it don't appear, that there was any charge in writing againſt Mr. *Baines* for any miſdemeanors committed by him in his office.

For the firſt part of the order is only a recital of a charge, according to the inference or apprehenſion of the juſtices, that Mr. *Baines* miſdemeaned himſelf, and cannot be took to be the charge itſelf, but only is a narrative, that there was a charge, which as they took it, imported miſdemeanors. If it had gone no further, that had been plainly ill, not only becauſe it does not appear there was any charge of miſdemeanors, but likewiſe becauſe it is too uncertain and general, *viz.* divers miſdemeanors, *&c.* for the miſdemeanors ought to be ſpecified, that the court here may judge, whether they were miſdemeanors in his office or not.

Then as to the facts after the *viz.* they are not ſufficiently ſet forth.

For as to the fact in relation to *Langhorne*, that don't appear to relate to Mr. *Baines*'s office of clerk of the peace, as it is ſet out in the order. For 1. it is not ſaid to be done *colore officii.* In *Hutt.* 70. *Luidley*'s caſe, in an information againſt the underſheriff of *York*, for taking 1 *l.* 10*s.* for making a warrant on a *capias ad ſatisfaciendum*, it was held not enough to ſay, he *colore officii* did it, but it ought to be ſhewn, to whom the *capias ad ſatisfaciendum* was directed.

2. It don't appear the 8*s.* and 6*s.* was too much, or more than was his due.

3. It don't appear, the *ſubpoena* was to ſummon witneſſes to the ſeſſions of the peace of *Weſtmoreland*, or that Mr. *Baines* made the *ſubpoena* as clerk of the peace of *Weſtmoreland*.

4. 'Tis ſaid Mr. *Baines* compelled *Langhorne* to pay and expend 8*s.* and 6 *d.* but 'tis not ſaid to whom Mr. *Langhorne* paid the

8*s.* and 6*d.* nor that Mr. *Baines* received it; but it ſhould be ſo expreſly averred, and that *Baines extorſive* received it.

Then as to the fact in relation to *Scott*, it is laid as ill:

1. It is not ſaid, *Baines colore officii*, or *extorſive* exacted of *Scott*, *&c.*

2. It is not ſaid for what he forced *Scott* to pay the 9*s.*

3. It is not ſaid to whom *Scott* paid them.

4. It don't appear but that 9*s.* were due from *Scott* more than his fees, and therefore it ſhould have been ſaid, *Baines* forced *Scott* to pay 9*s. pro feodis, et ultra feoda.*

And therefore for theſe reaſons the council for Mr. *Baines* inſiſted on it, that this order was ill, and ought to be quaſhed.

E contra it was argued for the Queen, that the order was good, and ought to be confirmed, and it was inſiſted on by the Queen's council, that this ſtatute of 1 *Will. & Mar. c.* 21. does not make this office of clerk of the peace a freehold by expreſs words, but only by conſequence of law; and though it is a freehold, yet that ſtatute, which has made it ſo, has ſubjected it to the juſtices, and therefore this officer muſt take his office with the charge.

1. Object. They argued, that there is not the ſame certainty requiſite in an order made by juſtices of the peace, as in an indictment. In 1 *Ventr.* 37. the King *verſ. Nelſon*, a motion was made to quaſh an order for keeping a baſtard child, becauſe it was ſaid to be made *ad ſeſſionem in comitatu praedicto*, and did not ſay, *tentam pro comitatu praedicto. Sed non allocatur*; for ſays the book, ſuch ſtrictneſs is not required in an order.

Vide 1 Sid. 419. 2 Keb. 521, 537.

2. Object. That this order was ſubſtantially good, though perhaps it might have been expreſſed more fully; for it does appear upon the whole order, that the ſtatute has been purſued in removing Mr. *Baines:* it appears, there was a charge againſt him in writing, that he had notice, and was heard by his council, what he had to ſay; that the facts charged on him were miſdemeanors in his office, for the *viz.* incorporates the ſubſequent particular facts with the general words before, and makes it altogether a good charge for miſdemeanors in his office, being explanatory of the general words precedent, and upon this head ſeveral caſes were cited, to prove that it was the proper office of a *viz.* to explain;

plain; nay, that an averment under a *viz.* is ſufficient of itſelf; and for that 1 *Saund.* 169. *Skinner verſ. Andrews* was cited, where in debt on an obligation, dated *Feb.* 8. 19 *Car.* 2. the condition was to perform an award to be made on or before the 16th of *March* next following; the defendant pleaded no award made; the plaintiff replied, that the arbitrators after making the bond, and before the exhibiting the bill of the plaintiff, *viz.* the ſaid 16th of *March*, made that award, and then aſſigns a breach, *&c.* the defendant demurred; and 'twas adjudged, that this averment, that the award was made on the 16th of *March* under the *viz.* was ſufficient. Beſides they urged farther, that if the *viz.* was not in this caſe took to be explanatory, the order would be nonſenſe, becauſe it began after the *viz.* with the word, That, *&c.*

Weſt's Prec. Indictments, ſec. 97, 130.

3. Obj. They further ſaid, that an indictment good to a common intent is well, *Co. Lit.* 303. much more in the caſe of an order; and they cited 1 *Sid.* 91. The King *verſ. Cover*, as a ſtrong caſe for them. In an indictment againſt the bailiff of a hundred for extorſion, *ſcilicet*, that *colore officii* he took 50 *s.* held good after a verdict, though ill on a demurrer. And Sir *Thomas Powys* cited 2 *Brownl.* 151. Dr. *Manning*'s caſe, if particular facts are charged in a bill in the Star Chamber, and afterwards there are general words, as for extortion, oppreſſion, and other offenſes; if the particular facts are proved, he may examine to other particular facts included within the general words, and they ſhall aggravate, and the court will give a higher ſentence for them.

4. Obj. 'Twas further inſiſted, that let the reſt of the order be as it will, yet the judgment was full, and ſufficient; for therein the juſtices have expreſly adjudged *Baines* guilty of miſdemeanors in his office; that this clerk of the peace was the juſtice's own officer, and therefore they had a greater power over him, and that the juſtices being a court of record, great regard was to be had to their proceedings, and 'twas not to be ſuppoſed they would act irregularly.

To theſe objections it was anſwered by the counſel of Mr. *Baines* particularly.

And as to the firſt they ſaid, that as much certainty was required in orders as in indictments, as to matters of ſubſtance, and ſo was the conſtant experience; but the ſame form was not abſolutely neceſſary, and therefore in convictions for deer-ſtealing it was not neceſſary to have *vi et armis*, *contra pacem*, *&c.* and ſo was it adjudged *T.* 12 *Will.* 3. *B. R.* the King *verſ. Chandler* and *Speed* [*Ante*, 545, 581.] and therefore the words reported in 1 *Vent.* 37. that ſuch ſtrictneſs is not neceſſary in an order, muſt be underſtood according to the ſubject matter of the queſtion, which was about the caption; but that book nor no other ſays, there need not be the ſame ſtrictneſs as to matters of ſubſtance. Beſides, Mr. *Ventris* at that time was a very young reporter, and might miſtake, as plainly he did in what he makes the court ſay, *Ib.* 59. in relation to keeping the baſtard child.

As to the ſecond objection, they ſaid, that the charge mentioned in the order is not a good charge, becauſe it don't appear the miſdemeanors therein mentioned were miſdemeanors in his office; that the *viz.* in this caſe can't incorporate the ſubſequent facts with the charge, nor be explanatory, becauſe here the matter alleged before the *viz.* is nothing but a ſtory told by the juſtices of what their judgment and apprehenſion was, that this was a charge in writing of miſdemeanors of Mr. *Baines* in his office; then comes the *viz.* which is to ſhew the court, how the charge was of miſdemeanors in his office, and is no more than if it had been, *viz.* the charge was that Mr. *Baines* did ſo and ſo, which when ſhewn don't appear to be in execution of his office: and this that comes under the *viz.* is to be took to be the very charge, and what went before only the inference and collection of the juſtices, and therefore the caſe out of 1 *Saund.* 169. don't warrant this order; for if the *viz.* muſt be took as a ſufficient averment of itſelf, as 'tis adjudged in that caſe, yet here what comes under the *viz.* is not laid to be in execution of his office, and therefore not a good charge. Beſides in that caſe, as reported in 1 *Sid.* 370. 'tis held but form, and that it had been ill on a ſpecial demurrer. And 'twas further inſiſted on, that if the *viz.* was not took to be explanatory, yet the order would not be nonſenſe, though it began with, That, *&c.* becauſe that muſt be took to be the very ſubſtance of the charge.

As to the third objection, 'twas anſwered, that that rule, that an indictment is good to a common intent, muſt be underſtood where ſubſtance enough appears, but in this caſe there does not. As to the caſe in 1 *Sid.* 91. they ſaid, in 1 *Keb.* 357. 'tis reported, that the indictment was, *colore officii et extorſive*, which is ſtronger. But *Powell* juſtice held that caſe not to be law, and as to the caſe in 2 *Brownl.* 151. 'twas ſaid, it was a Star Chamber caſe, but could not hold at common law; for the conſtant practice was againſt it, as well as the reaſon of the thing. 1 Keb. 351.

As to the fourth objection, 'twas ſaid, that the judgment did not make the order good, if 'twas otherwiſe ill, becauſe 'twas a concluſion without premiſſes, and as for Mr. *Baines* being the officer of the juſtices, that would make no alteration, he ought to have

6 T

juſtice done him, and as to matter of intendment, the court could not intend one way or other, but muſt take it as the order was, and therefore the counſel for Mr. *Baines* concluded that the order ought to be quaſhed.

Afterwards in this caſe the judges gave their opinions *ſeriatim*. Mr. juſtice *Powys* and Mr. juſtice *Gould* held the order good, for the ſame reaſons uſed by the counſel for the Queen; but chief juſtice *Holt* and Mr. juſtice *Powell* held the order ill, for the reaſons urged by Mr. *Baines*'s counſel, and were of opinion it ſhould be quaſhed. Whereupon the court being divided, the juſtices agreed, the matter ſhould be argued before all the judges of *England* at *Seajeants Inn*, and that judgment in the King's Bench ſhould be given according to the majority of their opinions. Whereupon in *Trinity* term 5. it was argued at *Serjeants Inn* in *Chancery lane* by Mr. Attorney *Northey* for the Queen, and by Mr. *Raymond* for Mr. *Baines*. And the juſtices of the King's Bench retaining their former opinions, ſix of the juſtices of the Common Pleas, and the barons of the exchequer, *viz.* chief baron *Ward*, juſtice *Blencowe*, juſtice *Tracy*, baron *Bury*, baron *Price*, and juſtice *Dormer*, were of opinion the order was ill, for the aboveſaid reaſons, and ought to be quaſhed; the chief juſtice and baron *Smith* held the order good. And afterwards in the ſame *Trinity* term the order was quaſhed by the court of King's Bench.

Smith *verſ.* Gould.

S. C. Salk. 666.

Trover don't lie for a negro.

5 Mod. 182, 186, 187.
2 Lev. 201.
3 Lev. 336.
Carth. 396.
1 Inſt 85,112.
2 Inſt. 29.
Regr. 102. b. 93. b.
F. N. B. 88.
A. St. 1 Ed. 6. cap. 3.
Hob. 99.
2 Cro. 262.
Fitz. Diſcon. 16.
Went. Off. Executors 75.
1 Bulſt. 95.

IN an action of *trover* for a *negro*, and ſeveral goods, the defendant let judgment go by default, and the writ of inquiry of damages was executed before the lord chief juſtice *Holt* at *Guildhall* in *London*. Upon which the jury gave ſeveral damages, as to the goods, and the *negro*; and a motion as to the *negro* was made in arreſt of judgment, that *trover* could not lie for it, becauſe one could not have ſuch a property in another as to maintain this action. Mr. *Salkeld* for the plaintiff argued, that a *negro* was a chattel by the law of the plantations, and therefore *trover* would lie for him; that by the *Levitical* law the maſter had power to kill his ſlave, and in *Exodus* xx. *ver.* 21. it is ſaid, he is but the maſter's money; that if a lord confines his villain, this court cannot ſet him at liberty: *Fitzh. Villain* 5. and he relied on the caſe of *Butts* and *Penny*, 2 *Lev.* 201. 3 *Keb.* 785. as in point, where it was held, *trover* would lie for *negroes*. *Sed non allocatur*. For *per totam curiam* this action does not lie for a *negro*, no more than for any other man; for the common law takes no notice of *negroes* being different from other men. By the common law no man can have a property in another, but in ſpecial caſes, as in a villain, but even in him not to kill him: ſo in captives took in war, but the taker cannot kill them, but may ſell them to ranſom them: there is no ſuch thing as a ſlave by the law of *England*. And if a man's ſervant is took from him, the maſter cannot maintain an action for taking him, unleſs it is laid *per quod ſervitium amiſit*. If *A.* takes *B.* a *Frenchman* captive in war, *A.* cannot maintain an action, *quare cepit B. captivum ſuum Gallicum*. And the court denied the opinion in the caſe of *Butts* and *Penny*, and therefore judgment was given for the plaintiff, for all but the *negro*, and as to the damages for him, *quod querens nil capiat per billam*.

Vide H. 8 & 9 W. 3. B. R. Chamberlain verſ. Harvey, Holt's opinion accord, *Ante* 146.

Regina *verſ.* Truebody.

TO a *mandamus* directed to the mayor, *&c.* of the borough of *Leſtwithiel* in *Cornwall*, to reſtore *Truebody* to the office of a capital burgeſs of that borough, they returned the conſtitution of the borough, and the election of *Truebody*, *&c.* but they ſhew further, that *Truebody* left the borough, and lived out of it for ſeveral years, and neglected attendance at the publick aſſemblies, *&c.* and therefore they removed him from his place of capital burgeſs. Sir *John Hawles* for *Truebody* took an exception to the return, that it did not appear, that *Truebody* had any notice or ſummons to attend, and ſhew cauſe, why he ſhould not be removed; which was contrary to natural juſtice, that a man ſhould be disfranchiſed, without ever being heard what he had to ſay for himſelf. *Sed non allocatur*; for *per curiam*, if a capital burgeſs quite leaves the borough, and goes and reſides altogether in another place, there is no need of ſummoning him before he is removed; becauſe he has abdicated the borough, and it is a ſufficient ground for turning him out; otherwiſe if he only left the borough a while for his health's ſake, *&c.* And the return was adjudged a good return.

S. C. Rep. Q. A. 75. Holt 449. If a capital burgeſs quite leaves the corporation, he may be diſfranchiſed without ſummons.

Dunn qui tam, &c. *verſ.* Hinchdy.

Intr. *Hill.* 3 *Annae* B. R. Rot. 169.

Bucks, ſſ. *GEorgius Dunn qui tam pro domina regina nunc quam pro ſeipſo in hac parte ſequitur, queritur de Joſepho Hinchdy in cuſtodia marreſchalli marreſchalciae dictae dominae reginae coram ipſa regina exiſtente, de placito quod reddat dictae dominae reginae et eidem Georgio, qui tam, &c. viginti quatuor libras, quas dictae dominae reginae et eidem Georgio, qui tam, &c. debet et injuſte detinet; pro eo videlicet, quod praedictus Joſephus poſt decimum diem Februarii anno*

S. C. Salk. 612. Vide 3 Lev. 290, 374. An action *qui tam* for making and ſelling buttons of wood only, 10 Will. 3. c. 2.

anno domini milleſimo ſexcenteſimo nonageſimo octavo, ſcilicet ſexto die Junii anno regni dictae dominae reginae tunc tertio, infra hoc regnum Angliae, videlicet apud Stony Startford in comitatu Bucks praedicto, fieri cauſavit et vendidit duodecim duodenas, Anglice dozens, *fibularum, Anglice* buttons, *de ligno tantum, et molinatarum, Anglice* turned, *in imitatione aliarum fibularum, contra forman ſtatuti in hujuſmodi caſu inde nuper editi et proviſi; per quod idem Joſephus juxta formam ſtatuti in hujuſmodi caſu inde editi et proviſi forisfecit dictae dominae reginae, et eidem Georgio, qui tam, &c. quadraginta ſolidos pro qualibet duodena inde, in toto attingentes ad praedictas viginti quatuor libras; et ſuper inde actio accrevit dictae dominae reginae, et eidem Georgio, qui tam, &c. ad exigendum et habendum de praedicto Joſepho eaſdem viginti quatuor libras; praedictus tamen Joſephus, licet ſaepius requiſitus, praedictas viginti quatuor libras, ſeu aliquem inde denarium, dictae dominae reginae, et eidem Georgio, qui tam, &c. ſeu eorum alteri nondum ſolvit, ſed illas dictae dominae reginae, et eidem Georgio qui tam, &c. ſolvere omnino contradixit, et adhuc contradicit; unde idem Georgius, qui tam pro dicta domina regina quam pro ſeipſo in hac parte ſequitur, dicit, quod ipſe deterioratus eſt, et damnum habet ad valentiam triginta librarum, et inde producit ſectam, &c.* Upon *nil debet* pleaded, the cauſe came to be tried before the lord chief baron *Ward* in *Bucks*, and the jury found a ſpecial verdict, *viz.* that the defendant, the day and year in the declaration, cauſed to be made and ſold twelve dozens, as is ſet forth in the declaration; and that thoſe buttons were made of wood only, except the ſhanks of the ſaid buttons, which were made of braſs: and then they found farther, that there are ſeveral buttons made of wood only, but whether the buttons ſo made and ſold are, and ought in law to be adjudged, buttons made and ſold contrary to the ſtatute, the jury don't know, but pray the advice of the court: if the court ſhould be of opinion that then are, then they find the defendant owes the Queen and the plaintiff, *qui tam, &c.* the ſaid twenty-four pounds, *&c.* if not, then they find the defendant owes not the Queen and the plaintiff, *qui tam, &c.* any thing. This action is grounded on 10 & 11 *Will.* 3. *c.* 2. And it was argued by Mr. ſerjeant *Weld*, and Mr. *Eyre* for the defendant, that this fact found in the ſpecial verdict is not within the ſtatute: becauſe, Firſt, they ſaid the ſhank was part of the button, and therefore, that being made of braſs, it was not a button of wood only: Secondly, that the preamble of the ſtatute recited the miſchief to be from making and wearing, and the preamble explains the enacting part, ſo that *or* ſhould be conſtrued *and*, the words being, that no perſon ſhould make, ſell, or ſet on, in the disjunctive; but the conſtruction in order to comply with the preamble, and to prevent the miſchief therein recited, muſt be, that no perſon ſhould make, ſell, and ſet on, and if ſo,

Buttons made of wood all but the ſhank.

then the defendant has not incurred the penalty of this ſtatute, becauſe the declaration only charges him, that he cauſed to be made and ſold, but not that he cauſed to be ſet on. But the court were clear of opinion in both points for the plaintiff. For as to the ſhank, it is no eſſential part of the button, for buttons of ſilk and hair are made without ſhanks, and ſo was it adjudged, *Hil.* 13 *Will.* 3. *B. R.* The King *verſ. Roberts* [*Ante*, 712.] As to the ſecond, the words are plain in the disjunctive, and either making, ſelling, or ſetting on ſuch buttons, are offences within this ſtatute; and the parliament could never mean them in the copulative, becauſe they who make and ſell the buttons, very rarely, or never, are the perſons that ſet them on, or cauſe them to be ſet on the cloaths. And judgment was given for the plaintiff, *Apr.* 26, 1705. *Paſch.* 6 *Annae*, Mr. ſerjeant *Cheſhyre* and Mr. *Raymond* for the plaintiff.

Mich. Term.

1 Annae reginae, B. R. 1706.

Reſolutions of all the judges on the ſtatute of 5 Ann. relating to bankrupts.

THE judges all met at *Serjeants Inn* in *Chancery-lane* this term, to conſider of the act of parliament of laſt ſeſſions, intituled, An act to prevent frauds frequently committed by bankrupts, and upon conſideration thereof, they all unanimouſly came to theſe reſolutions following.

1. That the commiſſioners of bankrupts have no authority to proceed upon that ſtatute, unleſs the perſon did become a bankrupt after the 24th day of *June* 1706, although ſuch perſon had committed an act of bankruptcy before the 24th of *June*, if no commiſſion was ſued out thereupon before the 10th of *March* before.

2. That the commiſſioners ought to certify, that ſuch perſon became a bankrupt after the ſaid 24th day of *June*.

3. That upon references of commiſſioners certificates upon that ſtatute to the judges, they will examine into, and take notice of the time of the act of bankruptcy committed, if complaint is made thereof by the bankrupt's creditors, otherwiſe not.

4. That if the commiſſioners certify a fact that is falſe, the whole certificate will be void.

5. That upon references of the certificates of the commiſſioners to the judges, witneſſes ſhall be examined upon oath, to ſatisfy the judges as to the facts, or elſe copies may be produced of *affidavits* took before maſters in Chancery, ordinary, or extraordinary, and filed in Chancery.

6. That the allowance or diſallowance of the certificate by the judges ought to be filed, as is the allowance by the lord keeper.

7. In caſe the commiſſion of bankrupts fell by the death of the commiſſioners, and was renewed and purſued without intermiſſion, or loſs of time, the ſecond commiſſion ſhall be as the firſt was, and the bankrupt ſhall have the ſame benefit by it.

8. In caſe a commiſſion is ſuperſeded, yet it may be renewed by *procedendo*, without any damage to the bankrupt.

Hilary Term

5 Annae Reginae, B. R. 1706.

Colebeck *verſ.* Peck.

Intr. *Mich.* 5 *Ann.* B. R. Rot. 187.

Variance. One dies after a verdict againſt him, and before the day in bank.

THE plaintiff ſued a *ſcire facias* againſt the defendant, as executor to *J. S.* on a judgment obtained by him againſt the teſtator: the defendant pleaded in abatement, that the teſtator died before judgment, *&c.* The plaintiff replied and ſet out the ſtatute of 17 *Car.* 2. *c.* 8. and that the teſtator died after a verdict obtained againſt him, and after the day of *niſi prius*, and before the day in bank. The defendant demurred, and Mr. *Whitaker* inſiſted that the plaintiff ought to have ſued a ſpecial *ſcire facias*, and not a general one; for now the writ ſuppoſes a judgment againſt the teſtator in his life-time, and the replication ſhews it was entred after his death, though well entred by virtue of the ſaid ſtatute. But *per curiam*, the writ is good, and could not be otherwiſe; for had it been ſpecial, there would have been a variance, the judgment being entred generally; and a *reſpondeat ulterius* was awarded. *Vide Raym.* 210. 1 *Mod.* 6. *Burnett verſ. Holden.*

1 Salk. 8.
1 Lev. 277.
2 Keb. 549.

The Queen *verſ.* the inhabitants of Barkin, of the hamlets of Donneſdon and Needham in the ſaid pariſh.

V. also Blackerby's Cas. in Law 200.

S. C. Salk. 452. but different points.
A farmer is not taxable to the poor's rate for his ſtock.

UPON quaſhing of ſeveral orders made relating to the poor's rates, the matter in difference was referred by the King's Bench to the determination of the lord chief juſtice *Holt*, who having heard all the parties, and they not ſeeming ſatisfied with his opinion, they ſignified their conſent in writing to ſubmit this queſtion to the opinion of the judges of the King's Bench, *viz.* whether a farmer for his ſtock ſhall not be chargeable and taxable to the poors rates, as well as a tradeſman for his ſtock in trade. And *November* 22 laſt paſt, *Powell*, *Powys*, and *Gould* juſtices, were of opinion, that a farmer for his ſtock was not taxable, contrary to the opinion of *Holt* chief juſtice. Whereupon the following rule of court was made this term, *viz. Suff. ſſ. Regina verſ. inhabitantes parochiae de Barkin, et hamlet. de Needham, et hamlet. de Donneſdon, in parochia praedicta. Super matura deliberatione per curiam hic habita, conſideratum eſt per curiam hic, quod firmarius, Anglice* a farmer, *non erit onerabilis et taxabilis ad ratas pauperum pro peculiis, Anglice* ſtock: *et quod artifex Anglice* a tradeſman, *eſt onerabilis et taxabilis pro peculiis, Anglice* ſtock *in arte, Anglice* trade.

A tradeſman is for his ſtock in trade.

See this case remarked upon by Ld. Mansfield in 5. Burr. 2656. See also contra 4. Burr. 2294. 2295.

Eaſter Term

6 Annae reginae, B. R. 1707.

Powell *verſ.* Beresford.

An inſtrument writ by the teſtator for fear of mortality, whereby he gave 1000 *l.* without witneſs, or making an executor, declared a will. 2 Vern. 647.

ON an appeal to delegates from a ſentence of the Prerogative Court the caſe was this. *John Beresford* having had a long acquaintance with Mrs. *Powell*, afterwards married the reſpondent; but having 500*l.* of Mrs. *Powell*'s in his hands, on the 7th of *December* 1704. made a will or teſtamentary ſchedule, all of his own hand writing as follows: In the name of God, Amen. I *John Beresford* of the *Inner Temple*, Eſq; do make this my laſt will and teſtament for fear of mortality, till I can ſettle it more at large: I do give and bequeath the ſum of 1000*l.* unto *Dorothy Powell*, to be paid by my executor, adminiſtrator, and for ſure payment thereof I do charge all the real and perſonal eſtate which I have in the world, I being very deſirous to make a proviſion for the ſaid *D. Powell*, for ſeveral good reaſons inducing me thereunto. In witneſs whereof I have hereto ſet my hand this preſent 7th day of *December* 1704. Signed *John Beresford*; and delivered the ſame to the ſaid *Dorothy Powell*. And about a fortnight before his death, which happened in *January* 1704. Mr. *Beresford* did declare he had left with Mrs. *Powell* an unqueſtionable ſecurity for 1000*l.* charged upon his real and perſonal eſtate; and that he had done the ſame for fear of mortality, till ſuch time as he could make a full and compleat will, which he declared he would do, ſo ſoon as his wife was brought to bed, to ſee if it were male or female. He died ſuddenly 6 *February* 1704. leaving his wife the appellant, then lying in of a daughter. The widow afterwards came to take adminiſtration to her huſband, and a *caveat* being entred by Mrs. *Powell*, ſhe appeared, and pleaded this will or ſchedule teſtamentary, and proved by four witneſſes what is alleged before. Se was alſo examined on interrogatories on the prayer of the reſpondent, on which ſhe depoſed, that ſhe was married to Mr. *Beresford* 18 *July* 1700, at his chambers in the *Inner Temple* by

Robert Harſenet clerk, ſince deceaſed. [But the marriage was not inſiſted on, *Harſnet* being dead.]

His hand was proved by three witneſſes, who ſwore they knew his hand, and believed it to be all his hand. A deed was proved to be executed by him, to which his name was ſubſcribed, by witneſſes that ſaw him ſubſcribe his name thereto. And four ſenior proctors were ſworn to examine and compare the letters and characters, *Jo. Beresford*, wrote to ſuch deed, and the characters and letters, *John Beresford*, ſubſcribed to the will, and to report their judgment to the court upon their oaths, who returned they found they were one and the ſame hand writing of *John Beresford* the teſtator.

The cauſe coming to be heard before the judge of the prerogative Sir *Rich. Raines*, he gave ſentence againſt the will, and pronounced, that *John Beresford* died inteſtate without any will at all by him made. And on this appeal being heard before the delegates, among whom were lord chief juſtice *Holt*, baron *Price*, and judge *Dormer*, the ſentence was reverſed, and they pronounced for the will. *R. Raymond* counſel for the appellant.

Regina *verſ.* Ipſwich corporation. Ante, 1233.

Reſtitution on a peremptory *mandamus*, and on the ſame day an order to ſummon the party to ſhew cauſe why he ſhould not be again removed for the matters for which he was diſplaced before.

A Peremptory *mandamus* being granted by the King's Bench, to reſtore ſerjeant *Whitacre* to the office of recorder of *Ipſwich*, *Hil.* 4 *Annae*, returnable the firſt day of this term; the corporation returned, that they had reſtored him according to the command of the writ. And on motion to file the return, it was oppoſed, on ſuggeſtion that the writ was not effectually obeyed; for at the ſame time they reſtored him, they made an order to ſummon him, to ſhew cauſe why he ſhould not be again diſcharged, which ſummons was ſerved on him. And on the 15th of *May* 1707. on hearing counſel of both ſides, the fact appeared to be, that a great court, which is an aſſembly of the whole corporation, was called 22 *April* 1707. where it was ordered he ſhould be reſtored, and he was reſtored. And they made another order after at the ſame court, that he ſhould be ſerved with a ſummons, to ſhew cauſe on the 7th of *May*, why he ſhould not be diſplaced for miſdemeanors committed by him, ſpecifying what, part of which or moſt were the ſame as in the former return. The 7th of *May* he ſent an anſwer in writing to the miſdemeanors charged on him, which was voted inſufficient, and they diſplaced him again. And the return to the peremptory *mandamus* was allowed to be filed, and held, the writ was well obeyed. *R. Raymond* counſel for Mr. *Thomſon*, who oppoſed ſerjeant *Whitaker*.

Regina *verſ.* Tanner et alios.

Infants in information for riots appear by attorney.

IN an information for a riot, the defendant pleaded not guilty, and the cauſe being carried down to *Hertford* aſſiſes in *Lent* 1606-7. verdict for the Queen. And motion was made to ſet aſide the verdict, Firſt, becauſe the defendant gave no authority to the attorney to appear before him. Secondly, becauſe he was an infant under eighteen, and ought to have appeared by guardian; and on reference to the maſter, it appeared there was an authority to plead; and as to the ſecond, the courſe of the crown office is for infants in riots, *&c.* to appear by attorney. And ſo it was ruled, and the court refuſed to ſet aſide the verdict. *R. Raymond* for the Queen.

Wilkinſon *verſ.* Tireman.

Intr. *Mich.* 5 *Annae.* B. R. Rot. 227, 228.

Amercement of an infant aided after verdict, by 16 & 17 Car. 2. c. 8.

ERROR of a judgment given in the Common Pleas in dower [*Intr. Hil.* 4 *Annae C. B. Rot.* 529.] brought by *Elizabeth Tireman* againſt *John Wilkinſon* an infant, who appeared by his guardian. The tenant pleaded, *Ne unques ſeiſie que dower.* On iſſue joined a verdict at *York* aſſiſes was given for the demandant; that the huſband was ſeiſed, *&c.* and further, that he died the 14 *July* 1703. ſeiſed in fee, and that the tenements were worth 40 *l.* 15 *s. per annum ultra repriſas*, and they aſſeſs damages beyond the ſaid value, and beſides coſts 2 *d.* and for coſts 40 *s.* And judgment was given for the demandant, to recover her ſeiſin of the third part of the tenements, *&c.* to hold in ſeveralty by metes and bounds, and the value of the third part from the time of her huſband's death, which value amounted to 38 *l.* 6 *s.* and the damages given by the jury 40 *s.* and 2 *d.* and 21 *l.* 8 *s.* 10 *d.* coſts *de incremento*, which value and damages attained *in toto* to 61 *l.* 15 *s.* *Et praedictus Johannes Wilkinſon in miſericordia*, *&c.* The defendant by his guardian, being then an infant, aſſigned the general error. And the error inſiſted on was in the judgment, that it appeared the defendant was an infant, and yet was amerced. But judgment was affirmed *Tueſday*, *May* 20, 1707. the court being all of opinion, that this was aided by the ſtatute of 16 & 17 *Car.* 2. *c.* 8. *R. Raymond* counſel for the demandant in the King's Bench. *Vide Cro. Car.* 410.

410. 1 *Ro.* 758. *pl.* 4. *Smith verſ. Smith.* *Co. Li.* 127. *a.* 5 *Co.*
49. *Moore* 394. *pl.* 511. *Vaughan*'s caſe.

Degrave *verſ.* Hedges.

UPON hearing counſel, who came to ſhew cauſe according to a former rule made in *Hilary* term laſt, why a prohibition ſhould not be granted to ſtay a ſuit in the Court of Admiralty, upon a ſtipulation entered into there by the plaintiff; the caſe appeared to be, that there were eight owners of the ſhip called the *Upton Galley*, ſix of whom were deſirous that the ſhip, then lying in the river of *Thames*, ſhould be ſent on a voyage to, *&c.* the other two oppoſed it; thereupon the ſix libelled in the Admiralty againſt the others in order to obtain a decree of that court, that the ſhip ſhould make the voyage accordingly; which was decreed accordingly; and that the ſix ſhould enter into a ſtipulation to the other two, for the ſafe return of the ſhip. The ſtipulation was entred into, and the ſhip ſailed, and was loſt in the voyage; the two, *viz. Grames* and *Rigby*, ſue the other ſix, *viz. Degrave*, and five others, on this ſtipulation in the Admiralty. *Degrave* moved for a prohibition to ſtay this ſuit, upon ſuggeſtion of the ſtatute of 13 *Rich.* 2. *c.* 5. and 15 *Rich.* 2. *c.* 3. and of the facts before alleged.

Eight ſeveral part owners of a ſhip, ſix would ſend her a voyage, two refuſe; Admiralty may compel the ſix to give a ſtipulation for the ſafe return of the ſhip, and if loſt, the two may ſue thereon in the admiralty.

Ante 223, 235.
P. 9 Will. 3. B.R. Lambert verſ. Aertree.
T. 9 Will. 3. C. B. Blackett verſ. Anſley.

Dr. *Lane* againſt the prohibition inſiſted upon it, that this was a matter of the utmoſt conſequence to the Admiralty; that as the Admiralty had exerciſed a juriſdiction in ſuch caſes for five hundred years paſt, ſo if a prohibition ſhould go, that court would ſignify nothing, becauſe moſt of their proceedings are by taking ſuch ſtipulations; that the ſame objections as are uſed in this caſe, would hold in the caſes of privateers, who all enter into an obligation, not to moleſt the King's ſubjects, nor to correſpond with his enemies, *&c.* and their ſhips commonly before they grant them their commiſſion lie in the *Thames*, and yet proceedings on ſuch ſecurities have always been in the Admiralty: and never doubted but they were good; and *argumentum, quod niminm probat, nihil probat.* That at common law there could be no remedy on this recogniſance or ſtipulation; that the intent of the ſtatutes of *Rich.* 2. are to reſtrain contracts of which the common law has a juriſdiction, which appears by the preamble, *viz.* that the Admiralty had incroached upon the juriſdiction of the common law. *Selden* in his *Mare clauſum*, *c.* 24. ſays that *Edward* III. ſettled the Admiralty, and reſtored and reduced it, and re-eſtabliſhed the laws of *Oleron*, which were the *Rhodian* laws, by which the *Romans* governed themſelves as to maritime affairs. And that by the laws of *Oleron* ſuch proceedings, as in the preſent caſe, in the Admiralty are allowed. Serjeant *Parker* was council for the plaintiff; but the court being of opinion, that this point was not fit to be determined on a motion, ſtopped him, and ordered the plaintiff to take a prohibition, and declare upon it, and then on the defendant's demurrer the point would come judicially before them, and would receive a more ſolemn determination. But *Holt* chief juſtice ſaid, that the court of Admiralty might take ſtipulations for bail, and that they might proceed upon them, and it was conſtantly allowed, though *Co.* 4 *Inſt.* 135. is of another opinion, and yet ſuch ſtipulations are as much within the words of the ſtatute of *Rich.* 2. as the recogniſance in this caſe. But the queſtion in this caſe is, if by the cuſtom of *England* the Admiralty has not ſuch a juriſdiction; if it has, neither the ſtatute, nor common law, will reſtrain them.

Trinity

Trinity Term

6 Annae reginae, B. R. 1707.

May *verſ.* Hodge.

S. C. Rep. Q. A. 117. Prohibition to the ſpiritual court refuſed for words, "Thou art "a baſtard, *&c.*

A Rule to ſhew cauſe, why a prohibition ſhould not be granted, to ſtay a ſuit commenced by *Dionyſia Hodge*, the wife of *William Hodge*, and *John Hodge* her ſon, before the archdeacon of *Cornwall* againſt the plaintiff *May*, for ſaying to *John Hodge* theſe words, *viz.* "Thou art a baſtard and "a pepper queen baſtard." And on the motion of Mr. *Raymond* this term, the rule was diſcharged. For as to the ſon, no action at law lies for calling him baſtard, without ſpecial damage; and they are not bare words of heat; and by the eccleſiaſtical law a baſtard cannot be a prieſt, 3 *Lev.* 119. *Vincent verſ. Alpy*, 2 *Roll. Ab.* 295. *pl.* 2. *Linw. page* 26. 2. As to the mother, it is calling her whore, *Cro. Car.* 399. 2 *Roll. Ab.* 296. *pl.* 18. *Hil.* 6 *Will.* 3. *B. R.* 1694. *Morrell et uxor verſ. Kendall.* The plaintiffs libelled againſt the defendant for calling the huſband cuckold, and prohibition was denied: though *Holt* held then the beſt way was, for the wife to libel alone; but in ſuch caſe if the huſband libelled alone, a prohibition ſhould be granted. 1 *Sid.* 248. *Knite verſ. Jacob.*

Ante 637.

Trin. Term

8 Annae Reginae, B. R. 1709.

Smith *verſ.* Bowen.

11 Mod. S. C. Rep. Q. A. 216. 230, 254. Holt 355.

BOWEN was indicted, tried, and convicted at the *Old Bayly* of the murder of *William Smith*; but there being ſome reaſon to apprehend *Bowen* might obtain her Majeſty's pardon, an appeal was at the ſame ſeſſions of gaol-delivery brought againſt *Bowen* by *George Smith*, brother and heir of the ſaid *William Smith*, in proper perſon, and was then and there arraigned. After the arraignment whereof it appearing, that *George Smith* was but ſix or ſeven years old, he was admitted to proſecute by guardian. *Bowen* prayed time to plead to this appeal till next ſeſſions, which was granted. After which he did procure her Majeſty's pardon, and obtained a *certiorari* returnable the firſt day of *Eaſter* term laſt, to remove the appeal into the King's Bench; at which day *Bowen* was brought up by a *habeas corpus* directed to the keeper of *Newgate*, and the appeal was returned upon the *certiorari*; *Bowen* was committed *cuſtodiae marreſchalli*. And Mr. ſerjeant *Parker* and Mr. *Whitaker*, counſel for the appellant, perceiving the miſtake committed at the *Old Baily*, moved, that the appellant might be admitted to proſecute by guardian before the appeal was arraigned; and thereupon the court were of opinion, that *Bowen* muſt be arraigned upon the appeal returned on the *certiorari*, which was done accordingly. Upon which at the prayer of the counſel for *Bowen*, *viz.* Mr. Solicitor General *Eyre*, Mr. *Raymond*, and Mr. *Pengelly* time was given to *Bowen* to plead till *diem Martis proxime poſt menſem Paſchae*, being *May* 24, 1709. at which day by advice of his council *Bowen* declared he would plead not guilty, the council knowing, that if they had pleaded in abatement the proſecution of the appeal in proper perſon by the appellee, whereas he being an infant it ought to be by *prochein amy* or guardian, the appellant would have confeſſed it, and ſo the appeal would have been abated, and then they would have arraigned him *in cuſtodia marreſchalli*, &c.

upon a new appeal; and by that means this miſtake would have been of no ſervice to the appellee. Whereas the council thought, by pleading not guilty to have tried the merits; and if the defendant had been found guilty, and judgment had been given againſt him, upon a writ of error to have aſſigned this for error in fact, and ſo reverſed the judgment: before which time the year and day would be elapſed, and by that means *Bowen* freed from the danger of a new appeal. But the court perceiving the intent of the appellee's council, declared, that by inſpection of the appellant they ſaw he was an infant, and therefore the appeal being brought by him in proper perſon was erroneous; and that therefore they would abate the appeal *ex officio*, and give the appellant leave to file a new bill of appeal by guardian, whereon *Bowen* ſhould be arraigned *inſtanter*, which was done accordingly: and thereupon this following entry, peruſed and approved by the lord chief juſtice *Holt*, was drawn up, and entred on the roll of the firſt appeal, as of the firſt day of the term.

Vide 41 Aſſ. p. 14. Bro. Appeal 75. an infant within age of 18 ſued an appeal, and for his nonage the appeal was abated, and the infant amerced. Q.

Et modo ad hunc diem, ſcilicet diem Mercurii proxime poſt quindenam Paſchae, iſto eodem termino, coram domina regina apud Weſtmonaſterium venit Johannes Bowen in cuſtodia vicecomitis Middleſex in curiam hic ductus virtute brevis dictae dominae reginae de habendo corpus eidem vicecomiti Middleſex directi, et inſtanter committitur cuſtodiae marreſchalli marreſchalciae dictae dominae reginae ibidem remanſurus quouſque, &c. Et praedictus Georgius Smith frater et haeres praedicti Willielmi Smith ſimiliter venit hic in curia in propria perſona ſua, et ſuperinde, quia per inſpectionem corporis dicti Georgii Smith per curiam dictae dominae reginae hic manifeſte apparet eidem curiae dictae reginae hic, quod praedictus Georgius Smith, tempore exhibitionis praedictae billae appelli verſus praefatum Johannem Bowen, ut praefertur, fuit, et modo eſt, infra aetatem viginti et unius annorum, et quia praedictus Georgius Smith (ſic infra aetatem viginti et unius annorum exiſtens) proſecutus fuit praedictam billam apelli in propria perſona ſua, et non per guardianum vel cuſtodem, ſeu proximum amicum ſuum, verſus praefatum Johannem Bowen; ideo conſideratum eſt per curiam dictae dominae reginae nunc hic, quod praedicta billa appelli per praefatum Georgium Smith ſic ut praefertur in propria perſona ſua exhibita caſſetur, &c. et quod praedictus Georgius Smith nil capiat per billam ſuaam praedictam, et quod praedictus Johannes Bowen eat inde ſine die, &c.

Note, that ſeveral of the year books ſay, that if by inſpection it appears to the court the appellant is an infant, the *parol* ſhall demur to his full age. 13 *Aſſ. p.* 11. *Br. Appeal* 53. *Mich.* 22 *Edw.* 3. *Corone* 30. *Br. Appeal* 116. 45 *Edw.* 3. 25. *Paſch.* 17 *Edw.* 4. *Br. Appeal* 105. 11 *Hen.* 4. 94. *Br. Appeal* 36.

But 27 *Hen.* 8. 11. *Br. Appeal* 2. and *Coverture & enfant* 2. is, that in the King's Bench an infant brought an appeal of murder, and it was demanded of the juſtices, how he ſhould appear, by guardian or *prochein amy?* *Fitz-James* ſaid, by guardian; and the clerks ſaid, the precedents were ſo. *Portman* juſtice, one book, *viz. Br. parol. demur.* 1. is, that the appeal ſhall ſtay till his full age. But that is not law at this day, for the common practice is to the contrary. *Quod nota*, ſays the book, that an infant ſhall be anſwered in an appeal brought by him, when he is within age, and it ſhall not ſtay till his full age. 1 *Ro. Abr.* 288. *D. Tr.* 43 *Eliz. Slanning verſ. Fits:* an appeal ſued by an infant by guardian. And 2 *Ro. Rep.* 57. *Onſlow*'s caſe. And *Will.* 3. *B. R.* Mr. *Spencer Cowper*'s caſe.

Then the council for *Bowen* inſiſted upon it, that he could not be arraigned upon a new bill of appeal, as *in cuſtodia marreſchalli, &c.* and for that they relied on *Cro. Eliz.* 605. and 1 *Ro.* 581. *Holland*'s caſe, where a man brought an appeal by original writ againſt four of Sir *George Farmer*'s ſervants, and at the return of the writ they appeared at the bar, and then he would have declared againſt them, being at the bar, as *in cuſtodia marreſchalli, &c.* (there being a fault in the writ) and by the rule of the court he could not. For the appearance of the defendants does not make them *in cuſtodia marreſchalli, &c.* unleſs there be a record made, *quod committitur marreſchallo, &c.* or that they find bail; and there the appellant was called on the writ, and nonſuited, and the defendants diſcharged.

But the court ſaid, the reaſon of that was, becauſe the defendants were not committed *cuſtodiae marreſchalli*; but *Bowen* was, in this caſe, and therefore a bill might be filed againſt him as *in cuſtodia marreſchalli*. And the lord chief juſtice *Holt* relied on the caſe of *Watts* and *Brains*, *Cro. Eliz.* 694, 778. as in point: where in an appeal of murder directed to the warden of the *cinque ports*, the writ was returned in the King's Bench, and filed, and the defendant brought to the bar, and becauſe the proceedings were void, becauſe the writ ſhould have been directed to the ſheriff of *Kent*, the appellee was committed to the *Marſhalſea*, and a bill was filed againſt him of appeal for the murder, as *in cuſtodia marreſchalli*, and afterwards he was executed thereupon.

The court being unanimous of this opinion, a new appeal was filed againſt *Bowen*, as *in cuſtodia marreſchalli, &c.* and he arraigned immediately upon it, which follows *in haec verba*:

Smith *verſ.* Bowen.

Intr. *Paſch.* 3 *Annae.* B. R. Rot. 304.

Middleſex, ſſ. *MEmorandum, quod die Martis proxime poſt menſem Paſchae, iſto eodem termino, coram domina regina apud Weſtmonaſterium, venit Georgius Smith de Eaſt Smithfield, in parochia ſancti Botolphi extra Aldgate in comitatu Middleſex frater et haeres Willielmi Smith, fratris ſui nuper defuncti; qui infra aetatem viginti et unius annorum exiſtit, per Thomam Smith patrem et guardianum ſuum per curiam dominae reginae hic ſpecialiter admiſſum, et protulit hic in curia dictae dominae reginae tunc ibidem, quandam billam ſuam verſus Johannem Bowen in cuſtodia marreſchalli, &c. de morte praedicti Willielmi Smith quondam fratris praedicti Georgii, unde eum appellat, et ſunt plegii de proſequendo, ſcilicet, Iſaacus Miller de parochia ſancti Andreae Holborn in comitatu Middleſex faber ferrarius, et Johannes Pickering de parochia ſancti Botolphi extra Aldgate in comitatu praedicto ſtannarius. Quae quidem billa ſequitur in haec verba, ſcilicet, Middleſex, ſſ. Georgius, &c.*

Mich. Term

8 Annae Reginae, B. R. 1709.

Burridge *verſ.* the earl of Suſſex, and others.

Wedneſday, *October* 26.

A deed of entail proved by an inquiſition *poſt mortem* finding it *in haec verba*, brought from the Rolls.

THE plaintiff brought an ejectment for lands in *Chevely*, *&c.* in *Kent*, upon the demiſe of Mrs *Leonard*, third daughter of *Henry Leonard*, late brother of the earl of *Suſſex*. On not guilty pleaded, the cauſe this day came to be tried at the Queen's Bench bar. And the leſſors, *&c.* made a title to a moiety of the lands in queſtion (as the plaintiff had declared) as heirs of the body of *Richard* lord *Dacre*, under a ſettlement made by him in King *James* the Firſt's time, the lands being of the nature of *Gavelkind*; to the other moiety whereof the earl of *Suſſex* was admitted by the plaintiff to be intitled. For *Richard* lord *Dacre*, who made the ſettlement, had iſſue *Francis* lord *Dacre*, and *Francis* lord *Dacre* had iſſue the preſent earl of *Suſſex*, *Francis*, and *Henry* the father of the leſſors, *&c.* And *Francis* the brother of *Henry* was dead without iſſue. And firſt it was reſolved by the whole court, that the lands lying in *Kent* ſhould be preſumed *prima facie* to be of the nature of *Gavelkind* without farther proof, that being the general tenure of that county, and that the proof muſt lie upon the other ſide to prove them diſgavelled. Then the counſel produced an inquiſition taken *poſt mortem* of *Richard* lord *Dacre*, 5 *Car.* 1. wherein the deed was found *in haec verba*, whereby the general tail was created, under which the leſſors of the plaintiff claimed. And it was a deed, whereby *Richard* lord *Dacre* covenanted to ſtand ſeiſed to the uſe of himſelf for life, and afterwards to the uſe of ſuch wife as he ſhould marry, and after to *Francis* his eldeſt ſon and heir apparent (who was afterwards *Francis* lord *Dacre*, grandfather of the leſſors, *&c.*) and the heirs of his body. *Richard* lord *Dacre* did afterwards marry *Dorothy*, to whom an eſtate for life by a ſubſequent deed was limited, and

ſhe

ſhe enjoyed it during her life. The original inquiſition itſelf with the writ annexed to it was produced, being brought from the *Rolls chapel.* And it was objected by Sir *Edward Northey* for the defendant, that it was not ſufficient evidence to prove the deed. But it was reſolved by the whole court, that it was good evidence, and did prove the deed and entail, and conſequently a title in the leſſors of the plaintiff, taking the lands not to be diſgavelled. But then the defendants gave evidence, that the lands were diſgavelled, very clear evidence as to all but one farm of 30 *l. per annum*, and as to that, though their evidence was defective, yet being left to the jury, they gave a verdict for the whole for the defendants. *Raymond* one of the council for the plaintiff.

Booth *verſ.* the marqueſs of Lindſey and others.

Monday, October 31, 1709.

A recovery in dower will eſtop the tenant and all claiming under him from giving a prior term in evidence. Comyns 581.

THE plaintiff brought an ejectment for lands in *Lincolnſhire*, on the demiſe of the counteſs dowager of *Lindſey.* On not guilty pleaded, the leſſor made title under a judgment in a writ of dower, brought by her for a third part of the manor of *Grimeſthorpe*, *Southorpe*, and *Edenham*, in which ſhe had judgment to recover the ſaid third part of the ſaid manors; and thereupon a writ of ſeiſin iſſued, whereupon the ſheriff returned, that he had given her ſeiſin of the lands in queſtion, as the third of the ſaid manors. Sir *Thomas Powys* and the other council inſiſted, that the plaintiff ought to prove the lands in the return part of the ſaid manors; but by the court, that ſhall be preſumed, unleſs the defendant prove the contrary, becauſe they will not intend the ſheriff has done wrong. And for the ſame reaſon they will intend the ſheriff has given ſeiſin but of a third. Then the council for the defendants offered to give in evidence an old term for five hundred years, created by *Robert* earl of *Lindſey*, by his marriage ſettlement made on the marriage with his firſt lady (the leſſor being his third wife) which was ſtill ſubſiſting, and was now in the executors of the late lord chief baron *Mountague*, who was ſurviving truſtee, the term being in truſt for raiſing portions for daughters of that marriage, which truſt was not yet performed, 6000 *l.* being yet due to the counteſs of *Rivers*, who was daughter of that marriage. And they inſiſted, that it was enough in all ejectments for the defendants to ſhew the title out of the plaintiff, and therefore they ſaid, it was every day's practice to give in evidence a prior mortgage made to a ſtranger, whereby the defendant in ejectment defended his poſſeſſion; for ejectment being a poſſeſſory action, the defendant's poſſeſſion was *prima facie* a title for him, if the plaintiff could not ſhew a better, for he muſt recover upon his own ſtrength, and not upon the defendant's weakneſs. And this was debated by the council of both ſides, and ſtrongly urged by the council of the defendant. Whereupon the court unanimouſly reſolved, that unleſs the defendants would derive a title under that term, or ſhew they had a title prior to the recovery (which they could not do) they were eſtopped by the recovery to give this term in evidence. For firſt, as to the marquis of *Lindſey*, who was tenant in the writ of dower, they held, that if he would have took advantage of this term, he ſhould have pleaded it in the Common Pleas to the writ of dower, not in bar of the action, for it is no bar in dower, but in delay of the execution; which he not doing, but pleading *ne unques ſeiſie que dower*, *&c.* he cannot now give it in evidence, for that would be in effect to falſify the recovery; for the lady has recovered her dower as in poſſeſſion, whereas had this term been pleaded, ſhe could have recovered it but in reverſion; ſo that the marquis is eſtopped to give it in evidence by the judgment. Then the other defendants, being all his tenants, are eſtopped likewiſe, claiming under him. But if they could ſhew any leaſes prior to the recovery, then the court would give them leave ſo far to falſify the recovery; but being only tenants to the marquis, they were eſtopped as well as he. And *Holt* chief juſtice ſaid, that theſe defendants were not within the ſtatute, which gives termors liberty to falſify recoveries. At common law no termor could falſify a recovery in a real action; then the ſtatute of *Glouc. c.* 11. gave termors remedy where judgments were let go by default; then the ſtatute of 21 *Hen.* 8. *c.* 15. gave termors leave to falſify recoveries in any real action in all caſes, but then ſuch perſon muſt ſhew himſelf to be a termor, or derive a title under the term; but the tenant of the land being a meer ſtranger to the term, is not within the benefit of that ſtatute, ſo as to give a term of a third perſon in evidence to falſify the recovery againſt himſelf, or thoſe under whom he claims, which is the preſent caſe. To which the other judges agreed, and refuſed the council of the defendant, though very importunate, to admit them to give evidence of that term of five hundred years; but offered to ſign a bill of exceptions, which the council declining to offer, attempted to falſify the ſheriff's return of the writ of ſeiſin, by proving, that the lands in the return, or at leaſt a great part of them, were not parcel of any of the three manors. Upon which Sir *Simon Harcourt* and ſerjeant *Pratt* inſiſted, that the defendant was eſtopped by the return of the ſheriff, and could not falſify in this ejectment, but might bring an action againſt him, if it was made of lands not part of the three manors, *&c.* and Sir *Simon Harcourt* cited *Br. Extent* 13. *F. Execution* 165. that if in dower, the ſheriff gives ſeiſin on the *habere facias* *ſeiſinam* of more than a moiety, the heir cannot enter, nor maintain an aſſiſe, but muſt have a *ſcire facias* to admeaſure the lands in in the return. But as to this, all the court was clear in opinion, that for whatever was compriſed in the return, which was not part of the manors in the judgment, the execution was actually void, and advantage might be took of it in the ejectment. Whereupon the council for the defendant attempted to prove the lands in the return not parcel of the manors, but being very deficient in their proofs, a verdict was given for the plaintiff. *Raymond* council with the plaintiff.

Henry Ludlow, Eſq; et al' *verſ.* John Lennard.

A *ſcire facias* doth not lie on a judgment pending a writ of error brought on that judgment; but the writ of error pending is a good plea to the *ſcire facias.*

Joſeph Kiffin recovered a judgment in the King's Bench againſt the defendant by *nil dicit* in an action on the caſe, and a writ of inquiſition being executed, final judgment was given againſt the defendant for 168*l.* Whereupon the defendant brought a writ of error returnable in the Exchequer Chamber, in *Trinity* term 1704, which was ſtill depending; afterwards *Kiffin* became a bankrupt, and a commiſſion being took out, the judgment was aſſigned to the plaintiffs, who as aſſignees of the commiſſioners ſued out two *ſcire facias's* in the King's Bench upon the judgment, in which upon two *nichils* returned, they obtained judgment, and ſued out a *fieri facias* thereupon, and took the defendant's goods in execution. Upon which Mr. *Squib* and Mr. *Raymond* moved, that the judgment in the *ſcire facias* might be ſet aſide as irregular, the writ of error being ſtill depending, and that the defendant might have reſtitution. The matter being referred to the maſter, he reported the fact *ut ſupra,* with this addition, that *Kiffin* died after the writ of error brought, and after *in nullo eſt erratum* pleaded. And the court held firſt, that the writ of error was not abated by the death of the defendant in error after *in nullo eſt erratum* pleaded. So that the writ of error was ſtill depending. Secondly, that *ſcire facias* don't lie on a judgment pending the writ of error brought on that judgment, but the writ of error pending is a good plea to the *ſcire facias:* ſo that *ſcire facias* was not regular; but then the three judges, *Powell*, *Powys*, and *Gould*, (*Holt* chief juſtice being abſent) made a queſtion, whether they ſhould ſet the judgment on the *ſcire facias* aſide on motion, and the execution ſued out thereupon, or ſhould drive the defendant to an *audita querela:* but on conſideration they all held, the whole proceedings were irregular, and ſet them aſide on motion. Mr. recorder *King*, and Mr. *Southouſe* council for the plaintiffs. *Vide* 3 *Lev.* 312. 20 *Hen.* 6. 4. *Cro. Jac.* 342, 535. 2 *Roll. Ab.* 492. *Stiles* 159.

Writ of error doth not abate by defendant's death after *in nullo eſt erratum* pleaded.

The Queen *verſ.* Tooley et alios.

S. C. Rep. Q. A. 242. Holt 485. Foſter 138. & from 312. ſec. 10. to 316. ſect. 13. conſiders this caſe very learnedly.

AN indictment was found againſt the defendants for the murder of one *Dent*: and upon not guilty pleaded, the jury found a ſpecial verdict; that by a ſtatute made the 27 *Eliz.* for the good government of *Weſtminſter*, it is enacted, that for reformation of diſorders in that city, the dean, high ſteward, or his deputy, or two capital burgeſſes, may hear and puniſh incontinencies, according to the cuſtom of *London*: that by the cuſtom of *London* any conſtable of any ward, pariſh or precinct, may execute his office throughout the whole city: that within the city, borough, and liberty of *Weſtminſter*, it has been uſed, that every perſon duly appointed conſtable of any pariſh within the liberties of the city, borough, and *ville* of *Weſtminſter*, his office of conſtable in and through the whole city and borough of *Weſtminſter* and liberties thereof has executed, and uſed to execute: that the eighth of *March* 8 *Annae*, &c. three commiſſioners duly appointed by virtue of the act for recruiting the army, for putting the act in execution, by virtue of that act, made their warrant under their hands and ſeals, directed to the conſtables of the pariſh of *St. Margaret's Weſtminſter*, within the city of *Weſtminſter*, thereby commanding the conſtables, to make ſearch within the ſaid city and liberty, for perſons within the deſcription of that act, which warrant after that day was delivered to the conſtables of the pariſh of *St. Margaret's*, to be executed: that after that day *Samuel Bray* into the pariſh of *St. Paul's Covent Garden* in the city and liberty of *Weſtminſter* to execute this warrant did come, and was: that within the pariſh of *St. Paul's Covent Garden* there was and is a conſtable belonging to that pariſh: that *Bray* before ſent to *Jo. Dent* to aſſiſt him to execute the warrant, that after, the ſaid eighth of *March*, between eight and nine at night, at the ſaid pariſh of *St. Paul's Covent Garden*, the ſaid *Samuel Bray* ſtaying to execute that warrant, one *Anne Dekins* in the ſtreet between the play-houſe and the *Roſe* tavern he then and there found, whom he ſuſpected to be a diſorderly perſon, and then and there as a diſorderly perſon took her into his cuſtody, as conſtable of the city and liberty of *Weſtminſter*, to carry her to priſon for her ſafe cuſtody: that *Anne Dekins* had been before taken up by *Bray* as conſtable, as a diſorderly perſon; that at her being taken up by *Bray* the eighth of *March* ſhe had not miſbehaved herſelf; that *Bray* had no warrant to take or detain her: that after the taking of the ſaid *Anne Dekins*, the priſoners (*Bray* then having her in cuſtody) in another place, called *Covent Garden*, did meet (they being all ſtrangers to *Anne Dekins*) drew their ſwords, and aſſaulted *Bray*, to reſcue her from his cuſtody: that *Bray* ſhewed his conſtable's ſtaff, and declared he was about the Queen's buſineſs, and intended the priſoners no harm; whereupon they put up their ſwords, and *Bray* carried the woman to the round-houſe: that the priſoners a little after, the ſaid *Anne Dekins* being in the ſaid priſon in *Covent Garden* aforeſaid, drew their ſwords again, and aſſaulted the ſaid *Bray* on account of the impriſonment of the ſaid *Anne Dekins*, and to get her diſcharged: that *Bray* called ſome perſons to his aſſiſtance, to keep her in cuſtody, and to defend himſelf from the violence of the priſoners: that *Dent* came to his aſſiſtance: that while *Dent* was in the conſtable's aſſiſtance, and before any ſtroke, one of the priſoners gave *Dent* the mortal wound in the indictment mentioned, of which he died, as in the indictment, *&c.* that the two others were aiding and aſſiſting him that gave the ſtroke: but whether the defendants were guilty, *&c.*

This caſe was argued laſt term by Mr. *Raymond* for the Queen, and Mr. *Pengelly* for the priſoners, he with Mr. *Lutwyche* being aſſigned by the court to be council for them. Mr. *Raymond* for the Queen ſaid, there were two points in the caſe: firſt, whether *Bray* was in the execution of his office, for if he were, then it is undoubtedly murder: ſecondly, ſuppoſe he was not, yet it will be murder, becauſe there was not a ſufficient provocation. And as to the firſt point he cited 9 *Co.* 66. [illegible] 4 *Co.* ~~265~~. [illegible] Conſtables may ſeiſe diſorderly perſons, and were officers at common law. 4 *Inſt.* 265. 10 *Edw.* 4. 18. *a.* 5 *Hen.* 7. 7. *b.* 22 *Edw.* 4. 35. and not only diſorderly perſons, but alſo ſuſpicious perſons, and it being found, that ſhe was a ſuſpicious perſon, *Bray* had an authority to ſeiſe her; and that he may ſeiſe ſuſpicious perſons, he cited 5 *Edw.* 3. 14. *Lamb.* *Iren.* 12. and we muſt rely upon theſe caſes, becauſe the ſpecial verdict only finds her to be a ſuſpicious perſon. It will be objected to me, that he being conſtable of *St. Margaret's*, was out of his precinct, when he took her up in *St. Paul's Covent Garden*. To which he anſwered, that the ſtatute of 27 *Eliz.* found in the ſpecial verdict, has relative words to the city of *London*, and by cuſtom in that city, any conſtable in the city may execute his authority throughout the city; and though conſtables are not named in the act, yet others being named, he ſhall be comprehended: as if a remedial law be made, and only one perſon mentioned, yet it may extend to others not named, as the ſtatute *de circumſpecte agatis*, where the biſhop of *Norwich* is only mentioned, yet all other biſhops are comprehended, and he cited *Fitz. Ab.* tit. *Prohibition.* 2 *Inſt.* 487. 1 *Rich.* 2. *c.* 12. *Plowden Com.* 36. *b.* It is found, that they have uſed to execute their authority all over *Weſtminſter*; and though they have not ſaid time out of mind, it is well in this caſe, being a ſpecial verdict; but in pleading

3

40.b.

Const.

pleading, that ſhould have been ſet forth. 2 *Roll.* 699. *Trin.* 13 *Car. Allen verſ. Graſh:* his having a warrant from the commiſſioners of the recruiting act does not hinder him from ſeiſing a diſorderly perſon in breach of the peace. And perhaps it may be objected, that ſhe was not a diſorderly perſon. To which he anſwered, that the conſtable having had her before in his cuſtody, as a diſorderly perſon, might well ſuſpect her again, it being between eight and nine at night, between the playhouſe and the *Roſe* tavern.

Secondly, ſuppoſe that *Bray* was not in the execution of his office, yet here was not a ſufficient provocation to extenuate that act of violence, as to make it manſlaughter only. For it is found, that ſhe being in cuſtody, the priſoners all drew their ſwords, and aſſaulted *Bray*; upon which he ſhewed his ſtaff: now if that were no provocation to the priſoners, then it is murder; for killing a perſon without provocation is murder. *Hale pl. cor.* 45. 3 *Inſt.* 52. And perhaps, if ſhe had reſiſted her ſelf, and killed the conſtable, it might only have been manſlaughter; but it is murder in a ſtranger. Now ſpeaking words, whereby a man ſuffers damage in his reputation, it is never allowed to be a ſufficient provocation, to make the killing of ſuch perſon manſlaughter only, as in *Kel.* 55. much leſs ſhould a wrong done to a ſtranger be a ſufficient provocation to make it only manſlaughter in me, if I kill the perſon who did the wrong, becauſe it cannot be ſuppoſed ſo great a provocation to me; ſo that in all caſes there muſt be a proportion in the provocation to the act of violence done after: as if a man break my cloſe, and I with a ſtake beat his brains out, it is murder, as was held in *Maugridge*'s caſe, *Kel.* 132. becauſe the provocation bore no proportion to the death of the man, and there ſhould be an open act of violence done to make it only manſlaughter. He ſaid, he expected *Hopkins Hugget*'s caſe would be objected; but this caſe differs from that, becauſe there they came civilly and demanded a ſight of the warrant; but in this caſe the very firſt act was an aſſault upon the conſtables: their ſwords were drawn, and an actuul fighting, which increaſed the provocation; but here was an aſſault on the perſon killed, before a blow given by thoſe of his party; there was no warrant, but here was a known perſon of the law: therefore upon theſe reaſons he ſubmitted it to the court, firſt, that *Bray* was in the execution of his office; ſecondly, if he were not, here was not a ſufficient provocation. Kel. 59.

Mr. *Pengelly* for the priſoner argued, that *Bray* was not a known officer, becauſe no authority was given to conſtables by the 27th of *Eliz.* for that act is not univerſal, like the ſtatute *de circumſpecte agatis*, or the ſtatute of *Weſtminſter* concerning the warden of the

Fleet; but it is only a particular juriſdiction given to particular perſons, from whom the conſtable had no warrant; but this warrant was given him by the commiſſioners of the recruiting act: and though in *London* the cuſtom may give a juriſdiction to the conſtables to act all over the city, yet in *Weſtminſter* there is no ſuch cuſtom. The ſpecial verdict finds, that ſuch a cuſtom has been uſed in *Weſtminſter*, but does not ſay time out of mind; and the act of *Elizabeth* being found, makes it plain, that they don't pretend to ſuch a cuſtom time out of mind. In *Hil.* 11 *Will.* 3. the King *verſ. Chandler*, it was ſettled, that a conſtable cannot go out of his precinct; but a juſtice of peace by his warrant may appoint a conſtable by name to execute it any where within the juriſdiction of the juſtice of peace. Secondly, it does not appear that the commiſſioners were appointed for this particular place or county, but it is only ſaid they were duly appointed commiſſioners, and by the act of parliament the execution of their warrant is reſtrained to particular officers within their juriſdiction: and in this caſe there was a particular conſtable in *Covent Garden*, ſo as there was no failure of juſtice; and therefore he uſurped an authority, and conſequently he was a treſpaſſer to all people he took up. But taking him to be a lawful officer, yet that will not juſtify his acting any thing beyond his authority: it does not appear, that he ever acted under the recruit warrant; and though, if he ſees perſons fighting, he may reſtrain them *ex officio*, or take up ſuſpicious perſons, yet the taking of this woman was not lawful, for ſhe was very decent at the time, and therefore no cauſe of ſuſpicion; but they ſhould have found her to be a night-walker, as is uſual in ſuch caſes. *Hearn's pleader* 392, 488, 489. 15 *Edw.* 1. *c.* 4. *Upper bench precedents* 218, 111, 522. Upon taking up a ſuſpicious perſon, it muſt appear, that there was a juſt cauſe of ſuſpicion: as when a man is taken up for felony, if a felony has been committed, it is cauſe of ſuſpicion, for the cauſe of ſuſpicion is traverſable. 12 *Co.* 92. *Stiles* 166. 2 *Roll. Abr.* 55, 590, 559. 2 *Inſt.* 52, 172. 3 *Inſt.* 118, 221. 2 *Vent.* 22. *Brook commiſſion*, *pl.* 3. If the conſtable had no authority, he was in an actual breach of the peace, and might be indicted, and is liable to all the conſequences of it; but where an officer is killed in the execution of his office, there is no doubt, but it is murder. *Cro. Car.* 371, 537. *Jones* 429. *Hale* 56. 4 *Inſt.* 333. But as this caſe is, if *Bray* himſelf had been killed, it had not been murder, much leſs ſhall it in killing an aſſiſtant. And as to the provocation, though it is found in the ſpecial verdict, that they did not ſee the firſt arreſt, yet they ſaw her under reſtraint, and *Bray* was continuing the treſpaſs, when they came up, and they came to reſcue the woman, that was unduly reſtrained of her liberty: therefore their ſeeing her under reſtraint, takes off all implied malice; and ſince it is not found, that they were upon an ill deſign, they cannot be ſuppoſed to have any previous malice. There is a very remarkable paſſage to this purpoſe in *Stiles* 467. and it is put in *Kel.* 136. which was this: *Bucknall* was indebted to *J. S. B.* and *C.* came from the creditor *J. S.* to demand the money; *B.* took a ſword that hung up and was in the ſcabbard, and ſtood at the door with it in his hand undrawn, to keep *Bucknall* the debtor in, till they did ſend for a bailiff to arreſt him: thereupon *Bucknall* the debtor took out a dagger, which he had in his pocket, and ſtabbed *B.* this upon a ſpecial verdict adjudged manſlaughter, becauſe he was inſulted, and impriſoned injuriouſly, without proceſs of law; and though within the words of the ſtatute of ſtabbing, yet not within the reaſon of it. The point they went upon in *Hopkins Huggett*'s caſe was upon reſtraining the liberty of the ſubject. And though it was objected by Mr. *Raymond*, that there was an actual fighting, yet that does not alter the caſe; for in *Maugridge*'s caſe, the firſt act of violence being done by *Maugridge*, it was held murder, notwithſtanding the reſiſtance that *Cope* made, *Kel.* 136. Now if there was no original malice againſt *Bray*, there could be no derivative malice to *Dent*, who came to his aſſiſtance; for where there is no malice in the principal, it cannot *egredi perſonam*. *Hale* 50. *Dier* 128. Earl of *Saliſbury*'s caſe. *Plow.* 100. *b.* *Stiles* 469. *Kel.* 65. *Thompſon*'s caſe. *Kel.* 87. 12 *Co.* 57. Therefore upon theſe reaſons he ſubmitted it to the court, whether the priſoners are guilty of murder.

Now this term it was argued again before all the judges of *England* at *Serjeants Inn* in *Chancery lane*, upon which argument the judges were divided in their opinion, *viz.* *Holt* chief juſtice, *Powell*, *Powys* and *Gould* juſtices of the King's Bench, and baron *Price*, baron *Bury* and baron *Lovel*, that it was manſlaughter; and *Trevor* chief juſtice of the Common Pleas, *Blencow*, *Tracy* and *Dormer* juſtices of the Common Pleas, and *Ward* lord chief baron, that it was murder. And the laſt day of the term *Holt* chief juſtice of the King's Bench delivered the opinion of all the judges in the King's Bench. He ſaid, that thoſe judges, who were for manſlaughter, founded their opinions upon the following reaſons: firſt, that it was a ſudden action without any precedent malice, or apparent deſign of doing hurt, but only to prevent the impriſonment of the woman, and to reſcue her, who was unlawfully reſtrained of her liberty; and if the woman was unlawfully impriſoned, then it cannot be murder, and cited 4 *Co.* 40. *Young*'s caſe; 9 *Co.* 65. *Mackalley*'s caſe, where it is held, that if a conſtable be killed in the execution of his office, it is murder; but it is otherwiſe, where he is doing a wrongful and oppreſſive act: it is not only neceſſary, that the conſtable be in the execution of his office, to make the killing of him murder, but he muſt give notice, that he is come to keep the peace. *Thomſon*'s caſe, *Kel.* 66. and ſo is *Younge*'s caſe, and *Mackally*'s caſe, to be underſtood; for if he does not give notice, the party may reaſonably ſuppoſe, that he came to aſſiſt his adverſary.

The ſecond point to be conſidered is, whether *Bray* was in the execution of his office? The ſtatute of 27 *Eliz.* don't mention a conſtable, only a power given to the dean, high ſteward, and two capital burgeſſes of *Weſtminſter*; but it does not follow from thence, that the conſtable has ſuch a power: we are all agreed, that the power of the conſtable is no greater than it was before this act. One of the judges held, that *Bray* was conſtable *de facto*; but that cannot be, ſince there was a conſtable at that time in *Covent-garden*. Now if the conſtable of one pariſh has not power over the whole liberty, then *Bray* had no more authority, than if he had been no conſtable at all. Suppoſe, for argument's ſake, that *Bray* was conſtable of *Covent-garden*, I take it, that the taking up the woman was illegal, though ſhe had been in his cuſtody before; and if ſo, he did not act as a conſtable, but a common oppreſſor: the verdict don't find, that ſhe was guilty of any diſorderly act, when he had her in his cuſtody before; and it is not a conſtable's ſuſpecting, that will juſtify his taking up a perſon, but it muſt be juſt grounds of ſuſpicion, for that is traverſable, 2 *Inſt.* 52. as if a felony be done, it is good cauſe of ſuſpicion, that is, if I ſuſpect a perſon where a felony is done, it is warrant enough for me to arreſt him; but it would be hard, that the liberty of the ſubject ſhould depend on the will of the conſtable, and ſhall his not liking a woman's looks be any cauſe of ſuſpicion?

If a conſtable take up a perſon in the night as a diſorderly perſon, without any juſt ground of ſuſpicion, and any perſon comes to reſcue the party ſo detained, and kills the conſtable, or any that aſſiſts him, it is only manſlaughter, be the conſtable in his juriſdiction or not.

3. The priſoners in this caſe had ſufficient provocation; for if one be impriſoned upon an unlawful authority, it is a ſufficient provocation to all people out of compaſſion; much more where it is done under a colour of juſtice, and where the liberty of the ſubject is invaded, it is a provocation to all the ſubjects of *England*. He ſaid, that a conſtable cannot arreſt, but when he ſees an actual breach of the peace; and if the affray be over, he cannot arreſt. 3 *Cro.* 372. 3 *Hen.* 7. 10. Conſtables have an authority by the ſtatute to arreſt perſons, but that muſt be by warrant from the juſtices of peace; but in this caſe there was no warrant.

What is a ſufficient provocation to make the killing one but manſlaughter.

When a conſtable may arreſt.

The reaſons of the five judges, who were of opinion it was murder, were theſe: four of them did agree, that *Bray* had no authority, but one was of opinion, that ſhewing his ſtaff was ſufficient; but I never knew that a conſtable's ſtaff was of ſo much efficacy, when the conſtable himſelf had no authority: four of them held, that ſhe being a ſtranger to the priſoners, it could be no provocation to them; otherwiſe if ſhe had been a friend or ſervant: but ſure a man ought to be concerned for *magna charta* and the laws; and if any one againſt the law impriſons a man, he is an offender againſt *magna charta*. We ſeven hold this to be a ſufficient provocation, and we have good authority for it: in *Hopkins Hugget*'s caſe (and this caſe is ſtronger than that) the judges that were of opinion, that the caſe was only manſlaughter, did not found their opinion upon the fight between them, but the provocation by the unlawful impriſonment; and the four, who were of opinion that it was murder, conformed, and gave judgment according to the opinion of the eight: the five judges in this caſe, who think this caſe murder, ſay, that to a relation or friend it is a provocation, but not to a ſtranger; but this is a diſtinction not to be met with in our books. He cited *Plowd.* 101. where two fight upon malice prepenſe, the ſervant of one of them, not knowing of the malice, comes to aſſiſt his maſter, and kills the other, this is held but manſlaughter in the ſervant; which caſe is abridged in *Hale* 51. the reaſon of which caſe is not becauſe he was ſervant, but becauſe he knew not of the malice. They ſay, that *Hopkins Hugget*'s caſe is *primae impreſſionis*; but yet it is of good authority, being given upon mature conſideration, and reſolved by eight of the judges. They ſay likewiſe, that in the caſe at bar, it could not be a provocation to the priſoners, becauſe they knew not that ſhe was illegally arreſted; but ſurely *ignorantia facti* will excuſe, but never condemn a man. Indeed he acts at his peril in ſuch a caſe, but he muſt not loſe his life for his ignorance, when he happens to be in the right; and cited Sir *Henry Ferrer*'s caſe, where he was arreſted by a warrant, which named him knight, when he was a baronet, and his ſervant killed the bailiff, and adjudged only manſlaughter, becauſe he was arreſted upon an ill warrant. Suppoſe a man having a judgment againſt him goes abroad, and upon his return is informed that there are bailiffs in his houſe, he goes in and kills one of them; but it proves, that they are thieves, that come to rob him; in this caſe he is in no fault. They objected, that it is dangerous to allow ſuch a power to the mob; but a provocation does not make it an allowing the offenſe, but only mitigation of the puniſhment, and for this the law makes the diſtinction between murder and manſlaughter. They ſay, that the priſoners came after the impriſonment of the woman was over; but certainly the putting her in priſon, and not carrying her before a juſtice, as they ſhould have done, is an aggravation: and why ſhould *Bray* call *Dent* to his aſſiſtance after ſhe was in priſon? They all agreed, that he was not conſtable of *Covent Garden*, and if ſo, it cannot be murder; for if a writ be directed to the ſheriff of *Middleſex*, and the man goes into the county of *Bucks*, the ſheriff follows and arreſts him in *Bucks*, he kills the ſheriff; this is only manſlaughter. I am as much for a reformation as any one, but in a legal manner; for *vir bonus eſt quis? qui conſulta patrum qui leges juraque ſervat.* After the chief juſtice had ended his argument, the counſel for the priſoners prayed the court, that they might be called to judgment, in order to pray their clergy, their being an appeal lodged againſt them, that they might have it to plead to the appeal; and hoped they might have it, notwithſtanding the late general act of pardon, which pardons puniſhments of manſlaughter; and made a doubt, whether they could plead this matter without an actual praying of their clergy, and having it allowed. But the court ſaid, they were bound to take notice of the act of pardon, whereby manſlaughter was pardoned; and therefore they muſt diſcharge them: but they ordered a ſpecial entry to be made upon the roll, that the court would not give any judgment, becauſe of the general act of pardon. Therefore they were diſcharged, as to the indictment; but there being a writ of appeal delivered to the ſheriff, the court held, that they were in cuſtody on the appeal by the delivery of the writ to the ſheriff.

Regina *verſ.* Harris.

Order of juſtices for ſuppreſſing an alehouſe.

AT the quarter-ſeſſions holden at *Guildford* the 12th day of *July* the eighth year of the preſent Queen, the juſtices grant a licence to *George Harris* for keeping a common alehouſe; and at the next ſeſſions, *viz.* the fourth day of *October* following, they made this order: " Whereas it appears to this court, that *George* " *Harris* of *Walton* upon *Thames*, *&c.* doth keep a lewd and diſ- " orderly houſe, it is therefore ordered by this court, that the ſaid " *George Harris* be, and is hereby ſuppreſt from keeping an ale- " houſe, *&c.* after ſix weeks time from the firſt day of the preſent " ſeſſions, *&c.*" And this order being removed into the King's Bench by *certiorari*, Mr. *Raymond* moved to quaſh it, becauſe by the 5 & 6 *Edw.* 6. *c.* 25. there muſt be a previous conviction, and that by the oath of two men, before the juſtices can hinder his ſelling of ale, *&c.* For by the ſtatute, every man who has a licence to ſell ale, is to be bound in recogniſance with ſurety, to keep good orders, *&c.* and that is to be certified the next quarter-ſeſſions, and they are to inquire whether any ſuch perſon bound in ſuch recogniſances, if they have done any act, whereby they have forfeited the ſame; and if they have, to award proceſs, to ſhew why they ſhould not forfeit it. But *per curiam* this order was confirmed, *Holt* chief juſtice being abſent; and by *Powell* juſtice, the juſtices in ſeſſions have a power by this act to ſuppreſs alehouſes, and need not proceed by information or conviction; but they have thereby a diſcretionary power given them to ſuppreſs them, with-

out

Juſtices may take away a licence without conviction upon the recogniſance.

out ſhewing any cauſe or miſdemeanor: and where the act ſpeaks of a conviction, that is only intended where the juſtices proceed for the penalty, which ought to be by *ſcire facias*.

Praedicto in the body of an order of juſtices don't refer to the county in the margin.

MR. *Pengelly* moved to quaſh an order made by two juſtices. The exception was, that *Southampton* was in the margin, but it was ſaid in the body of the order to be made by *A.* and *B.* two juſtices *de comitatu praedicto*; ſo it does not appear, that the two juſtices were of the county, and it ſhall not refer to the margin. Which the court agreed, and ſaid, that *praedicto* in orders or indictments don't refer to the county mentioned in the margin, though it does in declarations, and therefore the order was quaſhed.

Regina *verſ.* Lane.

S. C. Rep. Q. A. 270. 11 Mod.

Return to a *mandamus* to reſtore a capital burgeſs: that he conſented to be turned out, is not a good return of a reſignation.

A capital burgeſs may ſurrender by parol.

A *Mandamus* was directed to the mayor, aldermen, and common council of *Glouceſter*, to reſtore to *Lane* the place of a capital burgeſs. They returned, that *Lane* wrote a certain ſcandalous letter to an alderman, which amounted to a libel; and that he being charged therewith, at a court afterwards holden, he conſented to be turned out, *&c.* And exception was taken, that this was not a good return of a reſignation; for they ſhould have returned, *quod ipſe praedictus Lane reſignavit*, and that they accepted it, *&c.* *Powell* juſtice held, that a reſignation might be by *parol* according to Sir *Jonathan* caſe, but then it ſhould have been returned more certain, *&c.* Therefore *per curiam* a peremptory *mandamus* was granted.

AN action was brought in the King's Bench, and laid the declaration *ad damnum* of the plaintiff 50*s.* Serjeant *Richardſon* moved the court, that this action ought to have been brought in the court of Conſcience in *London* by the 1 *Jac.* 1. *c.* 14. which enacts, that if the cauſe of action be under forty ſhillings, and the defendant a freeman of *London*, it ſhall be brought in the court of Conſcience as aforeſaid: and he had an *affidavit*, that the cauſe was under forty ſhillings. But by *Powell* juſtice, it ought to appear upon the trial, that the cauſe of action was under forty ſhillings, and he would not take the oath of the party.

If an action be brought againſt a freeman of *London* for under forty ſhillings, but the declaration is *ad damnum* of fifty, it ſhall not be ſet aſide upon affidavit, that it is under forty ſhillings, upon the ſtatute of 1 *Jac.* 1. but it ſhould appear upon the trial.

A Writ went out to remove an inquiſition of *felo de ſe*, and they return an inquiſition *nuper captam*, and upon the return it appeared to be taken after the *teſte* of the writ of *certiorari*; and Sir *Edward Northey* urged, that it was well removed, though taken after the *teſte* of the writ, as a writ of error, *&c.* and by *Powell* juſtice, a writ of *certiorari* removes any order or conviction, though they be made or taken after the *teſte* of the writ, ſo they be taken before the return. Then Mr. *Raymond* took exceptions to the inquiſition: Firſt, becauſe it is ſaid to be taken *coram coronatoribus dominae reginae*, and does not ſay for what place: Secondly, it is ſaid *per ſacramentum duodecim, &c.* and don't ſay *proborum et legalium hominum*, nor for what place: and upon theſe exceptions the inquiſition was quaſhed.

Certiorari removes any order, *&c.* made between the *teſte* and return.

Regina *verſ.* Cecill.

MR. *Gilbert* moved to quaſh an order of ſeſſions made upon *Cecill* the maſter, to pay *John Yeoman* his ſervant 7 *l.* for wages in huſbandry; and took two exceptions to the order: Firſt, that *Yeoman* was a covenant ſervant, and that the ſtatute does not extend to covenant ſervants, though they are ſervants in huſbandry: his ſecond exception was, that by the order, it appears to be made upon the oath of the ſervant. As to the firſt exception, *Powell* juſtice ſaid, that the ſtatute having always had a favourable conſtruction, has been extended to covenant ſervants in huſbandry: and to the ſecond he ſaid, it would be hard to charge the maſter upon the oath of his ſervant upon a private contract or covenant between them, and that it is againſt a rule of law, that any ſhould be a witneſs in his own cauſe; and the ſtatute not directing that the ſervant's oath ſhould be taken in this cauſe, the juſtices ſhould have proceeded according to the rules of law, and upon this firſt ſtirring of it it was adjourned. And the laſt day of this term, it being moved again by Mr. *Gilbert*, and the laſt exception urged again, Mr. *Raymond* of the ſame ſide ſaid, that the juſtices having grounded their judgment in this order upon the ſervant's oath, it was not ſufficient evidence, to adjudge the money due to the ſervant; and though perhaps he could not have evidence to prove the contract, yet there is no doubt but he might prove the ſervice, and if he had done ſo, he had put it upon the maſter to prove the contrary. Mr. *Lutwyche* for maintaining the order ſaid, that orders

S. C. Rep. Q. A. 266. 11 Mod.

Order upon a maſter to pay wages in huſbandry quaſhed, becauſe it was made upon the ſervant's oath.

See the act, and it will appear, that it was firſt intended to extend only to ſervants who had the rated wages, and not covenant ſervants; and then if the ſervant had proved how long he had ſerved, it appeared how much was due: but now they have extended the act to covenant ſervants, and that maſters the miſchief in this caſe, for it will be difficult perhaps for the ſervant to prove how much he had agreed for; but however he ought not againſt a rule of law to be admitted to prove it himſelf.

differ from actions at law, and it is the conſtant practice to hear upon the oath of the ſervant: and though the order ſays upon the oath of the ſervant, and hearing his counſel, yet for ought appears, there might be other evidence beſides the ſervant's oath.

Powell juſtice. The oath of the party has been allowed ſometimes in caſes of neceſſity, but there is no neceſſity in this caſe, for there might have been evidence of the ſervice: *Powys* juſtice, and *Gould* juſtice agreed, and therefore the order was quaſhed.

Note, Mr. *Puckele* was with Mr. *Lutwyche*, who ſaid the oath of the party was not againſt law, becauſe it is allowed ſometimes in the *Welch* circuit.

Hutchinſon *verſ.* Savage.

Whether a releaſe of all debts by an adminiſtrator will diſcharge a debt due to the inteſtate, where there is a debt due to the adminiſtrator in his own right.

George Hutchinſon adminiſtrator of *John Dawſon* brings an action againſt *Robert Savage* for goods ſold by the inteſtate to the defendant. The defendant pleads, that the plaintiff, the 15th of *December* 1708. releaſed to the defendant, his heirs, executors, and adminiſtrators, all and all manner of actions, cauſe and cauſes of actions, ſuits, bills, bonds, writings obligatory, debts, dues, duties, accompts, ſum and ſums of money, judgments, executions, extents, quarrels, controverſies, treſpaſſes, damages, and demands whatſoever, as well in law as equity or otherwiſe, which *Hutchinſon* had againſt him the defendant, *&c.* The plaintiff replies, and craves *oyer* of the releaſe; upon which a general releaſe is ſet out of all debts, dues, and demands, *&c.* of *Hutchinſon*, ſo that *George Hutchinſon*, as creditor of *Savage* (it ſays, that he and others the creditors of *Savage* do releaſe him) and then ſays, that at the making that releaſe the defendant was indebted to him in his own right in the ſum of ſix pounds, and that he gave the releaſe to releaſe that debt, *&c.* to which the defendant demurred.

Mr. *Ketelbey* for the defendant ſaid, that ſuch general releaſes did diſcharge the debt due to him as adminiſtrator, and cited *Roll. Abr.* 404.

Mr. *Dee* for the plaintiff urged, that the caſe in *Rolle* had been held not to be law, and that it was certain, if a man grants *omnia bona ſua*, goods which he has as adminiſtrator do not paſs, and cited 3 *Cro.* 6. and that general words in a releaſe are qualified by the particular words 3 *Lev.* 273, and 272, where a bond taken in name of *J. S.* to the uſe of *J. D.* is not releaſed by a releaſe of all demands, *&c.* by *J. S.* to the obligor. *Stokes verſ. Stokes.*

And that if the releaſe in this cauſe had nothing to work upon, then perhaps it would have releaſed this debt due to him as adminiſtrator; but as this caſe is, it ſhall enure upon the debt due to him in his own right.

Powell juſtice ſaid, that the caſe in *Ro. Ab.* was taken out of the year book of *Edw.* 3. 39 *Edw.* 3. 96. at which time the law was held, that a grant of *omnia bona ſua* by an executor or adminiſtrator paſt goods, which they had as executor or adminiſtrator; but now that caſe is held contrary, and there is no difference between a grant and a releaſe; therefore that caſe of a grant of *omnia bona ſua* will govern this preſent caſe: but if there had been no other debts for the releaſe to work upon, then it had releaſed this debt. Upon this argument the caſe was adjourned, and the laſt paper day of this term Mr. *Raymond* for the defendant argued, that it was plainly the intent of the parties, that it ſhould diſcharge all the debts, as well in his own right, as adminiſtrator; for it ſays, all actions, that we every or any of us, *&c.* and every man's deed ſhall be taken moſt ſtrongly againſt himſelf, as a releaſe to *A. B.* of all actions, releaſes as well joint actions as ſeveral; and as to the objection, that a grant of *omnia bona ſua* don't paſs goods as adminiſtrator. He ſaid, that the caſe in *Rolle* was well abridged, and a good authority. He cited 1 *Leon.* 203. *Plowd.* 209. *Noy* 106. and *Cro. Jac.* 318. where the huſband granted to him *jus, titulum, et intereſſe ſua de et in decimis*, which he had in the right of his wife; and held that they paſs, though he had them in his wife's right.

Holt chief juſtice. If he have no goods, but as adminiſtrator, they muſt paſs by a grant of *omnia bona ſua*. *Adjournatur.*

Regina *verſ.* Stedman.

Information is not amendable.

AN information was exhibited againſt the defendant by the addition of gentleman; the defendant pleaded in abatement, that he was an upholſterer, and not a gentleman; and a rule being obtained at the ſide bar to amend the information, Mr. *Raymond* moved at the ſhewing cauſe, why it ſhould not be amended, and ſaid, that as they had taken advantage of this miſtake by pleading in abatement, the court could not amend it; and cited *Buckſon verſ. Hoſkins*, *Mich.* 3 *Ann. B. R.* where after *nul tiel record* pleaded to a *ſcire facias*, which miſrecited a judgment, an amendment was denied; and that criminal matters are not within the ſtatute of amendments.

Salk. 52. 6 Mod. 263, 310.

Mr. *Whitaker* of the ſame ſide, that there was no precedent to warrant amendments, after taking advantage of it by pleading, and all the caſes mentioned of amendments immediately before trial in informations are only of ſlips of clerks.

If a man be indicted by his right name and plead miſnomer in abatement, he is eſtopped to deny that name, that he gives himſelf.

Powell juſtice ſaid, that informations are the ſuggeſtions of the attorney general, which he may amend any time before trial, but it is a queſtion, whether it can be done after advantage took of it by pleading, as in this caſe. He ſaid that informations are within the ſtatute of additions, but this ought not to be amended to falſify the defendant's plea, though iſſue be not joined, and that a *miſnomer* in an indictment was not amendable, and he ſaw no difference between that and an information. If one be indicted by his right name, and he pleads *miſnomer* in abatement, and you indict him again, he is eſtopped to ſay, that the name he gives himſelf in his plea is not his right name. Adjourned to ſearch precedents.

Plaintiff nonſuit not to proceed till coſts paid, &c.

THE plaintiff brought an action, and was nonſuited, and afterwards he brought another action for the ſame cauſe, and a motion was to ſtay proceedings till he paid his coſts upon the firſt nonſuit, and granted *per curiam*.

Eaſter Term

9 Annae reginae, B. R. 1710.

MEmorandum, *Sir* John Holt *knight, lord chief juſtice of the Queen's Bench, who had executed that office with great reputation for his courage, integrity, and compleat knowlege in his profeſſion, ever ſince the revolution, (being ſworn into that office in* Eaſter *term* 1689) *died* March 5 *about three in the afternoon, at his houſe in* Bedford walk, *after a long lingering ſickneſs,* anno aetatis ſuae 68.

Memorandum, March 13, 1709. *Sir* Thomas Parker *knight, her Majeſty's youngeſt ſerjeant at law, was ſworn into the office of chief juſtice of the King's Bench in the room of the late chief juſtice* Holt, *at the lord chancellor* Cowper's.

Memorandum. March 26, 1710. *Sir* Henry Gould *knight, one of her Majeſty's juſtices of the Queen's Bench, died at his chambers in* Serjeants Inn *in* Chancery-lane, anno aetatis ſuae 66.

Memorandum, *That* May 12 *in this preſent* Eaſter *term Sir* Robert Eyre *knight, her Majeſty's ſolicitor general, and* Thomas Pengelly *eſquire, were ſworn ſerjeants at the Chancery bar, counted at the Common Pleas, and gave an entertainment to the nobility, judges,* &c. *at* Serjeants inn hall *in* Fleet-ſtreet. *The motto of their rings was,* Unit et imperat. *And the next day being* Saturday, May 13. *Mr. ſerjeant* Eyre *was ſworn one of the juſtices of the King's Bench in the room of juſtice* Gould *deceaſed, at the lord chancellor* Cowper's, *and the ſame time Mr.* Raymond *was ſworn ſolicitor general, both their patents being ſealed that day.*

Mich. Term.

11 Annae reginae, B. R. 1712.

Sir Thomas Cooke Winford *verſ.* Powell.

Judgment of an inferior court reverſed for want of an averment, that the cauſe of action aroſe within the juriſdiction. *Ante* 796, 1040.

SIR *Thomas Cooke Winford* brought a writ of error in the King's Bench upon a judgment againſt him in the *Marſhalſea* in an action on the caſe, wherein *Powell* declared, that whereas the ſaid Sir *Thomas Cooke Winford* the 12th of *June* in the ſeventh year of this Queen, at the pariſh of *St. Giles in the fields in comitatu Middleſex, ac infra juriſdictionem hujus curiae*, in conſideration, that the ſaid *Powell* at the ſpecial requeſt of Sir *Thomas Cooke Winford* had permitted the ſaid Sir *Thomas Cooke Winford* to uſe the pond *in area ipſius Powell* ſituate in the pariſh aforeſaid, *ac infra comitatum et juriſdictionem praedictos*, to water his horſes for ſix months before, and had provided water for the ſaid horſes for the ſaid ſix months, promiſed the ſaid *Powell*, that he the ſaid Sir *Thomas Cooke Winford* would pay the ſaid *Powell* what he reaſonably deſerved for the ſame, &c. and makes the proper averments. Then there is a count upon a *quantum meruit* for goods, &c. ſold and delivered. Then follows this count: *Cumque etiam* the ſaid *Powell*, *poſtea, ſcilicet die anno et loco ſupradictis, ad ſpecialem inſtantiam et requiſitionem ipſius* Sir *Thomas Cooke Winford* had permitted *eundem* Sir *Thomas Cooke Winford habere uſum alius ſtagni et aquae ipſius Powell, in area ipſius Powell ad lavandum et ad aquandum alios equos ipſius* Sir *Thomas Cooke Winford: idem* Sir *Thomas Cooke Winford in conſideratione inde poſtea, ſcilicet die anno et loco ſupradictis*, promiſed to pay, &c. On *non aſſumpſit* pleaded, and iſſue joined, a verdict was given for *Powell* for 7*s.* 6*d.* damage, and judgment was given for him in the *Marſhalſea* to recover the ſame. And on this writ of error brought, the judgment was reverſed, becauſe it did not appear in this laſt count, that the *aliud ſtagnum et aqua* of *Powell*'s was within the juriſdiction of the court, which cannot be intended in the caſe of an inferior juriſdiction, where nothing ſhall be intended to be within the juriſdiction, that is not expreſly averred ſo to be; though in the caſe of a ſuperior juriſdiction nothing ſhall be intended out of it. *Raymond* ſolicitor general for the plaintiff in error, Mr. ſerjeant *Comyns* for the defendant. The caſes cited for the plaintiff in error were 1 *Saund.* 74. *Peacock verſ. Bell & Kendall.* Sir *Tho. Jones Rep.* 230. *Wallis verſ. Squire.* *T. Jones* 103. 3 *Keb.* 677. *Harvey verſ. Holland.* 3 *Lev.* 234, 243. *Mico verſ. Morris.* 1 *Ventr.* 2. in the caſe of *Heely verſ. Ward.* 1 *Ventr.* 28. *Barkly verſ. Paine*, and ſee *Stanian verſ. Davyes*, *intr. Hil.* 13 *Will.* 3. *B. R. Rot.* 179. *Ante*, 795. 1 *Sid.* 95. *Littlebury verſ. Wright.* 1 *Roll. Ab.* 545. *p.* 3. *Ivie verſ. Storie.* *S. C. Cro. Car.* 571. *Jones* 451.

Jenkins qui tam, &c. *verſ.* Horne in Scaccario.

IN an information upon a ſeiſure of currans imported in the *William* and *Anne* of *Plymouth* into the port of *London*, contrary to the act of navigation, 12 *Car.* 2. *c.* 18. from *Algiers* in *Africa*, the currans not being of the growth, product, or manufacture of that place, or of the region where they were ſhipped, *&c.* The defendant claimed property, and on iſſue joined notice was given for trial in *Trinity* term laſt, and for the ſitting after *Trinity* term laſt. And on motion on behalf of *Charles Moone*, a ſecurity for *Horne* on the writ of delivery, the following order was made, *viz.* *Middleſex*, “ Whereas a writ of delivery for the “ ſaid ſhip with her apparel and furniture hath been awarded under “ the ſeal of this court, upon a recogniſance entred into to her “ Majeſty, by *Edward Groſe* of *Eaſt Smithfield* baker, and *Charles* “ *Moone* of *Mowell* in the county of *Cornwall* cooper, dated the “ 11th day of *February* laſt, in the ſum of 252*l.* now upon the “ motion of Mr. *Dodd* of council with the ſaid *Charles Moone*, in“forming the court, that the plaintiff gave notice of trial to be “ had in this cauſe, the ſitting of the lord chief baron within the “ laſt *Trinity* term in *Middleſex*; in purſuance of which notice “ the ſaid *Charles Moone* attended with his council and witneſſes “ on the day appointed for the ſaid trial, as alſo on the day of “ ſitting after the ſaid term in *Middleſex*, not having received any “ countermand from the ſaid plaintiff; whereby the ſaid *Charles* “ *Moone*, who is at the whole charge of the defenſe made in this “ cauſe, was put to great expenſe: it was therefore now prayed, “ that the ſaid recogniſance might be diſcharged, and that the ſaid “ *Charles Moone* might have his coſts: it is this day ordered by “ the court, that the ſaid recogniſance entred into by the ſaid “ *Edward Groſe* and *Charles Moone* ſhall be vacated and diſ“charged; and that it be referred to *John Morgan* Eſq; deputy

“ to her Majeſty's remembrancer of this court, to tax the ſaid “ *Charles Moone* his coſts againſt the plaintiff in this cauſe; unleſs “ cauſe be ſhewed to the contrary on the laſt day of *Michaelmas* “ term next.”

Upon the motion of Mr. Attorney General, the ſolicitor General, and Mr. *Ward*, at the ſetting down of cauſes after this term, to which time the order was enlarged, it was diſcharged; firſt, as to the diſcharging the recogniſance upon declaring the plaintiff intended next term to try the cauſe; ſecondly, as to the payment of coſts for not going on to trial; becauſe ſuch order can be made only in behalf of, and upon the motion of the defendant, and his council, and not in behalf of the ſecurity. Lord chief baron *Bury*, and *Lovel* baron, preſent in court. Note; the lord chief baron exclaimed againſt the order, as being obtained perfectly irregularly without *affidavit*, and by ſurpriſe.

Ongley *verſ.* Peale.

S. C. Caſes Law and Eq. 103. A deviſe to *J. W.* and his brothers ſucceſſively for their lives (without expreſſing the order of ſucceſſion) with condition that the tenement be not entred upon till a month after marriage.

ERROR to reverſe a judgment given in the Common Pleas for *Peale*, in an ejectment for houſes on *Ludgate-hill* in *London*, on the demiſe of *Oliver St. John*, brought againſt Mr. *Ongley*, and four other tenants: on not guilty pleaded; as to all the defendants but Mr. *Ongley*, and as to all the houſes but one, the jury find for the defendants; and as to that one houſe they find a a ſpecial verdict, *viz.* that the 12th of *January* 1668, *Oliver* earl of *Bolingbroke* was ſeiſed thereof in fee, and being ſo ſeiſed the ſaid 12th of *January* made his will, [Note, that will was not found *in haec verba* in the ſpecial verdict, nor the deviſes therein contained] and that the 20th of *May* 1679 he being ſeiſed as aforeſaid, *debito modo fecit*, *ſigillavit*, *et publicavit* a codicil in writing to the ſaid will annexed, which follows *in haec verba* “ *May* 20, 1679. *Memorandum:* Whereas my uncle *Anthony St.* “ *John*, and my deareſt and beloved wife, whom I made my ſole executrix, are dead: that as to what I left to them I re- “ voke this my ſaid laſt will and teſtament in manner following: “ Firſt, as to the 2000 *l.* given my dear wife out of the manor “ of *Melchbourne* I give and leave it to Sir *St. Andrew St. John* “ of *Woodford*, alſo my impropriation of *Thurley* to him and his “ heirs: I give to him and his brothers ſucceſſively for their lives “ my houſe at *Ludgate* [the houſe in queſtion] with this condi- “ tion nevertheleſs, that the ſaid 2000 *l.* be not paid to Sir *St.* “ *Andrew*, nor the impropriation of *Thurley* entred on, till “ within a month after his marriage. And as for my houſe at “ *Ludgate* I do not leave it to him, nor his brothers, afore to be

" entred on and enjoyed, till ſuch time alſo after their marriages; " as for all my other lands, *&c.*" That the earl died ſeiſed; that at the making the codicil Sir *St. Andrew* had two brothers, *Rowland* and *Oliver*, that Sir *St. Andrew* was eldeſt, *Rowland* the ſecond, and *Oliver* the third; that *Rowland* died in the life-time of Sir *St. Andrew* and *Oliver*, that Sir *St. Andrew* died 10th of *February* 1708, that *Oliver* was married divers years before Sir *St. Andrew*'s death, and is yet living; that *Oliver* entred after Sir *St. Andrew*'s death, and demiſed to the plaintiff, *&c.* Upon which ſpecial verdict judgment was given for the plaintiff in ejectment in the Common Pleas. Whereupon Mr. *Ongley* brought this writ of error in the King's Bench. And it was argued by the ſolicitor general for the plaintiff in error, that the deviſe was void for incertainty, certainty being as much required in the caſe of a will as to the perſon, as in the caſe of a deed; as a deviſe by *A.* to his ſon, where he has two, is void, becauſe *non conſtat* which he meant, *Cro. Eliz.* 743. in the caſe of *Taylor* and *Sayer*. Now here it is uncertain by reaſon of the word ſucceſſively not ſhewing which ſhall take firſt, and which ſecond, in ſucceſſion. That the conſtruction ought to be made from the words, but in caſe of a deed ſuch a limitation had been void, *Hob.* 313. *Cro. Jac.* 264. *Hutt.* 87. *Windſmore verſ. Hobart* in point, and *Hob.* 314. *Greenwood verſ. Tyler.* But there is no reaſon in a will, when the words are the ſame, to put a different conſtruction upon them. But if it had been *ſucceſſive ſicut nominantur in chartâ*, *&c.* it had been good in a deed. *Dier* 361. So it would be in a will.

Secondly. The condition in relation to marriage makes it more uncertain, for till marriage none can take; and ſuppoſe the ſecond brother had married, and neither of the other two, who muſt have took? Certainly none of them. Or if he that is married ſhould take firſt, then that would overthrow the other conſtruction of *ſucceſſive*, that the oldeſt ought to take firſt, and then the ſecond, and then the third. Objection: the intent is apparent. Anſwer 1. The intent muſt be collected from the words, but the words, as was ſaid before, import no ſuch thing, and nothing can be averred *dehors* for their explanation. Secondly, the intent cannot controul the operation of law; as a deviſe to *J. S.* for life without impeachment of waſte, remainder to the heirs males of his body, the deviſor intends only an eſtate for life to *J. S.* yet the law ſupervenes his intent, and he will be tenant in tail. 2 *Leon.* 70. *Chaloner verſ. Bowyer*, and by *Hale* chief juſtice in the caſe of *King* and *Melling*, 1 *Ventr.* 214, 225.

Mr. ſerjeant *Pengelly* argued for the defendant in error, that the deviſe to Sir *St. Andrew* was a direct deviſe to him, as appears

pears by the preceding words; that that could not be avoided by doubtful expreſſions after that the deviſor took notice of the brothers, according to the rules of common law, which was according to their ſeniority: that what he meant by *ſucceſſive* is plain, and therefore in a will ought to take effect, for which purpoſe there are ſtronger caſes in the books, as *Raym.* 82. *Bate verſ. Amherſt & Norton.* A deviſe to one of his couſin *Amherſt*'s daughters, who ſhould marry a *Norton*, held good to the firſt that married a *Norton*. *Dier* 333, 6. Deviſe to *J. S.* on condition, and then that it ſhould remain to his houſe: held a good remainder, becauſe they conſtrued his houſe the head of his family. *Stiles* 434, 5. *Moore* 637. *Br. Leaſe* 64. he likewiſe cited as oppoſite caſes.

Secondly, the clauſe about marriage made no alteration in the expoſition of the will, only added a reſtriction to the deviſe, which before was general; and therefore if the ſecond ſon married before the eldeſt, yet he could not take by this deviſe; which the court agreed, and took it to be a mighty plain caſe, and affirmed the judgment *niſi cauſa, &c.* But Mr. Attorney General, who was to have ſhewn cauſe, taking it to be clearly againſt him, never did ſhew cauſe, and ſo the judgment was affirmed againſt Mr. *Ongley*, who was a purchaſer for a valuable conſideration by the advice of Mr. ſerjeant *Pemberton*, and Mr. *Richard Webb* of the *Inner Temple*. And my client told me, Mr. *Webb* on a further and late conſideration adherred to his former opinion, that the deviſe was void for uncertainty. Note, *Oliver St. John* takes but an eſtate for life by the will, and ſo the ſale by *Powlett* earl of *Bolinbroke*, heir at law, and brother to earl *Oliver*, to Mr. *Ongley*, will be good as to the fee.

Anno primo Georgii regis.

MEmorandum, *On* Sunday Auguſt 1, 1714. *at half an hour paſt ſeven in the morning her Majeſty Queen* Anne *died at* Kenſington, *in the fiftieth year of her age, being born the 6th of* February 1664. *Upon her deceaſe the lords, and others of her late Majeſty's privy council, immediately met at* St. James's, *where the inſtruments ſigned by his Majeſty, and ſealed by him, purſuant to the act of parliament of* 6° *of the late Queen, appointing ſeveral lords to be added to thoſe appointed by the ſaid act of parliament to be regents during the King's abſence, were produced by the lord archbiſhop of* Canterbury, *the lord chancellor* Harcourt, *and* Monſieur Krienburg *the* Hanover *miniſter, and opened and read, and afterwards ordered to be inrolled in Chancery.*

The regents by the act of parliament were,

Thomas *lord archbiſhop of* Canterbury.
Simon *lord* Harcourt, *lord chancellor.*
Charles *duke of* Shrewſbury, *lord treaſurer.*
John *duke of* Bucks, *lord preſident of the council.*
William *earl of* Dartmouth, *lord privy ſeal.*
Thomas *earl of* Strafford, *firſt commiſſioner of the admiralty.*
Sir Thomas Parker, *lord chief juſtice of the King's Bench.*

The regents appointed by the King, by the three inſtruments under his hand and ſeal.

William *lord archbiſhop of* York.
Charles *duke of* Shrewſbury.
Charles *duke of* Somerſet.
Charles *duke of* Bolton.
William *duke of* Devonſhire.
Henry *duke of* Kent.
John *duke of* Argyle.
James *duke of* Montroſe.
John *duke of* Roxborough.
Thomas *earl of* Pembroke.
Arthur *earl of* Angleſea.
Charles *earl of* Carliſle.
Daniel *earl of* Nottingham.

Mountague Venables *earl of* Abingdon.
Richard *earl of* Scarborough.
Edward *earl of* Orford.
Charles *lord viſcount* Townſhend.
Charles *lord* Halifax.
William *lord* Cowper.

Then all the lords of the late Queen's privy council preſent took the oaths of privy counſellors, the great officers, who uſed to be ſworn in council, took the oaths of their offices, and then the lords juſtices took the oaths of allegiance and ſupremacy, &c. *according to that act.*

All the judges, King's ſerjeants, attorney and ſolicitor general, and King's council, took their oaths before the lord chancellor at his houſe, as if they were newly admitted, though by that act they were continued but for ſix months after the Queen's demiſe.

And all other officers, who held their offices during pleaſure, took their oaths of office (who had oaths of office to take) in the ſame manner as if newly admitted.

Note, it being made a queſtion among the lords juſtices (who aſſembled in a room by themſelves diſtinct from the council, where they tranſacted matters, which they determined without the aſſiſtance of the privy council, and only came into the council chamber, when they held a privy council, and then ſat on a row on the ſide of the table, on the right hand of the King's chair, thoſe of the firſt quality ſitting in the middle of that ſide of the table) whether the officers, juſtices of peace, &c. *could act before they took their oaths of office (which could not be immediately done, becauſe* dedimus's *were to iſſue for that purpoſe): It was held by the lords juſtices, that they ought to take the oaths of office in convenient time, but that in the* interim *they might act, otherwiſe the whole deſign of the act of parliament would be evaded, which was, that on the demiſe of the crown, there might not be a vacancy of officers in caſe of neceſſity; but if they could not act till they had took their oaths of office, there would be a vacancy, which miſchief the act intended to prevent. And at this reſolution the lord chancellor* Harcourt, *lord* Cowper, *and lord chief juſtice* Parker *were preſent, and therefore they iſſued a proclamation, to give notice of that clauſe in the act continuing officers, and requiring them to take the oaths, and thereby commanding all officers to take the oaths of office with the firſt opportunity, and to act in the mean time.*

A liſt of the principal officers in the law at the time of the deceaſe of her late Majeſty Queen *Anne*, *Auguſt* 1. 1714.

SIMON *lord* Harcourt, *lord chancellor of* Great Britain.

Sir John Trevor *knight*, *maſter of the Rolls.*

Sir Thomas Parker *knight*, *lord chief juſtice of the King's Bench.*
Sir Littleton Powys *knight*,
Sir Robert Eyre *knight*, } *juſtices of the King's Bench.*
Sir Thomas Powys *knight*,

Thomas *lord* Trevor, *lord chief juſtice of the Common Pleas.*
Sir John Blencowe *knight*,
The hon. Robert Tracy *eſquire*, } *juſtices of the Common Pleas.*
Robert Dormer *eſquire*,

The right honourable Sir William Wyndham *baronet*, *chancellor of the Exchequer.*

Lord chief baron vacant.
Sir Thomas Bury *knight*,
Robert Price *eſquire*, } *barons of the Exchequer.*
Sir William Baniſter *knight*,

John Smith *eſquire*, *baron, and lord chief baron in* Scotland.

Sir William Simpſon *knight*, *curſitor baron.*

Lord Berkley *of* Stratton, *chancellor of the duchy of* Lancaſter.

Sir Edward Northey *knight*, *attorney general of the duchy of* Lancaſter.

Sir Joſeph Jekyll *knight*,
Sir Nicholas Hooper *knight*, } *Queen's two firſt ſerjeants.*

Sir Edward Northey *knight*, *attorney general.*

Sir Robert Raymond *knight*, *ſolicitor general.*

Sir John Cheſhyre *knight*, *Queen's ſerjeant.*

Sir William Whitlock *knight*,
John Conyers *eſquire*,
Edward Jeffreys *eſquire*, } *Queen's counſel.*
Thomas Lutwyche *eſquire*,
John Ward *eſquire*,

Juſtices of Wales.

Sir Joſeph Jekyll *knight*,
Edward Jeffreys *eſquire*, } *juſtices of* Cheſter, Flint, &c. Montgomery *and* Denbigh.

Charles Cox *eſquire*,
William Bridges *eſquire*, } *juſtices for* Brecknock, Glamorgan *and* Radnorſhires.

Merrick *eſquire*,
William Jeſſop *eſquire*, } *juſtices for* Caernarvan, Merioneth *and* Angleſea.

Francis Winnington *eſquire*,
Edmund Bridges *eſquire*, } *juſtices for* Caermarthen, Pembroke *and* Cardigan.

Memorandum, Tueſday September 21, 1714, *being the next day after the King had made his publick entry into* London *from* Greenwich, *the lord viſcount* Townſhend, *one of his Majeſty's principal ſecretaries of ſtate, by his Majeſty's command, fetched the great ſeal from the lord* Harcourt; *and the next day, being* 22 September 1714, *it was delivered to the lord* Cowper *with the title of lord chancellor of* Great Britain, *and that day he took the oaths in council at* St. James'*s*.

Memorandum, *That* Thurſday October 14, ſuperſedeas's *paſſed the great ſeal, to remove the lord* Trevor *from being chief juſtice of the Common Pleas, Sir* Thomas Powys *from being one of the judges of the King's Bench, and Sir* William Baniſter *from being one of the barons of the Exchequer, and Sir* Robert Raymond *from being ſolicitor general; and patents paſſed the great ſeal, for appointing Sir* Edward Northey *his Majeſty's attorney general, and* Nicholas Lechmere *eſquire his Majeſty's ſolicitor general, and they took the oaths of office at the lord chancellor's* Saturday *the* 16th *of* October *following.*

Memorandum, Friday October 22, 1714, Spencer Cowper *eſquire, and* John Forteſcue Aland *eſquire, were appointed attorney*
general

general and ſolicitor general to his royal highneſs the prince of Wales.

Memorandum, *That* Tueſday October 26, 1714, *Sir* Peter King *knight, recorder of* London, *and Sir* Samuel Dodd *knight, of the* Inner Temple *both, and Sir* James Mountague *knight, of* Lincolns Inn, *appeared to writs returnable in Chancery, commanding them to take on them the degree of ſerjeants at law, and they were coifed by the chief juſtice of the King's Bench in the treaſury of the Common Pleas, and afterwards performed the uſual ceremonies at the bar of the Common Pleas, and gave rings with this motto:* Plus quam ſperavimus.

Memorandum, *That* Thurſday November 4, 1714, *Sir* Joſeph Jekyll *and Sir* Thomas Powys *took their places as firſt and ſecond King's ſerjeants, being ſworn at the lord chancellor's the day before.*

Memorandum, *That* Monday November 22, 1714, *Sir* Thomas Parker *knight was ſworn chief juſtice of the King's Bench, and Sir* Littleton Powys, *Sir* Robert Eyre, *and* John Pratt *eſquire ſerjeant at law, were ſworn juſtices of the ſame court*; *Sir* Peter King *knight was ſworn chief juſtice of the Common Pleas, and Sir* John Blencowe, Robert Tracy *and* Robert Dormer *eſquires, were ſworn juſtices of the Common Pleas*; *Sir* Samuel Dodd *was ſworn chief baron, and Sir* Thomas Bury, Robert Price, John Smith, *and Sir* James Mountague, *were ſworn barons of the Exchequer. And the ſalaries of the two chief juſtices, and chief baron, were encreaſed from* 1000 l. *to* 2000 l. per annum, *and the ſalaries of the reſt of the judges were encreaſed from* 1000 l. *to* 1500 l. per annum, *for which they had diſtinct patents from thoſe by which they were appointed judges.*

Mich. Term

1 Georgii regis, 1714.

December 6. 1714. *Chancery.*

Mary Spendlove daughter of Charles Spendlove and Mary his wife, who was ſiſter of John Lambert deceaſed, } Plaintiffs.

John Aldrich and Mary his wife, Henry Capps, Samuel Hartly, Samuel Wade and John Wade, } Defendants.

A. deviſes a legacy of 200 *l.* to *B.* payable at 15, in the interim to be put out by the executors. Deviſed other legacies, and the ſurplus of his real and perſonal eſtate to *C.* and *D.* whom he made executors, *D.* being an infant.

ON an appeal from a decree of the maſter of the rolls on a bill brought by the plaintiff *Mary Spendlove*, for the recovery of a legacy of 200 *l.* deviſed to her by her uncle *John Lambert*. The caſe was this: *John Lambert* being ſeiſed in fee of lands, *&c.* in *Norfolk*, and poſſeſſed of a conſiderable perſonal eſtate, 8 *June* 1696 by his laſt will deviſed to the plaintiff 200*l.* at her age of fifteen years, if ſhe ſhould ſo long live, and in the mean time to be put out by his executors for her beſt advantage, till ſhe attained her ſaid age, and gave by his ſaid will ſeveral other legacies, and particularly 100 *l.* to the defendant *John Wade*, then an infant, and deviſed all the reſt of his real and perſonal eſtate, after debts and funeral charges, to the defendants *Henry Capps*, and *Samuel Wade*, who was then an infant, and made them joint executors of his ſaid will.

C. proved the will alone.

John Lambert died ſoon after, *Henry Capps* alone proved the will, the other executor the defendant *Samuel Wade* being then and long after an infant, *viz.* born 20 *September* 1692.

The plaintiff *Mary Spendlove* was born the 6th of *March* 1685, and came to the age of fifteen the 6th of *March* 1700, when the 200 *l.* legacy became payable to her, which ſhe applied to *Capps* for, but he not paying, ſhe received intereſt of him for part of the time before he became a bankrupt.

B. being 15 applied to *C.* for the legacy, for which *C.* paid *B.* intereſt.

In 1704 *Henry Bonett*, being admitted by the eccleſiaſtical court at *Norwich* guardian and curator to the defendant *Samuel Wade*, ſettled accounts with *Capps* on behalf of *Samuel Wade*, in relation to *John Lambert*'s perſonal eſtate, and 200 *l.* was left in *Capps*'s hands to pay the plaintiff; and the defendant *Samuel Wade*'s ſhare of the ſurplus of *Lambert*'s eſtate came to 824 *l.* 16 *s.* 1 *d.* which was left in *Capps*'s hands, and he agreed to pay intereſt for it; after which *Bonett* received of *Capps* 198 *l.* 10 *s.* 1 *d.* of which 29 *l.* 13 *s.* was for intereſt.

E. guardian to *D.* the infant executor ſettled accounts with *C.* relating to *A.*'s eſtate, and left 100 *l.* in *C*'s hands to pay *B.* and received intereſt after for the ſhare of *D.*'s ſurplus.

Capps in *July* 1707 became a bankrupt, and in *Auguſt* 1707 a commiſſion iſſued out againſt him, and he was found a bankrupt. The plaintiff came into the commiſſion, and proved this 200 *l.* legacy as her debt, and 16 *l.* due for intereſt 6 *July* 1707. and received her dividend of 5 *s.* in the pound.

C. became a bankrupt, *B.* came into the commiſſion, and proved the 200*l.* legacy as a debt, and received her dividend.

Bonett alſo as guardian to *Wade* came into the commiſſion for 744 *l.* 1 *s.* part of the ſaid 824 *l.* 16 *s.* 1 *d.* and received his dividend, 186 *l.* 2 *s.* 6 *d.* which added to the 189 *l.* 10 *s.* made 384 *l.* 12 *s.* 6 *d.* out of which he had made conſiderable diſburſements for the defendant *Wade*.

The guardian for *D.* came in, *&c.* and received his dividend for the ſurplus belonging to *D.* left in *C.*'s hands.

After this in *June* 1708 the plaintiff *Mary Spendlove* filed her bill againſt *Capps*, *Samuel* and *John Wade*, and *Bonett*, and the aſſignees of the commiſſion againſt *Capps*, for a ſatisfaction of the 200 *l.* legacy given her by *John Lambert*'s will. *Capps* put in his anſwer, confeſſed *aſſets* of *Lambert* came to his hands ſufficient to pay all his debts, legacies, *&c.* his own bankruptcy, a certificate and confirmation of it by the lord chancellor, *&c.* and inſiſted on that as a diſcharge of his debts. The defendant *Wade* by *Bonett* his guardian put in his anſwer, ſetting out the facts above alleged; and *Bonett* put in his anſwer, and thereto annexed a particular of the writings and ſecurities ſent to him by *Capps* belonging to *Lambert*'s eſtate, and a copy of the account he made up with *Capps*.

On a bill by *B.* againſt *C.* and *D.* for the legacy.

Bonett having made his will, and thereby having ſubjected his real and perſonal eſtate to the payment of his debts, *&c.* and having appointed *Samuel Hartly* executor, died ſoon after his anſwer put in. *Hartly* refuſing to act, adminiſtration with the will annexed of *Henry Bonett* was granted to *Mary* his only daughter, wife of the defendant *John Aldrich*.

The plaintiff brought a bill of reviver againſt *Aldrich* and his wife, *Hartly* and *Samuel Wade*, praying a diſcovery of *Bonett*'s eſtate from *Hartly* and *Aldrich* and his wife. *Aldrich* and his wife in their anſwer ſet forth, that they had accounted for *Bonett*'s eſtate before Mr. *Orlebar* one of the maſters of this court, purſuant to a decree in a cauſe, wherein the creditors of *Bonett* were plaintiffs againſt *Hartly* and *Aldrich* and his wife; and that by the maſter's report it appeared, the whole real and perſonal eſtate of *Bonett* was not ſufficient to pay his debts by mortgages and bonds by 675 *l.*

Decreed, that *B.* ſhould have ſatisfaction againſt *D.* out of *A.*'s eſtate come to his hands, or what *D.* or his guardian received for intereſt of the ſurplus, or the dividend.

The plaintiff having replied, and witneſſes having been examined, the cauſe was heard before the maſter of the rolls, the 24th of *November* 1713. who decreed, that it ſhould be referred to Sir *Thomas Gery*, to take an account of the perſonal eſtate of the teſtator *John Lambert* come to the hands of *Henry Capps* and *Samuel Wade*, the reſiduary legatees, or to the hands of *Henry Bonett*, as curator of *Samuel Wade*; his honour declaring, that what money was paid by *Capps* to *Bonett* of *Lambert*'s eſtate, on the account of *Samuel Wade*, before *Capps* became a bankrupt, and what money was received by *Bonett* for intereſt of *Samuel Wade*'s reſiduary part of *Lambert*'s eſtate, and alſo what money was received by Mr. *Bonett* under the commiſſion of bankruptcy for *Samuel Wade*'s dividend, or any dividend to *Bonett* on account of *Samuel Wade* in reſpect of the money which *Capps* owed *Samuel Wade* on the balance of his ſaid account made up between *Bonett* and *Capps*, was ſtill the eſtate of *Lambert*, and liable to the payment of the ſaid plaintiff *Spendlove*'s demands, in regard the ſaid reſiduary legatees could take nothing by the will of *Lambert* until all his debts and legacies were paid: and the maſter was to diſtinguiſh what of *Lambert*'s eſtate remained in ſpecie; and what upon the account ſhould appear to have been received by *Bonett* as aforeſaid, the ſame was to be made good out of the real and perſonal eſtate of *Bonett*; and *Aldrich*'s wife and *Hartly* were to account for his eſtate, *&c.* and what remained due of the 200 *l.* legacy with intereſt from her age of fifteen, and her coſts, were to be paid the plaintiff out of what had been received by *Bonett*, and made out of his eſtate, and out of the aſſets of *Lambert*, that ſhould appear to be remaining in ſpecie in *Aldrich*, his wife's, or *Hartly*'s hands; and *Aldrich*, his wife, and *Hartly*, were to have no coſts.

From this decree *Aldrich* and his wife, *Hartley* and *Samuel Wade* appealed; which appeal was heard before the lord chancellor *Cowper*, *December* 6, 1714. at which time it was inſiſted on for the appellants, that the plaintiff after ſhe was intituled to her legacy had accepted *Capps* as her paymaſter, by letting the money lie in his hands, and receiving intereſt of him for it ſome years before he became a bankrupt. Secondly by coming into the commiſſion of bankruptcy, proving her debt, and receiving her dividend after he had failed out of his eſtate. Thirdly, that *Capps* had accounted with *Samuel Wade*'s guardian only for the *ſurplus*, and had retained money in his hands on that account to ſatisfy the plaintiff's legacy. Fourthly, that what the guardian *Bonett* had received of *Capps* for intereſt or upon the dividend was received as out of the ſurplus belonging to *Samuel Wade*, and applied for his maintenance and education. Fifthly, that *Hartly* having never acted as executor to *Bonett*, and *Aldridge* and his wife having accounted before the maſter purſuant to a decree of this court, ought to have had their coſts.

But the lord chancellor declared, he was of opinion, that the decree was right; for it appearing by the proofs, that the plaintiff had often applied to *Capps* for her legacy, but could not get it out of his hands, ſhe was in the right to get the intereſt, when ſhe could not get the principal: beſides, during the time ſhe received the intereſt, ſhe was under twenty-one, and therefore her accepting of intereſt could not prejudice her. And her coming into the commiſſion, and receiving a dividend would be no obſtruction to her following *Lambert*'s *aſſets* till ſhe had a full ſatisfaction; and what was received by *Bonett* of *Capps* muſt be looked on as the eſtate of *Lambert*, and could not be a *ſurplus*, till all the debts and legacies of *Lambert* were paid. That the account ſettled between the guardian and *Capps*, and the leaving money in *Capps* hands to pay the plaintiff, could not poſſibly bind her, ſhe not being party, or conſenting to that tranſaction; nor could the application of the money received by *Bonett* any ways affect her intereſt, it remaining as to her *Lambert*'s eſtate ſtill, and liable to her legacy. He thought likewiſe the appellants ought not to have coſts, and affirmed the decree. Mr. *Vernon* and *R. Raymond* with the appellants.

Cliffe et alii *verſ.* Gibbons, Kadwell, et alios.

December 8, 1714. *Chancery.*

A fee paſſes by the deviſe of all the reſt of his eſtate to his wife *E.* ſubject to the payment of his debts.

UPON hearing this day, the caſe appeared to be this, *viz.* *Ranceford Waterhouſe* being ſeiſed in fee-ſimple of a plantation and ſeverel lands, *&c.* in *Jamaica*, the 15th of *November* 1688 made his will in writing, and thereby directed that all his debts ſhould be paid as ſoon as conveniently could be after his deceaſe together with his funeral and other charges, and thereby gave power to *Elizabeth Waterhouſe* his wife (if need ſhould be) to ſell his lands, tenements, ſervants, good and chattels in *Jamaica*, and his leaſes, ſhipping and goods in *England*, to raiſe money to pay the ſame, and then to pay ſuch legacies as are given by his will; among which he gave his ſaid wife 1000 *l.* to be by her detained out of the firſt money that could be raiſed by the profits or ſale of his eſtate, after payment of his debts: and the reſidue of his eſtate, after debts and legacies paid, he gave to his ſaid wife, whom he made ſole executrix; and ſoon after died. She proved the will, and entred upon, and poſſeſſed herſelf of, the real and perſonal eſtate both in *Jamaica* and *England*, and by perception of the profits thereof paid all his debts, funeral charges and legacies, and ſo did not ſell the *Jamaica* eſtate. *Elizabeth Waterhouſe* the 13th of *April* 1711 made her will, and gave all her eſtate in *Jamaica* to the defendant *John Gibbons*, and his heirs upon truſt to pay the plaintiff *Cliffe* 1000 *l.* by yearly payments out of the neat produce (after all charges deducted) and then to pay ſeveral other legacies; and after payment of all the ſaid legacies, ſhe gave that eſtate to the defendant *John Gibbons* and his heirs. She being alſo ſeiſed and poſſeſſed of both real and perſonal eſtate in *England*, ſhe charged it with the payment of ſeveral legacies, and (among others) with 30 *l.* to the defendant *John Kadwell*, and 250 *l.* apiece to the defendants *Mary* and *Anne Kadwell* his daughters. And the *reſiduum* of her eſtate in *England* ſhe gave to the plaintiff *Cliffe*, and made the plaintiff *Cliffe* and the defendant *John Gibbons* executors.

November 30, 1712. *Elizabeth Waterhouſe* the teſtatrix ſigned a ote as follows, *viz.*

“ *London*, *November* 30, 1712. “ Couſin *John Gibbons*, in
“ caſe I die, pay unto my couſins *Mary* and *Anne Kadwell* 250 *l.*
“ apiece, and 70 *l.* more to my couſin *John Kadwell* for mourn-

"ing, and place it to my account, and it ſhall be allowed you.
† "*The mark of* Elizabeth Waterhouſe;"
ſhe then not being able to write her name as uſual: which note upon a conteſt in *Doctors commons* was made a codicil to the ſaid will. And the plaintiff *Cliffe* and defendant *Gibbons* joined in the probate.

The teſtatrix at her death had about 80 hogſheads of ſugar upon the high ſeas coming from *Jamaica* for *England*, of which 32 were loſt; the reſt afterwards came to *England*, and were poſſeſſed by the defendant *John Gibbons*.

This being the fact, *Mary Cliffe* the plaintiff brought her bill againſt *John Gibbons* and the *Kadwells*, to have an account of the perſonal eſtate of *Elizabeth Waterhouſe*, of which the defendant *Gibbons* poſſeſſed himſelf, to have her 1000*l.* legacy charged on the *Jamaica* eſtate, to have the 250*l.* and 250*l.* and 70*l.* legacies given the *Kadwells* paid out of the *Jamaica* eſtate; and to have an account of the ſugars, as part of the *Engliſh* eſtate. To which all the defendants put in their anſwers, and witneſſes were examined, *&c.* The *Kadwells* brought a croſs bill againſt *Cliffe* and *Gibbons*, the executors of the will of *Elizabeth Waterhouſe*, for their legacies given by the will and codicil, *&c.* And on hearing both cauſes this day before the lord chancellor *Cowper*, the firſt queſtion was, whether *Elizabeth Waterhouſe* was ſeiſed in fee of the *Jamaica* eſtate, ſo as to have a power to charge it or not; for the defendant *Gibbons* (whoſe mother was heir at law to *Ranceford Waterhouſe*, and who had conveyed the *Jamaica* eſtate to her ſon the defendant) inſiſted that ſhe only had a power given her by her huſband's will to ſell, which ſhe never executed, but by perception of the profits paid his debts, *&c.* that by the words, the reſt of his eſtate, which he deviſed to her, only an eſtate for life paſſed, and that the reverſion deſcended to his heir at law, under whom he claimed, and conſequently, that *Elizabeth Waterhouſe* could not charge the 1000*l.* upon that eſtate for the plaintiff's benefit.

But the lord chancellor *Cowper* was clear of opinion, that a fee paſſed by the deviſe of all the reſt of his eſtate to his wife *Elizabeth*, ſubject to the payment of his debts, *&c.* and decreed the 1000*l.* to be paid to the plaintiff. See 3 *Mod.* 45. *Reeves verſ. Winnington. A.* deviſes all his eſtate to *J. S.* a fee paſſes. 1 *Ro. Ab.* 834. *Stile* 193, 281. *Johnſon verſ. Kerman.* 3 *Keble* 245. *Wilſon verſ. Robinſon.* 3 *Mod.* 228. *Hyley verſ. Hyley.* And the lord chancellor held, that where a man deviſes all his eſtate, goods and chattels, and no mention had been made before in the will of lands of which the teſtator was ſeiſed in fee, a fee-ſimple will not paſs; but where a real eſtate is mentioned before in the will, and then ſuch words follow, a fee paſſes.

The next queſtion was, whether the *Kadwells* ſhould have each of them two ſums of 250*l.* one by the will, and the other by the order. And upon reading witneſſes, who depoſed, that the teſtatrix took notice ſhe had given them 250*l.* by the will, and ſaid ſhe would make it up 500*l.* both ſums were decreed them, and alſo that it ſhould be paid out of the *Engliſh* eſtate, which appeared to be her intent by the depoſition of witneſſes.

The third queſtion was, whether the ſugars, that were on the ſeas at the teſtatrix's death, ſhould be eſteemed as a part of her *Jamaica*, or *Engliſh* eſtate. And decreed, that it not being arrived in *England* before her death, and the truſts being to be performed by the will out of the neat produce of the *Jamaica* eſtate, it ſhould be took as part of the *Jamaica* eſtate.

Hilary Term

1 Georgii regis, 1714.

Rex *verſ.* Bradford.

February 9, 1714.

A bond to the King, his executors and adminiſtrators, is within the 33 Hen. 8. c. 39.

IN a *ſcire facias* brought in the petty-bag, it was ſet out, that the 13th day of *March* laſt paſt at *Weſtminſter* in the county of *Middleſex*, *Iſaac Pyke*, the defendant *Bradford*, and others, *per quoddam ſcriptum ſuum obligatorium ſigillis ſuis ſigillatum cognoverunt, et quilibet eorum cognovit, ſe teneri et firmiter obligari ſereniſſimae dominae Annae nuper reginae Magnae Britanniae, &c. defunctae in* 500 *l. ſolvendis dictae nuper reginae executoribus vel adminiſtratoribus ſuis*, which was not paid to the Queen in her life, nor yet to the King; therefore the writ commanded the ſheriff of *Middleſex*, to ſummon the defendant *B.* to be in Chancery, *&c. in craſtino animarum* next following, to ſhew why execution ſhould not be againſt him, *&c. teſte* 4 *Octob.* 1 *Georgii*. Upon *ſcire feci* returned, the defendant appeared, and demurred to the writ, and the attorney general joined in demurrer. And Mr. *Peere Williams* and Sir *Robert Raymond* for the defendant took exception, that this bond was not framed according to the ſtatute of 33 *Hen.* 8. *c.* 39. and conſequently it had not the effect of a recogniſance, nor could a *ſcire facias* lie thereon; for the money was made payable to the Queen, her executors and adminiſtrators, and therefore alſo was entred into to her, in her natural capacity. See *Moore* 193. *pl.* 342. *Anderſ.* 129. *Scroggs verſ.* lady *Greſham*: and ſee the ſtatute of 33 *Hen.* 8. *c.* 39. Mr. Solicitor General *Lechmere* for the King; of which opinion was the lord chancellor, and gave judgment for the King. See 2 *Co.* 92. *Mich.* 35 *Hen.* 6. 29. *b. pl.* 34.

Trin.

Trin. Term

1 Georgii regis, 1715.

Redſhaw *verſ.* Braſier et uxorem, et alios.

October 18, 1715. *Chancery.*

UPON exceptions to Mr. *Lovibond* the maſter's report, the caſe was this: *Joſeph Anderſon* a freeman of *London* having iſſue by his firſt wife, *Juliana* (who was the firſt wife to the plaintiff *Redſhaw*, and to whom he had took out adminiſtration) and *Hannah* wife of *Braſier*, and by *Barbara* his ſecond wife (who after *Anderſon*'s death married alſo the plaintiff *Redſhaw*, and to whom after her death, he alſo took out adminiſtration) *Joſeph*, *William*, and *Jane* (who died in her father's life-time) 15 of *September* 1701 made his will, and thereby directed, that an inventory ſhould be took of his perſonal eſtate by his executors, and that *Barbara* his wife ſhould have her widow's chamber, and after his debts and funerals paid, gave her a third part of his perſonal eſtate; another third part he gave equally amongſt his children, *Juliana*, *Hannah*, *Joſeph*, *William*, and *Jane*; and the remaining third part he gave as follows, *viz.* 740 *l.* to *Hannah*, 200 *l.* apiece to *Joſeph*, *William*, and *Jane*, and the overplus (if any) to be equally divided among four of his children, and to be paid them by his executors, *viz.* to his ſons at the age of twenty-one years, and to his daughters at twenty-one, or marriage; and if the third part of his perſonal eſtate in his diſpoſe ſhould by bad debts or other accidents fall ſhort, and not be ſufficient to pay all his ſaid legacies, he willed each of his ſaid legatees ſhould bear ſuch loſs, whatever it amounted to, in proportion according to their legacies, and made *James Duck*, *Joſeph Chandler*, *Samuel Greenhill* and *Thomas Greenhill* executors; and died in *April* following.

Mr. *Duck*, Mr. *Chandler* and *Thomas Greenhill* only proved the will, and exhibited an inventory of their teſtator's perſonal eſtate into the chamber of *London*, and entred into the uſual recogniſance, and paid *Barbara* the widow, and Mr. *Redſhaw* (who had married *Juliana*) ſeveral ſums on account of their cuſtomary ſhares.

Thomas Greenhill died, and Mr. *Duck* having took out adminiſtration to him, a bill was exhibited againſt Mr. *Duck*, Mr. *Chandler* and the infants, by *Redſhaw*, for an account of the perſonal eſtate, and to have a diſtribution thereof according to the cuſtom and the will.

May 18, 1707, the cauſe was heard, and an account directed, and the maſter by his report charged the defendant *Duck* (who was become inſolvent) with 163*l.* 1*s.* 10*d.* as the balance of his account not anſwered by him, and with 279*l.* 19*s.* received by *Thomas Greenhill* out of the teſtator's perſonal eſtate not anſwered by him, making together 443*l.* 10*d.* And the maſter reported, that that 443*l.* 10*d.* ought to be paid to the defendant in right of his wife *Hannah* (who ſurvived both her brothers, *Joſeph* and *William*, and was intitled to their ſhares out of the teſtamentary part) but if it was loſt, it ought to be born out of the teſtamentary part, and not out of the cuſtomary parts. To which report the defendant *Braſier* took exceptions, which coming to be argued the 15th of *December* 1714 before the lord chancellor, the queſtion aroſe, upon what part of the teſtator's eſtate the loſs of this money (in caſe it ſhould not be recovered) was to fall; whereupon it was ordered, that the ſaid maſter ſhould ſtate a caſe touching the ſaid loſs, and ſend it to the recorder of the city, to certify to the court the cuſtom of the city of *London* upon the caſe ſo to be ſtated, *viz.* whether by the ſaid cuſtom the loſs of the ſaid freeman's eſtate by the inſolvency of his executors ought to be born out of the teſtamentary part of his eſtate only, or out of the whole perſonal eſtate, as well cuſtomary as teſtamentary.

The maſter ſtated the caſe as before, and ſent it to the recorder. And the lord mayor, aldermen, and recorder, ſent a certificate to the court ſubſcribed by them, which after a recital of the caſe ſtated by the maſter was as follows:

" We the lord mayor and aldermen of the ſaid city of *London*, " whoſe names are ſubſcribed, do in obedience to the ſaid order, " by *William Thompſon* eſquire, recorder of the ſaid city, *ore tenus* " humbly certify unto your lordſhip, that if a freeman of *London* " dies, leaving a widow and children, his perſonal eſtate (after his " debts paid, and the cuſtomary allowance for his funeral, and for " the widow's chamber being firſt deducted thereout) is by the " cuſtom of the ſaid city to be divided into three equal parts, and

" diſpoſed of as follows, *viz.* one third part thereof belongs to his " widow, another third part belongs to his children unadvanced " by him in his life-time, and the other third part ſuch freeman " by his laſt will may deviſe as he pleaſes.

" But where a loſs of a freeman's eſtate by the inſolvency of his " executors doth happen, there is not any cuſtom of the city of " *London*, which directs, whether ſuch loſs ought to be born out " of the teſtamentary part of his eſtate only, or out of his whole " perſonal eſtate, as well cuſtomary as teſtamentary. Dated the " 26th day of *April* 1715," and ſubſcribed by Sir *William Humphreys* lord mayor, Sir *William Thompſon* the recorder, and fifteen aldermen.

The cauſe coming on in the paper this day, the certificate being read, it appeared, no aid for the determination of this caſe was to be had from the cuſtom, and no caſe being ſtated as a precedent, where this matter had been determined, it ſtood for the opinion of the court upon the reaſon of the thing. And after hearing the counſel on both ſides, the lord chancellor *Cowper* held, that the loſs was to be born wholly out of the teſtamentary part, ſince it proceeded from the inſolvency of the executor, who was appointed by the teſtator and in the nature of his truſtee, for whoſe defaults it was juſter that his legatees, *&c.* ſhould ſuffer, than the perſons who claimed a right by the cuſtom, and not under the teſtator. Sir *Thomas Powys* and Mr. *Cowper* counſel for the plaintiffs. Sir *R. Raymond* only counſel for the defendants; Sir *Joſeph Jekyll* and Mr. *Ketelbey*, who were the defendants other counſel being abſent.

Hilary

Hilary Term.

10 Georgii regis, B. R. 1723.

Memorandum, *That Sir* Robert Raymond, *and* Edmund Probyn *of the* Middle Temple, *Eſq*; *appeared in Chancery,* Friday *the* 31*ſt day of* January 1723, *in obedience to writs directed to them, returnable* immediate, *commanding them to take upon them the degree of ſerjeants at law: and they took the uſual oaths there, and immediately after were coiſed in the treaſury of the Common Pleas, and being brought to the bar counted in that court; and after having entertained the lord chancellor, judges, and ſerjeants, at dinner at* Serjeants Inn *hall in* Fleetſtreet, *Sir* Robert Raymond *was that evening ſworn one of the juſtices of the court of King's Bench at the lord chancellor's houſe in* Lincoln's Inn Fields, *in the room of Sir* Robert Eyre, *who in the* Michaelmas *vacation before had been made lord chief baron of the Exchequer in the room of the late lord chief baron* Mountague, *who died in* Michaelmas *term. The ſame time Sir* Philip Yorke *his Majeſty's ſolicitor general was ſworn attorney general in Sir* Robert Raymond*'s place, and Sir* Clement Wearg *within a few days ſucceeded Sir* Philip Yorke *in the office of his Majeſty's ſolicitor general: and Sir* Robert Raymond *took his place as one of the judges of the King's Bench,* Monday, February *the* 3*d*, 1723. *The motto of our rings was,* Salva ——— Libertate potens. Lucan.

The inhabitants of the pariſh of St. Giles in Reading *againſt* the inhabitants of the pariſh of Everſley Blackwater.

Monday, February 3, 1723.

S C. 1 Stra. 580.
A poor child, who had gained no ſettlement, born in the pariſh of *St. Giles*, where the father lived, but had gained no ſettlement, after the death of the father may be removed into the pariſh of *Everſley*, where the father was laſt ſettled.

A poor child muſt be maintained in the pariſh where born, if it has gained no ſettlement, and the parents have no ſettlement.

A. Having gained a ſettlement in the pariſh of *Everſley Blackwater* removed into the pariſh of *St. Giles* in *Reading*, and married there, had two children born there, and lived there till his death; but gained no new ſettlement in that pariſh. After the death of *A.* the children were removed by order of two juſtices to *Everſley Blackwater*, the place of their father's laſt legal ſettlement. And upon an appeal to the quarter-ſeſſions from this order of the two juſtices, this order, by an order of the ſeſſions, which ſtated the caſe ſpecially, was quaſhed, the juſtices of peace at the quarter-ſeſſions being of opinion, that the children could not be removed to *Everſley Blackwater* after their father's death, he never having been in that pariſh after they were born, and having lived with his children always in the pariſh of *St. Giles*. Theſe orders being removed into the King's Bench by *certiorari*, Mr. *Reeve* for ſupporting the order of ſeſſions inſiſted, that the place of the birth of the children in this caſe was the place of their ſettlement, *Salk*. 528. Inhabitants of *Comner verſ. Milton*. And that it was adjudged *Paſch*. 12 *Will*. 3. *B. R.* between the pariſhes of *Spittlefields* and *St. Andrew Holborn*, that a poor child muſt be maintained by the pariſh where it is born, if it have gained no other ſettlement, and its parents have no ſettlement: See before, 567. 2 *Bulſtr*. 351. But it was held by *Pratt* chief juſtice, *Powys*, *Forteſcue* and *Raymond* juſtices, that though the place of the birth of a poor child, where the father has got no ſettlement, is the place of the ſettlement of the child; yet where the father has gained a ſettlement, his children, though born in another pariſh, ſhall be looked on as ſettled at the place of their father's laſt legal ſettlement, and ſhall be removed thither, as well after the death of their father, if occaſion requires, as in his life-time, ſuppoſing they have gained no ſettlement of their own. And therefore the order of the quarter-ſeſſions was quaſhed.

Elde qui tam *verſ.* Stephens.

February 4, 1723.

In debt *qui tam* for exerciſing a trade in a corporation contrary to 5 Eliz. c. 4. after verdict fendant, the plaintiff ſhall pay him coſts, notwithſtanding 18 Eliz. c. 5. par. 6.

IN debt *qui tam, &c.* brought by the plaintiff againſt the defendant for exerciſing the trade of a mercer in the corporation of *Oſſulſtry* contrary to the 5 *Eliz. cap.* 4. verdict was given for the defendant, and a rule was made, that the plaintiff the informer ſhould pay the defendant's coſts on the 18 *Eliz. c.* 5. *ſect.* 3. Mr. ſerjeant *Darnall* moved to diſcharge the rule, becauſe he alleged, that this ſuit was commenced for the benefit of the corporation, and therefore the ſtatute of 18 *Eliz. c.* 5. did not extend to this caſe: becauſe by *par.* 6. it is provided, that that act ſhall not reſtrain any certain perſon, body politick or corporate, to whom, or to whoſe uſe, any forfeiture, penalty, *&c.* is, or ſhall be ſpecially limited or granted by virtue of any ſtatute, *&c.* And by the ſtatute of 5 *Eliz. cap.* 4. *par.* 45. all forfeitures for exerciſing trades in a corporation, contrary to that ſtatute, are given to the uſe of the corporation. And he offered to produce an *affidavit*, that this ſuit was for the benefit of the corporation; and if ſo, this caſe was not within the ſtatute of 18 *Eliz. c.* 5. for that extends only to common informers. 2 *Leon.* 116. *Doghead's* caſe, *Cro. Eliz.* 434. *Johnſon verſ. Pays.* But it was held by all the judges, that the court could not receive any information of this matter by *affidavit*, nor take notice of any thing but what appeared on the face of the record; and therefore could look upon the plaintiff only as a common informer, and by conſequence he ought to pay coſts: for which reaſon the motion was denied. But ſee *Hob.* 183. *Moore* 886. *pl.* 1245. and *quaere*, whether the 5 *Eliz. c.* 4. *par.* 45. gives the main penalty (as *Hobart* expreſſes it) for uſing a trade in a corporation contrary to that act to the corporation; and if it does, if a common informer can maintain a ſuit for it? Note, that matter was not ſtirred in this caſe by the counſel, nor taken notice of by the court on the motion, nor was it material in the preſent queſtion before the court.

The court can only take notice of what appears in the record.

The King *againſt* Johnſon.

S. C. 1 Stra. 579.

On a *habeas corpus* the court took a child out of the cuſtody of the guardian appointed by the Spiritual Court, and delivered her to the guardian appointed by her father's will.

A *Habeas corpus* was granted, directed to the defendant, to bring up the body of a child about ten years of age, which ſhe had in her cuſtody. To which ſhe returned, that ſhe was appointed guardian to the child by the Spiritual Court, and therefore kept her in her cuſtody. But the perſon, who ſued out the *habeas corpus*, inſiſted, he was appointed guardian to the girl by her father's will. The child was very unwilling to be taken from the care of Mrs. *Johnſon*, who was her near relation, and had taken great care of her, and was to have no benefit by keeping her. And the court doubted, whether they ſhould deliver the child to the guardian appointed by the father's will, or only ſet her at liberty out of Mrs. *Johnſon*'s cuſtody, and leave her to go to whom ſhe pleaſed. Whereupon the court ordered Mrs. *Johnſon* to bring up the child again the laſt day of the term, at which time alſo the guardian, who was then in the country, was directed to attend; at which day the child was delivered by the court to the guardian appointed by the father's will.

The King *againſt* the chancellor, maſters and ſcholars of the univerſity of Cambridge.

S. C. 1 Stra. 557.

Mandamus to reſtore Dr. *Bentley* to his academical degrees.

Return.

A *Mandamus* was directed to the chancellor, maſters and ſcholars of the univerſity of *Cambridge*, commanding them to reſtore *Richard Bentley* to the academical degrees in that univerſity of batchelor of arts, maſter of arts, batchelor of divinity, and doctor of divinity, *&c.* To which the defendants returned, that the univerſity of *Cambridge* is, and time out of mind has been, a body corporate, conſiſting of a chancellor, maſters and ſcholars of the ſame univerſity: that the ſaid chancellor, maſters and ſcholars have, and time out of mind have had, the care, government and correction of the ſaid univerſity, and of all the ſcholars, ſtudents, and others, upon the account of their ſtudies reſiding in the ſaid univerſity; and for all the time aforeſaid uſed to confer certain academical degrees or titles, *viz.* as well thoſe degrees in the ſaid writ mentioned as degrees of the like nature in divers other faculties or ſciences, *et ab eiſdem gradibus ſive titulis ſuſceptis iterum pro rationabilibus cauſis ſuſpendere amovere aut excludere quandocunque viſum fuerit neceſſarium ſeu expediens:* that time out of mind there has been within the ſaid univerſity *quaedam curia tenta coram cancellario ejuſdem univerſitatis aut procancellario univerſitatis praedictae vel locum tenente eorundem cancellarii magiſtrorum et ſcholarium univerſitatis praedictae pro*

Preſcriptive right in the body to confer and deprive of degrees.

Vice-chancellor's court.

pro cognitione triatione et determinatione omnium placitorum perſonalium, tam debitorum computorum et quorumcunque aliorum contractuum quam tranſgreſſionum contra pacem et miſpriſionum quarumcunque, infra villam Cantabrigiae et ſuburbia ejuſdem villae factarum (mayhem and felony only excepted) *ubi magiſter vel ſcholaris vel ſerviens ſcholaris aut communis magiſter dictae univerſitatis una partium fuerit ubicunque infra villam praedictam aut ſuburbia ejuſdem ſecundum leges et conſuetudines univerſitatis praedictae:* that Queen *Elizabeth* by her letters patent, dated 26 *April*, third of her reign, granted for herſelf, *&c.* to the ſaid chancellor, maſters and ſcholars of the ſaid univerſity, *quod ipſi et eorum loca tenentes* for the time being, *coram ſeipſis* ſhould have conuſance of all pleas perſonal, as well of debts, *&c.* (as laid before in the preſcription) and that all ſuch pleas the chancellor, maſters and ſcholars *et eorum loca tenentes* might hear, hold and finally determine *ubicunque infra villam aut ſuburbia ejuſdem villae placuerit, et inde executionem facere ſecundum leges et conſuetudines ſuas antetunc uſitatas*; and that the ſaid court ſhould be a court of record; and of ſuch actions, *&c. tam ex officio quam ad ſectam partis ſecundum leges et conſuetudines praedictas inquirerent et finaliter determinarent eiſdem modo et forma prout ante tempus illud uſi fuerunt; et quod tam juſticiarii ad placita coram ipſa regina et ſucceſſoribus ſuis tenenda aſſignati et aſſignandi, juſticiarii dictae dominae reginae haeredum et ſucceſſorum ſuorum de banco, quam alii judices quicunque in praeſentia et abſentia dictae reginae haeredum et ſucceſſorum ſuorum dicto cancellario et ejus ſucceſſoribus eorumque loca tenentibus de omnibus placitis praedictis allocationem facerent abſque difficultate vel impedimento aliquali; et quod nullus juſticiarius ſeu judex in praeſentia vel abſentia dictae reginae haeredum ſeu ſucceſſorum ſuorum, vicecomes major ballivus ſeu aliquis miniſter de placitis illis ſeu aliquo eorundem ſe intromitteret, nec partem ad reſpondendum coram ipſis poneret, ſed quod pars illa coram praefatis cancellariis ſeu eorum loco tenentibus inde ſolummodo juſtificaretur et puniretur in forma praedicta et non alibi neque alio modo; et quod omnia brevia ſuper hujuſmodi placitis et tranſgreſſionibus contra iſtam conceſſionem facta ſeu fienda forent ipſo jure nulla:* that by an act of parliament held 2 *April* 13 *Eliz.* intitled, An act concerning the ſeveral corporations of the univerſities of *Oxford* and *Cambridge*, and the confirmation of the charters, liberties and privileges granted to either of them, it was enacted, that letters patent granted by *Henry* VIII. to the chancellor and ſcholars of the univerſity of *Oxford*, and the ſaid letters patent of the ſaid Queen granted to the chancellor, maſters and ſcholars of the univerſity of *Cambridge*, and all other letters patent granted by any of the Queens predeceſſors to either of the univerſities, *extunc forent bonae effectuales et pleni vigoris in lege* to either univerſity *ſecundum formam verba clauſulas et veram intentionem* of the ſaid letters patent, as if they had been

Letters patent of 3 Eliz.

Act of parliament 13 Eliz. confirming the privileges of the univerſities.

verbatim

Plaint levied by Dr. *Middleton* at the vice chancellor's court 23 *Sept.* 1718. againſt Dr. *Bentley.*

Proceſs granted and directed to the eſquire bedel.

Service of proceſs on Dr. *Bentley.*

Dr. *Bentley*'s contempt of the proceſs.

At a court held 3 *Octob.* Dr. *Middleton* declared.

verbatim recited in the ſaid act; and that all the ſaid letters patent, and all liberties, franchiſes, privileges, *&c.* by the ſaid letters patent, ſhould by virtue of the ſaid act of parliament be ratified and confirmed to the ſaid ſeveral univerſities: that at a court held 23 *Sept.* 1718. before *Dr. Gooch* vice-chancellor of the ſaid univerſity of *Cambridge necnon locum tenente* of the chancellor, maſters and ſcholars of the ſaid univerſity, held within the town of *Cambridge ſecundum conſuetudinem infra univerſitatem praedictam* time out of mind uſed, *et juxta libertates et privilegia* to the ſaid chancellor, maſters and ſcholars before granted, Dr. *Conyers Middleton,* then being one of the maſters of the ſaid univerſity, and within the ſaid univerſity reſiding, levied a plaint in debt for 4*l.* 6*s.* againſt *Richard Bentley* in the writ named, one of the ſaid maſters, and within the ſaid univerſity then reſiding, according to the cuſtom of the ſaid court and of the ſaid univerſity time out of mind uſed, for a debt and cauſe of action within the juriſdiction of the ſaid court contracted or ariſing, and thereupon the ſaid Dr. *Middleton* then and there prayed proceſs againſt the ſaid *Richard Bentley* according to the cuſtom of the univerſity and court aforeſaid all the time aforeſaid uſed, *ſuper quo ad petitionem* of the ſaid Dr. *Middleton taliter in eadem proceſſum fuit quod quoddam decretum ſive proceſſus extra curiam praedictam bedello armigero univerſitatis praedictae ac miniſtro curiae illius directum,* to compel the ſaid *Richard Bentley* to appear at the then next court to be held before the vice-chancellor *ac locum tenente* of the chancellor, maſters and ſcholars of the ſaid univerſity, *emanavit ſecundum conſuetudinem curiae praedictae,* which decree afterwards and before the return thereof, *viz.* the ſaid 23 *Sept.* 1718. was delivered to *Edward Clark,* one of the eſquire bedels and officers of that court then being, to be executed in due form of law, which ſaid *Edward Clark* afterwards, *viz.* the ſaid 23 *Sept. ſecundum exigentiam decreti praedicti* at *Trinity* college within the juriſdiction of the ſaid court *ad ipſum Richardum acceſſit et praedictum decretum ſive proceſſum ei oſtendit et inſervivit, et ſuperinde idem Richardus Bentley* the ſaid 23 *Sept. infra juriſdictionem curiae illius adtunc et ibidem colloquium habens cum praefato Edwardo Clark de et concernens decretum ſive proceſſum praedictum et de et concernens praefatum Thomam Gooch judicem illum adtunc exiſtentem, contumelioſe dixit et propalavit, quod proceſſus ille fuit ſtatutis minime congruus, Anglice* unſtatutable, *quodque ipſe noluit illi obedire, et decretum ſive proceſſum illum e manibus ipſius Edwardi Clark adtunc et ibidem abſtulit, et adtunc et ibidem affirmavit, quod praedictus procancellarius non fuit ipſius judex, et quod praedictus procancellarius ſtulte egit, et alia verba contumelioſa de eodem protulit:* that at the then next court before the ſaid vice-chancellor, *&c.* within the ſaid town of *Cambridge, &c.* held 3 *Octob.* 1718. *ſecundum conſuetudinem ejuſdem univerſitatis et curiae et juxta libertates et privilegia praedicta,* the ſaid Dr. *Middleton* appeared, and declared againſt *Richard Bentley* upon the ſaid plaint, that he was indebted to *Middleton* in 4*l.* 6*s.* and named his proctor: and at the ſaid court *Robert Grove* then regiſter and miniſter of the ſaid court *exhibuit depoſitiones* of the ſaid *Edward Clark* bedel and miniſter of the ſaid court of the contempt aforeſaid, *quibus depoſitionibus adtunc et ibidem lectis, ad eandem curiam per conſiderationem ejuſdem curiae ad petitionem* of the ſaid proctor, and with the aſſent of ſix doctors (naming them) *eidem procancellario adtunc aſſidentium,* the ſaid *Richard Bentley ſecundum conſuetudinem curiae et univerſitatis praedictarum a toto tempore praedicto uſitatam et approbatam pro contemptu illo ſuſpenſus fuit ab omni gradu ſuſcepto, et per eandem curiam adtunc et ibidem pronuntiatus fuit eſſe ſic ſuſpenſus:* that there is, and time out of mind has been, a cuſtom within the ſaid univerſity, that the chancellor or vice-chancellor of the ſaid univerſity *vel ejus locumtenens quandam congregationem conſiſtentem de eodem cancellario aut procancellario vel ejus locumtenente et magiſtris regentibus et non regentibus infra univerſitatem Cantabrigiae praedictam reſidentibus infra limites ejuſdem univerſitatis ſummonere et convocare poterit quandocunque placuerit*; and that the congregation ſo ſummoned and convened *quoſlibet gradus academicos per eandem univerſitatem ſecundum conſuetudines ejuſdem univerſitatis conceſſos ab aliqua perſona infra univerſitatem illam reſidente propter contumaciam talis perſonae aut aliam juſtam et rationabilem cauſam prout eis viſum fuerit expediens auferre, et eoſdem gradus aut eorum aliquos eidem perſonae ſupra ſuam purgationem aut ſummiſſionem reſtituere de tempore in tempus ſecundum ſuam diſcretionem poterit et per totum tempus praedictum uſa fuit et conſuevit:* that at a congregation of the ſaid univerſity according to the cuſtom by the ſaid Dr. *Thomas Gooch* vice-chancellor, *&c.* ſummoned and convened the ſeventeenth of *October* 1718, within the ſaid univerſity and town held, the ſaid vice-chancellor *narravit praedictis magiſtris ſic convocatis et conventis contemptum praedictum, et eorum judicium de praemiſſis petiit, ſuper quo viſis et intellectis actibus et recordis curiae praedictae, necnon lectis et auditis depoſitionibus praedictis, quaedam gratia ſive placitum de eodem Richardo Bentley propoſita fuit ſecundum conſuetudines infra univerſitatem praedictam in ea parte a toto tempore ſupradicto uſitatas in his verbis: Cum reverendus vir Richardus Bentley collegii Trinitatis magiſter ad ſummos in hac univerſitate titulos et honores veſtro favore dudum promotus adeo ſe immemorem et loci ſui et veſtrae authoritatis dederit, ut debite ſummonitus ad comparendum et reſpondendum in cauſa coram procancellario obedientiam recuſaverit, miniſtrum univerſitatis ſummonentem indignis modis tractavit, procancellarium et capita collegiorum opprobriis impetiverit, juriſdictionem denique univerſitatis longo uſu regiis chartis et auctoritate parliamenti ſtabilitam pro nihilo habendam eſſe declaraverit; cumque idem Ri-*

The regiſter exhibited the depoſitions of the bedel of the contempt.

Judgment by the ſaid court, that Dr. *Bentley* ſhould he ſuſpended from all degrees.

Cuſtom to hold a congregation.

Cuſtom for the congregation to deprive for contumacy, *&c.*

and to reſtore.

Congregation held 17 *Octob.* 1718.

Grace put up.

Dr. Bentley deprived of all degrees.

chardus Bentley ſuper his cauſis ab omni gradu ſuſpenſus fuerit, et poſtea per tres dies juridicos expectatus comparere tamen neglexerit: placeat vobis, ut dictus Richardus Bentley ab omni gradu titulo et jure in hac univerſitate dejiciatur et excludatur: et ſuperinde idem Richardus Bentley per ſententiam et congregationem ſecundum conſuetudines univerſitatis praedictae a toto tempore praedicto uſitatas ab omni gradu titulo et jure in eadem univerſitate dejectus et excluſus fuit: quodque idem Richardus Bentley authoritati ejuſdem univerſitatis ſe ſubmittere neglexerit et recuſaverit, et hucuſque neglexit et recuſat: et his de cauſis praefatum Richardum Bentley ad gradus academicos in brevi praedicto mentionatos non reſtituimus, et eum ſic in contemptu remanentem reſtituere vel reſtitui facere ſalva authoritate academica non poſſumus.

A. Snape procan.

Return of a viſitor good in a *mandamus*.

Privileges of graduates in the univerſities.

Laſt *Trinity* term this caſe was argued by Mr. ſerjeant *Cheſhyre* for Dr. *Bentley*, and by Mr. ſerjeant *Comyns* for the univerſity; and at that time the whole court, *viz. Pratt* chief juſtice, *Powys*, *Eyre*, and *Forteſcue*, juſtices, were ſtrong of opinion, that the return was ill, and that a peremptory *mandamus* ought to iſſue; having before reſolved, that a *mandamus* would well lie in this caſe, becauſe theſe degrees in the univerſity were to be looked on as more than bare titles of honour, or precedency, ſeveral temporal advantages being annexed to them by acts of parliament. And this term the merits of the return were argued by Mr. *Reeve* for Dr. *Bentley*, and Mr. Attorney General *Yorke* for the univerſity. Mr. *Reeve* for Dr. *Bentley* admitted, that if the univerſity had returned, that the King was their viſitor, as they might have done, it would have put an end to the diſpute here; but not having returned, that they had a viſitor, if it appears by the return that the proceedings in the univerſity have not been agreeable to the rules of juſtice, a peremptory *mandamus* ought to iſſue. He inſiſted, when degrees in the univerſity were conferred upon a perſon, he had thereby a freehold in them, and would be intituled to ſeveral privileges and advantages annexed to them by acts of parliament, of which this court muſt take notice. By 21 *Hen.* 8. *c.* 13. *ſect.* 23. doctors in divinity, batchelors in divinity, *&c.* may purchaſe and take diſpenſations to hold two benefices with cure of ſouls, *&c.* By 13 *Eliz. c.* 12. *ſect.* 6. a batchelor of divinity may be admitted to a benefice of above 30*l. per annum* in the Queen's books. Incumbents of churches in cities and towns corporate united purſuant to 17 *Car.* 2. *c.* 3. *ſect.* 6. muſt be graduates of one of the univerſities in this kingdom. And graduates in the univerſities are intituled to ſeveral privileges by the canons of 1603, *Canon* 41, 127.

In this return the univerſity rely on two things:

1. A ſuſpenſion of Dr. *Bentley* from his degrees by the vice-chancellor's court.

2. A deprivation of them by the convocation.

As to the ſuſpenſion, he inſiſted it was not legal. For the ſupport of it he ſaid, the univerſity rely:

1. On a cuſtom.

2. The letters patent of Queen *Elizabeth*, in which there is that clauſe, *Quod nullus juſticiarius ſeu judex ſe intromittat*, &c.

3. The act of 13 *Eliz.* confirming the ſaid letters patent, and the liberties and franchiſes of the univerſity.

A grant of holding plea, &c. with a clauſe, *nullus judex ſe intromittat*, &c. is but a grant of excluſive conuſance.

And he would firſt conſider that clauſe of *nullus juſticiarius ſeu judex ſe intromittat*, &c. becauſe it was ſtrongly urged for the univerſity, that by that clauſe this court was excluded from all juriſdiction of inquiring into their proceedings in this caſe. But he ſaid, this was no more than a grant of conuſance of pleas excluſive of other courts, and muſt be governed by the rules the law has provided relating to ſuch ſort of grants, by which the courts above are not deprived abſolutely of juriſdiction. For if an action is commenced in this court againſt a ſcholar of the univerſity, the univerſity may claim conuſance of the plea by virtue of theſe letters patent, and the act of parliament; and if they make their claim properly, and in time, it muſt be allowed, and the proceedings here will be ſtopt. But if the univerſity does not make their claim the firſt day, this court will proceed notwithſtanding this grant. And ſo was it held *H.* 11 *Ann. B. R. Perne verſ. Manners*; where caſe was brought againſt the defendant, a member of the univerſity, inhabiting within their juriſdiction. The bill was of *Eaſter* term 11 *Ann.* and the defendant had an imparlance till the firſt day of *Trinity* term following; after which, and before plea pleaded, the univerſity of *Cambridge* by their attorney demanded conuſance, and ſet out the letters patent, and act of parliament of Queen *Elizabeth* before mentioned; and the claim was diſallowed, becauſe it was not made the firſt day. And it was then held by the court, that as to the grantee of the franchiſe, there was no difference as to the claim between a grant of a general conuſance, and a grant of conuſance with excluſive words; and on a grant of general conuſance the claim muſt be before imparlance.

Perne verſ. Manners, Caſes L. & E. 156.

Claim of conuſance muſt be the firſt day.

lance. Conuſance cannot be demanded after the tenant has made default. *Mich.* 3 *Hen.* 6. 10. That conuſance cannot be demanded after an imparlance. *Mich.* 6 *Hen.* 7. 9. Then they held, that the act of parliament made no difference, becauſe that confirmed this franchiſe only as it was granted, *viz.* a grant of excluſive conuſance; but the claim of it muſt be according to the rules of law. Indeed in that caſe it was held, there was this difference as to the defendant in the action between a grant of a general conuſance, and of an excluſive conuſance; the firſt the defendant cannot plead to the juriſdiction of the court, the laſt if he comes in time he may; from which caſe it appears, the court looked upon this grant only as a grant of an excluſive conuſance, and that the act of parliament only confirmed it as ſuch, and put it upon the ſame foot as ſuch grants ſtood in law in caſes of grants of excluſive conuſance, and that this court is not thereby excluded from examining into their proceedings. 1 Sid. 103. 1 Lev. 89.

He admitted, that the facts ſet out in the return were contempts to the vice-chancellor's court, which they might have puniſhed, if they proceeded according to the rules of law. He ſaid, that court was a court of record, and therefore might have ſet a fine, and impriſoned the party till it was paid, which is a proper puniſhment for a contempt; but that ſuſpenſion is not a proper puniſhment for a contempt. A corporation could not ſuſpend a member of their body for a contempt to one of their courts. And if they had returned a cuſtom to ſuſpend for a contempt, it would have been an unreaſonable cuſtom, and void. But here no ſuch cuſtom is returned, but only that they ſuſpended *Richardum Bentley ſecundum conſuetudinem curiae*, which is not ſufficient; for the cuſtom, if any ſuch, ought to have been returned particularly. Beſides, they muſt have ſome other way to puniſh contempts to the vice-chancellor's court; for if a perſon, that is not a graduate in the univerſity, ſhould commit a contempt to that court, certainly they have a way to puniſh him; but that could not be by ſuſpending him from any degrees, becauſe he has none.

In the next place he ſaid, that as it ſtands upon this return, the contempt was not ſufficiently made to appear to the vice-chancellor's court. For it is alleged, that *Robert Grove* the regiſter *exhibuit depoſitiones dicti Edwardi Clark, bedelli et miniſtri curiae, ut praefertur, de contemptu praedicto*, which depoſitions being then and there read, *per conſiderationem ejuſdem curiae* the ſaid *Richard Bentley* was ſuſpended, &c.

1. It is not alleged, theſe depoſitions were upon oath, and the word depoſitions does not import *ex vi termini*, that they were upon oath. 3 *Inſt.* 167. *Latch* 133. If in caſe of an indictment it ſhould be *juratores deponunt*, it would be ill.

2. It ought to appear, before whom the oath was taken, and that he had an authority to adminiſter the oath.

3. It is ſaid *depoſitiones de contemptu*; now poſſibly the depoſitions might clear the doctor of the contempt, for it is not ſaid, the depoſitions made out the contempt.

He inſiſted, that the return to this *mandamus* ought to be as certain as a conviction, that the court may judge upon it; becauſe the party has no way to anſwer it, but by falſifying the facts returned, in an action for a falſe return; and in this caſe, if an action was brought to falſify the return as to that part relating to the depoſitions, if it ſhould appear on the trial, the depoſitions were not upon oath, yet the plaintiff could not recover, becauſe they are not alleged ſo to be in the return; and yet if they were not upon oath, vice-chancellor's court ſhould not have proceeded upon them.

But ſuppoſing theſe things ſhould be looked upon to be ſufficiently alleged; yet the ſuſpenſion by the vice-chancellor's court is void, becauſe it is ſet out in the return, that the chancellor, maſters and ſcholars, uſed to confer degrees, and to ſuſpend them, and remove perſons from them; ſo that the power of ſuſpending degrees is in the whole body, but here the ſuſpenſion was by the vice-chancellor's court, which is not the whole body, and that court has no power to ſuſpend. For which reaſons the ſuſpenſion by the the vice chancellor's court muſt fall to the ground.

2. As to depriving Dr. *Bentley* of his degrees by the congregation, Mr. *Reeve* inſiſted, the proceedings were arbitrary and illegal. The cuſtom is returned, that the congregation have time out of mind uſed to deprive any perſon reſiding within the univerſity of any academical degrees conferred by the ſaid univerſity, *propter contumaciam talis perſonae, vel aliam juſtam et rationabilem cauſam.*

1. He ſaid, that the return had not brought Dr. *Bentley* within their juriſdiction, as the cuſtom is laid; for it is not averred, that he reſided within the univerſity.

2. It is not laid in the cuſtom, to what court, or to whom, the perſon to be degraded is to be guilty of contumacy.

3. Though it is ſaid, they may degrade for other reaſonable cauſe; yet here no reaſonable cauſe appears, for it cannot be a reaſonable cauſe for the congregation to degrade for a contempt or contumacy to another court; and it is not ſaid he was guilty of contumacy to the congregation.

4. It came very odly before the congregation, for it did not come by way of appeal, but the vice-chancellor *narravit*, &c.

No deprivation by the congregation in the univerſity without ſummoning the party.

But he relied upon it, that there was a fatal fault in the return, which could not be anſwered; which was, that it did not appear, the doctor was ſummoned, or had notice of theſe proceedings againſt him, ſo that he had no opportunity to make his defenſe. And to condemn a perſon, without hearing him, or giving him an opportunity of defending himſelf, was contrary to natural juſtice; and ſuch proceedings have been always held illegal and void by this court. 9 *E.* 4. 14. *a.* 11 *Co.* 99. *Ja. Bagg*'s caſe. 1 *Sid.* 14. 2 *Sid.* 97. *Rex verſ. Champian.* 4 *Mod.* 37. *Glide*'s caſe. And ſo it was held in ſerjeant *Whitaker*'s caſe, when he was removed from being recorder of *Ipſwich*, to be reſtored to which he brought his *mandamus*.

B. R. cannot take notice, the univerſity courts proceed according to the rules of the civil law.

That it is no objection, to ſay the univerſity courts proceed according to the rules of the civil law; for that not being alleged in the return, this court can take no notice of it: and ſaying theſe things were done *ſecundum conſuetudinem*, is nothing, for the cuſtom ought to be ſpecially ſet out in the return. For which reaſons he inſiſted, the matter in the return did not excuſe the diſobedience of the writ, and therefore he prayed a peremptory *mandamus* might iſſue.

Mr. Attorney General *Yorke e contra* argued for the univerſity. He ſaid, as to the point of want of ſummons, he did admit, unleſs this caſe could be diſtinguiſhed from the caſes of members of corporations, it would be againſt the univerſity. The caſe, he ſaid, was of great conſequence, becauſe the franchiſes and privileges of the univerſity were concerned on one hand, and the rights and liberties of the members thereof on the other.

Two things muſt be took for granted:

1. That every fact well laid in the return muſt be took to be true.

2. That

2. That it would be no objection againſt the proceedings of the univerſity, that they were contrary to the rules of the common law, provided they were warranted by their cuſtoms and charter confirmed by act of parliament.

That there were two general queſtions in this caſe:

1. If a writ of *mandamus* lay, to reſtore Dr. *Bentley* to his academical degrees?

2. If the cauſe of depriving the doctor of them, ſet out in the return, is ſufficient, and the return good?

As to the firſt, the court having already determined, the writ was good, and well lay, he would acquieſce under that determination.

But as the other ſide had agreed, that if the univerſity had returned a viſitor, it would have put an end to this *mandamus*; ſo he could not but obſerve, that if there was a viſitor, if the doctor was aggrieved by theſe proceedings in the univerſity, he might have made his application there.

As to the ſecond, the return conſiſts of two parts:

1. The ſuſpenſion by the vice-chancellor's court.

2. The degradation by the congregation.

If either of them is ſufficiently juſtified, the return will be good, and no peremptory *mandamus* ought to go.

Firſt he ſaid, he would conſider the validity of the ſuſpenſion. As to the objections to the form, they would receive plain anſwers; but as to the objection, that Dr. *Bentley* was not heard againſt the contempt in the vice-chancellor's court, and that it was againſt natural juſtice, a man ſhould be condemned, without being heard; he anſwered, that it muſt be admitted, there was no neceſſity, that Dr. *Bentley* ſhould be actually heard; but if he had an opportunity to be heard, that would be ſufficient. Now he had an opportunity to be heard, for he was ſerved with proceſs to appear at the next court, and if he had paid obedience to that proceſs, he had heard the charge againſt him, to which he might have been heard.

That

If *A.* is charged by *affidavit* with a contempt to the court, as ſpeaking reflecting words ſaying he will not obey the proceſs, or beating the officer, an attachment will go, without giving him a day to be heard.

That there was no neceſſity to iſſue out a ſommons, or to give him new notice, to come and anſwer the contempt; for if a perſon commits a contempt to this court, or the court of Chancery, by declaring he will not obey the proceſs of the court, by beating an officer executing the proceſs of the courts, or by ſpeaking reflecting or contemptuous words of any of the judges; upon an *affidavit* made of the fact, he will be committed, without hearing him; for it is looked on to be a vain thing, when he has committed a contempt before, to make a rule of court, to give an opportunity of committing a new contempt againſt it. This is the rule in this court, and in Chancery; and it is alſo the rule in the canon and civil laws. And that is very conſiderable in this caſe, becauſe the proceeding of the vice-chancellor's court is according to thoſe laws. In the civil law there is a diſtinction between *contumaciam preſumptivam* and *contumaciam manifeſtam. Calvin Lexicon, contumacia. Alciati praxis, fol.* 92, 93, 99. *Contra contumacem poteſt procedi abſque ulla nova citatione. Menſingerius obſerv. ad idem. Decret. L.* 2. *tit.* 6, or 96. *de contumaci.* The proceedings in the vice-chancellor's court being according to the rules of the civil law, though this court ſhould examine them, yet they muſt be examined according to the rules of that law.

Proceeding in vice chancellor's court according to civil law.

The cauſe of ſuit was within the juriſdiction of the vice-chancellor's court, and this was a contempt in that cauſe; and if that court had a juriſdiction, all the objections as to the irregularity of the proceedings will be out of the caſe. Their proceedings are confirmed by Queen *Elizabeth* by her letters patent, as far as ſhe could do it; but the crown cannot erect a court to proceed according to the civil law by charter, therefore an act of parliament was neceſſary: an act accordingly paſſed, to confirm the letters patent, in which the excluſive words are exceeding ſtrong, as well as the confirmation of all their liberties, privileges, *&c.* That their proceedings are acccording to the civil law, *Hale* chief juſtice in his *Hiſtory of the law* takes notice, 33, 34. *Mich.* 8 *Hen.* 4. *rot.* 42. And in the caſe of *Manners* and *Perne*, *Hil.* 1 *Ann. B. R.* it was inſiſted on in the argument of that caſe, and not denied, that their proceedings were by the civil law. Beſides, every fact alleged to be done in the return is ſaid ſo to be, *ſecundum conſuetudinem, &c.* of the univerſity; and ſo is the ſuſpenſion alledged to be.

Crown cannot erect a court to proceed according to civil law.

In inferior courts it is enough to ſay, *ſecundum conſuetudinem curiae.*

But it has been objected, that it is not enough to ſay, Dr. *Bentley* was ſuſpended, *&c. ſecundum conſuetudinem, &c.* but there ought to be a cuſtom particularly ſet out for that purpoſe. To which he anſwered, that in proceedings in inferior courts it is always allowed, to ſay they were *ſecundum conſuetudinem curiae.*

As to the objection, that ſuſpenſion from the academical degrees is not a proper puniſhment for a contempt to a court; he anſwered, that by the rules of the civil law it is the only proper puniſhment. And it is like an outlawry in the temporal courts, it is to compel the party to come in and anſwer; and upon his doing that, the ſuſpenſion is took off. And theſe degrees cannot properly be called freeholds, nor civil temporal rights; they were originally only in nature of licences to profeſſors in ſeveral profeſſorſhips, and are now titles of diſtinction and precedence. The power of granting degrees flows from the crown. If the crown erects an univerſity, the power of conferring degrees is incident to the grant. Some old degrees the univerſity have abrogated, ſome new ones they have erected; and they are took notice of in acts of parliament for collateral purpoſes; and though the acts have annexed collateral privileges to them, that will not alter the nature of them, nor take away the power the univerſity had over them before; no more than if it ſhould be enacted by an act of parliament, that none but ſuch as were educated at *Eaton*, *Weſtminſter*, or *Wincheſter*, ſhould be capable of degrees, would it reſtrain the univerſity from exerciſing the power they have over degrees, upon ſuch perſons educated at thoſe ſchools, upon whom they ſhould be conferred. It does not follow, that if temporal rights are annexed to theſe degrees, the univerſity would be deprived of their power of degrading. A biſhop has a freehold in his biſhoprick, and a right to ſit and vote in parliament; yet he may be deprived by his metropolitan. Biſhop of *St. David's verſ. Lucy*, 1 *Salk.* 135. the eccleſiaſtical court may excommunicate for a contempt, and that affects the party's temporal rights of ſuing, *&c.* This puniſhment by ſuſpenſion does not differ in reaſon from thoſe caſes. Therefore he concluded, this ſuſpenſion was a proper puniſhment for the contempt.

Degrees in the univerſity.

The eſtabliſhing, that the vice-chancellor's court had a juriſdiction, lets in the excluſive clauſes, and they muſt take place. It muſt be admitted in this caſe, that neither a prohibition, nor a *certiorari*, would have lain in this caſe. And if they have a juriſdiction, and the excluſive clauſes take place, the irregularity of their proceedings cannot be examined in this court on a *mandamus*.

If courts have a juriſdiction and power to proceed by rules different from the common law, this court will not examine into the regularity of their proceedings on a *mandamus*. And therefore if a *mandamus* is granted, to reſtore a fellow of a college; if they return a viſitor, though his ſentence has been irregular, it is not examinable here. 1 *Lev.* 23, 65. 4 *Mod.* 106. *Philips verſ. Berry.* So if the eccleſiaſtical court excommunicates a perſon without a citation, this court will not grant a prohibition; but the party muſt appeal. When a prohibition is granted to the vice-chancellor's court for not granting a copy of a libel, it is by reaſon of the expreſs words of an act of parliament. And if an act of parliament ſhould enact, that no *certiorari* ſhould lie, to remove convictions of juſtices of peace for ſuch and ſuch offenſes; though the juſtice of peace ſhould convict the party without ſummoning him, no *certiorari* would be granted by this court, to remove ſuch a conviction.

As to the objection, that by this means the vice-chancellor's court would have an uncontrolable juriſdiction without appeal; and that it was unreaſonable, a man ſhould be concluded by the firſt determination; he anſwered, an appeal lay from the vice-chancellor's court to the congregation. [But note, that does not appear by the return.] However, this depended on a poſitive law, which was made ſuch by confirming the privileges of the univerſity by the act of parliament.

2. As to the objections againſt the degradation by the congregation, he ſaid they were,

1. As to the power they had to degrade.

2. As to the manner of their proceedings.

He ſaid, that what had before been urged to ſupport the ſuſpenſion, might properly be applied to ſupport this degradation, without repetition. But he farther inſiſted upon it, that the whole proceeding againſt Dr. *Bentley* ought to be conſidered as the act of the court of the univerſity. For by the letters patent the grant is to the chancellor, maſters, and ſcholars, that they, *viz.* the chancellor, maſters, and ſcholars, which is the whole body of the univerſity, and their *loca tenentes*, ſhould have conuſance, *&c.* and therefore the congregation are to be conſidered as the judges of the court, and the vice-chancellor only as their official: that the court uſually held before the vice-chancellor, might be held before the congregation: that by the civil law, where there is a commiſſary, he has only part of the juriſdiction, the reſt remains in the ordinary, and that the ordinary may proceed upon a report made by his official. So here, the congregation might proceed upon the report of the vice-chancellor, which in this caſe he made to them.

Note, the congregation does not conſiſt of the chancellor, maſters, and ſcholars, which is the whole body; but of the chancellor, or vice-chancellor, or his *locum tenens, et de magiſtris regentibus et non regentibus,* reſiding within the univerſity.

As to the objection, which he ſaid had been made, that if the degradation ſtood, Dr. *Bentley* would be deprived of his degrees, without ever being heard, without proſpect of being reſtored; he anſwered, that this was but in nature of a proceſs, to compel Dr. *Bentley* to come in and appear, *&c.* and that it is the general rule of all courts, and of all laws, that when the party comes and clears his contempt, he ſhall be reſtored, *&c. Linw. cap.* 18. *contumacia.* That this privilege of ſuſpending degrees, and degrading, was agreeable to the privileges all other univerſities enjoyed; and that it was neceſſary, that univerſities ſhould have ſuch a ſummary method of proceeding. For which reaſons he inſiſted, the return was good, and that no peremptory *mandamus* ought to iſſue.

Mr. *Reeve* by way of reply inſiſted, that though great ſtreſs had been laid upon the allegations in the return in its ſeveral parts, that the facts were done *ſecundum conſuetudinem*, *&c.* that was not ſufficient to make the return good. For the grant in the letters patent of Queen *Elizabeth* is, that the univerſity ſhould hold a court, to hear and determine pleas, *&c. ſecundum leges et conſuetudines ſuas ante tunc uſitatas:* therefore if they have a method of proceeding by the civil law, which has been always uſed, that ought to have been averred ſpecially; and without it, this court cannot take notice of it under that general allegation, but muſt intend the proceedings are according to the rules of the common law. It is true, in caſes of inferior courts ſuch an allegation is enough, becauſe their proceedings are agreeable to the common law; but if the rules of the common law are to be excluded, ſuch a cuſtom muſt be ſpecially ſet out.

And as to the objection, that the vice-chancellor's court is part of the congregation, and that the congregation is held before the whole body; the firſt is not alleged ſo to be in the return; and as to the laſt, the congregation conſiſts of the chancellor or vice-chancellor, or his *locum tenens*, and the regents and non-regents, which is not the whole body of the univerſity.

February 7, 1723. lord chief juſtice *Pratt* delivered the opinion of the court, *viz.* of himſelf, *Powys*, *Forteſcue* and *Raymond* juſtices, that the return was ill; becauſe ſince it is not ſhewn in the return, that the proceedings in the vice-chancellor's court or the congregation are according to the rules of the civil law, they muſt be intended to be agreeable to the rules of the common law;

Degradation of the univerſity without ſummoning party (when there does not appear an appeal lies to another court) is illegal and void.

law; and if ſo, it not appearing the party has any redreſs by applying to another court, this court will relieve him, if he has been proceeded againſt, and degraded, without being heard, which is contrary to natural juſtice. This caſe therefore will fall under the rules for the removing of members of corporations, which cannot be done, without ſummoning the party, and giving him an opportunity of being heard. The caſes determined upon that head are ſo numerous, and the rule ſo well ſettled and known, that it cannot now be diſputed; for want of doing which, this ſuſpenſion or degradation cannot be ſupported. And therefore a peremptory *mandamus* was granted.

Eaſter

Eaſter Term

10 Georgii regis, B. R. 1724.

Thomas Knight, Eſq; *againſt* Richard Cambridge.

Error C. B. intr. Paſch. 7 *Geo. C. B. Rot.* 677.

S. C. 8 Mod. 231. 1 Stra. 581. S. C.

The policy inſured againſt the barretry of the maſter: the breach was, that the ſhip was loſt by the fraud and neglect of the maſter.

CAmbridge brought a writ of error upon a judgment given againſt him in the Common Pleas, in an action brought by the plaintiff upon a policy of inſurance of the ſhip *Riga Merchant*, at and from *Port Mahone* to *London*. And ſerjeant *Branthwaite* for the plaintiff in error inſiſted, that the judgment was erroneous, becauſe the breach was ill aſſigned: becauſe the policy was, that the defendant *Cambridge* ſhould inſure the ſaid ſhip, among other things, againſt the barretry of the maſter, and all other dangers, damages, and misfortunes, which ſhould happen to the prejudice and damage of the ſaid ſhip; and the breach aſſigned was, that the ſhip in the ſaid voyage, *per fraudem et negligentiam magiſtri navis praedictae depreſſa et ſubmerſa fuit, et totaliter perdita et amiſſa fuit, et nullius valoris devenit.* This he inſiſted, was not within the meaning of the word barretry, but the breach ſhould have been expreſs, that the ſhip was loſt by the barretry of the maſter. Beſides the owner of the goods has a remedy againſt the owners of the ſhip, for any prejudice he receives by the fraud or neglect of the maſter; and therefore there is the leſs reaſon, the inſurer ſhould be liable. Beſides, if the word barretry ſhould import fraud, yet it does not import neglect; and the fact here alleged is, that the ſhip was loſt by the fraud and neglect of the maſter. But the court was unanimous of opinion, that there was no occaſion to aver the fact in the very words of the policy, but if the fact alleged came within the meaning of the words in the policy, it is ſufficient. Now barretry imports fraud, *Du Freſne Gloſſar. verbo barataria, fraus, dolus.* And he that commits a fraud, may properly be ſaid to be guilty of a neglect, *viz.* of his duty. Barretry of a maſter is not to be confined to the maſter's running

Breach aſſigned within the meaning of the words of the policy is good.

running away with the ſhip: and the general words in the policy ought to be conſtrued, to extend to loſſes of the like nature as thoſe mentioned before: now loſſes ariſing from the fraud of the maſter are of the ſame nature, as if he had run away with the ſhip, ſuppoſing barretry was to be confined to that, which it is not, becauſe it imports any fraud. And judgment was affirmed, *April* 27, 1724.

Philip Wilkinſon *againſt* Sir Peter Meyer.

S. C. 8 Mod. 173. Expoſition of 7 Geo. 1. about regiſtring contracts. 1 Stra. 585. S. C.

Covenant upon an indenture, dated the 19th of *Auguſt* 1720, made between the plaintiff of the one part, and the defendant of the other, whereby the plaintiff, in conſideration of 1436 *l.* 10 *s.* to be paid to him as therein after mentioned by the defendant, covenanted for himſelf, *&c.* that he, his executors or adminiſtrators, ſhould on or before the 25th of *March* next enſuing transfer, *&c.* to the defendant, his executors, adminiſtrators and aſſigns, all ſuch ſtock, bonds, notes, bills, and money, as the *South-Sea* company ſhould allow, deliver, and pay, to the proprietors of lottery annuities, for 1277 *l.* 1 *s.* 6 *d.* capital ſtock in the lottery annuities at 5 *per cent.* then already ſubſcribed into the ſaid company by or in the name of the ſaid plaintiff, with all dividends, profits, *&c.* and the defendant, in conſideration of the premiſſes, for himſelf, *&c.* covenanted with the plaintiff, that he, *&c.* ſhould within the time aforeſaid accept all the ſaid ſtock, bonds, *&c.* which ſhould be given by the *South-Sea* company for the 1277 *l.* 1 *s.* 6 *d.* lottery annuities, *&c.* and would pay 1436 *l.* 10 *s.* for the ſame: and for non-payment of the 1436 *l.* 10 *s.* the action of covenant was brought. After *oyer* of the indenture, the defendant by leave of the court pleaded four ſeveral matters in bar; the laſt of which was, that neither the contract in the declaration mentioned, nor any abſtract or memorial thereof, was entred and regiſtred in the *South-Sea* company's book, as is required by the ſtatute in that caſe made and provided. To the three firſt the plaintiff had judgment upon demurrer; and as to the laſt plea, the plaintiff took iſſue, which being tried the ſitting after laſt *Michaelmas* term before lord chief juſtice *Pratt* in *London*, the plaintiff produced the regiſter-book of the *South-Sea* company, wherein a copy of the contract was entred *verbatim*, under which was ſubſcribed, "This is for "my proper uſe and benefit," which was ſubſcribed by the plaintiff with his own name, *Philip Wilkinſon*; upon which the defendant's counſel objecting, that the regiſter did not expreſs the name of the perſon, for whoſe uſe and benefit the contract was made, according to the direction of the ſtatute, the ſtatute requiring the entry to expreſs the name of the perſon, for whoſe uſe the contract was made, which relates to the time of making the contract, whereas this entry only expreſſes the name of the perſon, for whoſe uſe and benefit it was at the time of the regiſtring; the chief juſtice *Pratt* directed the jury to find a verdict for the plaintiff for 1436 *l.* 10 *s.* but ſubject to a caſe to be made for the opinion of the court, and the *poſtea* was to be ſtayed in the mean time. Accordingly a caſe was ſettled by the council on both ſides, and ſigned by Sir *Clement Wearg* for the plaintiff, and Mr. *Fazakerley* for the defendant, which ſtated the contract *in haec verba*, and the breach aſſigned in the declaration, and the pleas, and iſſue, and evidence of the regiſter as above; and farther, that no evidence was offered, that the contract was made for the benefit of any other perſon beſides the plaintiff, nor any that the ſaid contract was made for the uſe and benefit of the plaintiff only. And the 24th of *April* this term this caſe was argued by Mr. *Strange* for the plaintiff, and Mr. *Fazakerley* for the defendant.

The clauſe in 7 *Geo.* 1. *ſtat.* 2. *par.* 8. upon which this queſtion depends, is to this effect, "That every contract for the ſale " or purchaſe of ſubſcriptions or ſtock of the *South-Sea* com- " pany, *&c.* which ſhall not be compounded by the parties thereto, " or intereſted therein, on or before the 29th of *September* 1721, " or an abſtract or memorial thereof, ſigned by the party intereſted " therein, and who ſhall be minded to take advantage of the ſame, " ſhall be entred and regiſtred in books, which are thereby required " to be provided for that purpoſe by the reſpective companies, to " whoſe capital ſuch ſtock, *&c.* do or ſhall relate, before the 1ſt " of *November* 1721. and in default of ſuch entry and regiſter, " every ſuch contract, as to ſo much as ſhall remain unperformed " and not compounded on or before the 29th of *September* 1721, " ſhall be void: and that ſuch entries ſhall expreſs the name of " the parties or perſons for whoſe uſe or benefit ſuch contracts " were made," *&c.*

Mr. *Fazakerley* inſiſted for the defendant, that the words of the act were plain, that the name of the perſon for whoſe uſe or benefit the contract was made muſt be expreſſed, which refers to the time of the making the contract; and the act intended ſo, becauſe it deſigned to diſcover what contracts were made for any of the directors, who were ſo cunning, that they made none in their own names. But yet as this regiſter is, this contract might be made for the benefit of a director, who after might releaſe his equity or right to the plaintiff; and yet the regiſter will be true. But Mr. *Strange* for the plaintiff argued, that the preamble to this clauſe ſhewed what the deſign of the parliament was, *viz.* for preventing a multiplicity of vexatious and doubtful ſuits concerning theſe contracts in law or equity; therefore it directed the name of the perſon, for whoſe uſe or benefit ſuch contracts were made, ſhould be expreſſed in the entry and regiſter, that the defendant might know, who had a demand upon him; which in this caſe the defendant did, the intire contract being regiſtred: and by the import of the deed it appears to be for the plaintiff's benefit. And of that opinion was the court; and *Raymond* juſtice ſaid, that this act being *ex poſt facto*, the conſtruction of the words ought not to be ſtrained, in order to defeat a contract, to the benefit whereof the party was well intituled at the time the contract was made. Judgment was given for the plaintiff.

The inhabitants of Buckington *againſt* the inhabitants of St. Michael Sebington in Somerſetſhire.

S. C. 1 Stra. 582.

An apprentice lets himſelf to ſervice without his maſter's conſent, and ſerves two years; no ſettlement, though his maſter was broke.

An order made by two juſtices for removing *Richard Allen* a poor perſon to *Buckington* as the place of his laſt legal ſettlement, and an order confirming the ſame made at the quarter-ſeſſions, being removed into the King's Bench by *certiorari*, the fact ſtated ſpecially in the order of ſeſſions was, that *Richard Allen* was bound an apprentice to *J. S.* in *Buckington*, and ſerved him in that pariſh ſix months; afterwards *J. S.* broke; upon which *Allen*, without *J. S.*'s direction or conſent, let himſelf as a ſervant to *J. N.* who lived in *St. Michael Sebington*, and ſerved him there two years: that afterwards *J. S.* delivered up to *Allen* his indenture of apprenticeſhip. And the court of King's Bench was unanimous of opinion, that *Allen* gained no ſettlement by his ſervice at *Sebington*, he having let himſelf without his maſter's conſent; and though the maſter had failed, yet that did not determine the apprenticeſhip, but the apprentice continued not *ſui juris:* and the maſter's delivering up of the indenture afterwards, if it ſhould be looked on as a ſubſequent conſent, will not make his letting himſelf good, ſo as to gain a ſettlement by his ſervice with *J. N.* but if he had let himſelf to *J. N.* with *J. S.*'s conſent, his ſervice would have made a ſettlement. 1 *Salk.* 68. pariſhes of *Caſtor* and *Eccles*. But *Allen* was ſettled in *Buckington*, where he was bound apprentice, and lived and ſerved his maſter above forty days. The orders were confirmed.

John Stevenſon, jun. *verſ.* William Nevinſon, mayor of Appleby, and the common-council of Appleby.

TO a *mandamus* iſſued out of the King's Bench directed to the defendants, commanding them to reſtore the plaintiff to the office of a common-council-man of the borough of *Appleby* in *Weſtmorland*, they among ſeveral other facts returned, that the plaintiff was not elected a common-council-man, as in the writ was ſuppoſed. To which return the plaintiff came in, and denied the ſeveral material facts relied on by the defendants in their return; and among the reſt alleged, that the plaintiff was choſe a common-council-man, as in the writ was alleged, and concluded to the country. Upon which as well as the other facts iſſue was joined, and the ſeveral iſſues were tried at the bar *May* 6, this term. And after the plaintiff had proved the fact of his being elected common-council-man, Mr. ſerjeant *Pengelly* for the defendants inſiſted, that by the conſtitution of the borough, which was by preſcription, no perſon was capable of being elected a common-council-man of the borough, who did not hold a burgage tenure, and alſo inhabit within the borough; but the plaintiff inhabited in *Bondgate*, which was ſevered from the borough, and no part of it. To prove which conſtitution, the firſt witneſs produced was one *Richard Wooſe*. But it being objected for the plaintiff, that he had a burgage tenure, and alſo inhabited in the borough, and could not be a witneſs, to prove a right in himſelf, and ſuch as had his qualifications, excluſive of all others; which fact being admitted, he was refuſed by the court to be admitted to prove this conſtitution. But then one Mr. *Lee* was produced as a witneſs for the defendants, to prove it, who was an inhabitant of the borough, but it was admitted he had no burgage tenure. Whereupon he was allowed by the court to be a good witneſs, as to the right fixing in ſuch as had held burgage, and alſo were inhabitants, ſince he did not attempt to eſtabliſh the right in the inhabitants only. But after a long examination a verdict was given for the plaintiff upon all the iſſues.

S. C. 1 Stra. 583.

By the conſtitution of a corporation by preſcription it was inſiſted, no perſon ſhould be a common-council-man, but he who inhabited in the borough, and alſo held a burgage tenure. One that only inhabited in the borough may be a witneſs to prove the conſtitution.

John Tufton, Eſq; *verſ.* William Nevinſon, mayor of Appleby in Weſtmorland.

Upon an iſſue of *non fuit electus* on a *mandamus* to ſwear an alderman of a corporation, the plaintiff mnſt prove he received the ſacrament within a year before his election.

TO a *mandamus* directed to the defendant, commanding him to ſwear the plaintiff into the office of an alderman of that borough, being duly choſen; the defendant among ſeveral other facts returned, that the plaintiff was not elected an alderman, as by the writ is ſuppoſed. And iſſues being joined upon them, they came to be tried at the bar, *Saturday May* the 9th this term. The plaintiff gave evidence, that he was elected alderman *Monday* before *Michaelmas* 1723. But it was objected by Mr. ſerjeant *Pengelly* for the defendant, that Mr. *Tufton* ought to prove, he had received the ſacrament within a year before his election; the expreſs words of the 13 *Car.* 2. *cap.* 1. *par.* 12. being, that no perſon ſhall for ever hereafter be elected, *&c.* into any the offices aforeſaid, that ſhall not have within one year next before ſuch election taken the ſacrament, *&c.* and in default thereof every ſuch election is declared to be void. To which Mr. Attorney General *Yorke* and ſerjeant *Comyns* anſwered for the plaintiff, that firſt at the time of the election no ſuch objection was made to Mr. *Tufton*, and that they proved by witneſſes; therefore the plaintiff could not expect this objection would be made at the trial, and came not prepared to make out that fact. But the defendant, if he intended to inſiſt on proof of this matter, ſhould have given notice to the plaintiff before the trial, and then he would have provided to have proved it. Serjeant *Comyns* alſo ſaid, that the act 5 *Geo. cap.* 6. for quieting and eſtabliſhing corporations, confirms perſons then in offices, *&c.* who had omitted receiving the ſacrament, as 13 *Car.* 2. *cap.* 1. directs, and diſcharges them from all forfeitures for the ſame, and enacts that no perſon, who ſhould be thereafter elected, *&c.* ſhould be removed by the corporation, or otherwiſe proſecuted for ſuch omiſſion, nor ſhould any incapacity or diſability, *&c.* be incurred, by reaſon of the ſame, unleſs ſuch perſon be ſo removed, or ſuch proſecution commenced, within ſix months after ſuch perſons being elected, *&c.* And Mr. *Tufton* was elected alderman *Monday* before *Michaelmas* 1723, ſo that above ſix months are elapſed ſince the election. But the whole court were unanimous in opinion: Firſt, that this caſe was not within the act of the ſeventh of his Majeſty, becauſe the plaintiff never was admitted into the office, and therefore could not be removed, nor incur a forfeiture: Secondly, that it was incumbent on the plaintiff, to prove that he had received the ſacrament, *&c.* within a year before his election, by 13 *Car.* 2. *cap.* 1. elſe his election was void. And ſo it was ſaid to have been ruled by lord chief juſtice *Parker*, between

Vavaſor verſ. Hammond. The King verſ. Muſkett.

between *Vavaſor* and *Hammond*. And ſo it was held in the caſe between the King and *Musket*, concerning a member of the corporation of *Buckingham*; only a difference was there taken, that in caſe a member of a corporation had been long in poſſeſſion of his office, there ought to be notice given, that this would be inſiſted on at the trial. But here the plaintiff has never been admitted into the office, but ſued this *mandamus* to get himſelf ſworn in. As to this, which was the fifth iſſue concerning the plaintiff's election, the jury by the direction of the court found for the defendant. As to the four other iſſues, they found for the plaintiff.

Hugh Machell *verſ.* William Nevinſon, mayor of Appleby in Weſtmorland.

A corporation met to chuſe a mayor; the common-council had a right to chuſe common-council men: a major part of the common council cannot proceed to ſuch election of common-council-men.

THE plaintiff ſued a *mandamus* out of the King's Bench, directed to the defendant, commanding him to ſwear the plaintiff into the office of a common-council-man of the corporation, being duly choſen. To which the defendant returned, that the plaintiff was not elected a common-council-man, as by the writ was ſuppoſed. Upon which iſſue being joined, the iſſue was tried at the bar, *Saturday May* 9, this term. And upon the evidence it appeared, that the corporation was a corporation by preſcription, conſiſting of a mayor, twelve aldermen, and ſixteen common-council-men, beſides the freemen at large; that the mayor was to be choſen out of the aldermen by the common-council, the aldermen to be choſen out of the common-council or freemen, and the common-council to be choſen out of the freemen by the common-council; and if the common-council were equally divided, then the aldermen were to vote; and if they were equally divided alſo, then the mayor had a caſting vote: that the mayor was to ſerve for a year, and until another was choſen; that the members uſed to be ſummoned to meet to chuſe a mayor, by order of the old mayor, and no certain time was fixed for the choice of a mayor, it uſed to be about *Michaelmas*; but 26 *May* 1674 an order was made by the mayor, aldermen and common-council-men, that they ſhould for the future meet on the *Monday* before *Michaelmas* day every year, to chuſe a mayor, under a penalty inflicted upon every one of them that wilfully abſented himſelf: that at other days, for filling up vacancies of aldermen or common-council-men, the mayor uſed to ſummon the body, and they never uſed to meet without ſuch a ſummons; and when they met, acquainted them with the vacancy, and with the occaſion of the meeting, and always ſent out a ſummons for the meeting on the day, which they called the charter day: that the mayor, eleven aldermen, and fifteen common-council-men met 23 *September* 1723, being the *Monday* before *Michaelmas*, in the

Moothall: the mayor declared, their meeting was to elect a mayor; upon which ſome of the common-council ſaid, there was a vacancy of an alderman and common-council-man, and they would firſt proceed to fill up thoſe vacancies; but the mayor ſaid, they were filled up: upon which nine of the common-council withdrew into the council-chamber, ſix of them ſtaying in the *Moothall* with the mayor: the nine elected the plaintiff a common-council-man, and ſigned a paper purporting their election, and brought it, and tendred it to the mayor, and deſired him to ſwear the plaintiff; but he refuſed, and ſaid, *currat lex*. The plaintiff attempted to prove, that it was uſual to fill up vacancies the *Monday* before *Michaelmas*, before they elected the mayor; but only one inſtance was given in evidence, of one *Gregſon* choſe common-council-man on that day before the mayor was elected, and that but two years before the election of the plaintiff; and it did not appear, but the mayor directed the going to that election, and that all the common-council then living were preſent and conſenting. But all the witneſſes for the plaintiff agreed, they never knew before this time an inſtance of proceeding to fill up a vacancy, without the mayor's declaring the vacancy, and directing them to proceed to fill it up.

The facts appearing thus upon the evidence, Sir *Thomas Pengelly* his Majeſty's firſt ſerjeant, Sir *Clement Wearg* ſolicitor general, and Mr. *Reeve* and Mr. *Bootle*, inſiſted for the defendant: that upon the plaintiff's own evidence the election of him to be a common-council-man was a void election; for they ſaid, this being a corporation by preſcription, the right and manner of election was to be governed by the uſage: that for the election of aldermen and common-council-men at any other time but this *Monday* before *Michaelmas*, it was agreed, there ought to be a preceding ſummons from the mayor for the corporation to meet: and ſo it was in caſe of election of mayors before the order in 1674: that ſince that time a ſummons uſed to go to meet that day; that that day was only for electing mayors, founded upon that order: that all the witneſſes agreed, the mayor uſed to declare the vacancies of aldermen and common-council-men, and direct the common-council-men to proceed to an election, and did not know an inſtance to the contrary till this time. But indeed they ſaid, the common-council thought they had a right to proceed to ſuch election, when they were met, without ſuch direction; but that was a miſtake in them, for there was no uſage to found ſuch opinion upon: that though ſome of the witneſſes ſaid, they had ſeveral times elected aldermen and common-council-men this *Monday* before *Michaelmas* before they elected the mayor; yet they could give but one inſtance, which was of one *Gregſon* elected ſo common-council-man two years before the election in queſtion; and they could not ſay, but in that as other caſes they had a general memory of, though they could not recollect particular names, the mayor might direct the going to thoſe elections, and that all the common-council-men concurred in it: that the mayor's preſence being neceſſary at the meeting he ought to preſide, and for avoiding confuſion ought in reaſon to give directions, though he did not vote among the common-council in the election; and that as the uſage gave the common-council a right of electing, the ſame uſage gave the mayor a right of directing when they ſhould proceed to the election. But in this caſe the mayor refuſed it, ſaid the vacancies were filled up, *currat lex*; that ſix of the common-council did not go into the council-chamber, but ſtayed with the mayor; and therefore this not being a day appointed for chuſing common-council-men, nor no ſummons for that purpoſe, part of the common-council, though the major part, could not elect to bind the reſt; and therefore they concluded, this election of the plaintiff was a void election.

But Mr. Attorney General *Yorke*, ſerjeants *Comyns* and *Probyn*, Mr. *Hungerford* and Mr. *Uſher*, argued, that the election of the plaintiff was good. They ſaid, that what the defendant's counſel inſiſted upon, was to put the whole power over the corporation in the mayor; and that to allow their objections, was to permit the mayor to take advantage of his own default. They urged, the aſſembly here was regularly held, that all the common-council in being were there, that the mayor himſelf had no vote in the election of aldermen or common-council-men; that his preſence was neceſſary in the *Moothall*, but his aſſent to or approbation of the election was not neceſſary; that the mayor's withdrawing, when they were in the council-chamber, could not diſſolve the common-council; then nine going into the council-chamber was a majority of the common-council, and their acts would bind the reſt, who might have come in if they would, as all the witneſſes proved: that the act of filling up the corporation was a neceſſary act, and ought to be ſupported, if by law it could.

The King verſ. Carliſle corporation.

The court were unanimous of opinion, that the election was void for the reaſons given by the council for the defendant; and ſaid it was almoſt the ſame caſe with that of the King *verſ. Carliſle* corporation, *T.* 6 *G. B. R.* 1720, where upon a return to a *mandamus* to reſtore *Coulter* to the office of a capital burgeſs, it appeared, that the power of removing a member was in the mayor and aldermen, or major part of them; the ſummons was of the whole corporation to elect a recorder; and after that election was made, the mayor and aldermen ſeparated themſelves from the reſt, and removed *Coulter* for miſbehaviour, *&c.* and held the removal was void, when there was no ſummons to meet as mayor and aldermen,

men, but only as part of the whole body. By direction of the court the jury gave a verdict for the defendant.

Sir Chriſtopher Muſgrave *verſ.* Nevinſon, mayor of Appleby in Weſtmorland.

S. C. 1 Stra. 584. A new trial granted, becauſe the verdict was given againſt evidence, after trial at bar upon a traverſe to the return of a *mandamus*, where the queſtion was, whether the plaintiff was elected alderman of Appleby or not? *Ante* 514.

THE plaintiff ſued a *mandamus* out of the King's Bench directed to the defendant, commanding him to ſwear the plaintiff mayor of *Appleby*, being duly choſen. To which the defendant returned, the plaintiff was not elected mayor, as by the writ was ſuppoſed. Upon which iſſue being joined, it was tried at the bar, *Saturday May* the 9th this term. The conſtitution of the borough was admitted to be, that the mayor was to be choſen out of the aldermen. And therefore it was inſiſted upon by the defendant, that the plaintiff ſhould prove his being an alderman. And upon the evidence the fact appeared to be thus, *viz.* that the 5 *December* 1721 the mayor, aldermen, and all the common-council-men then alive, being fifteen (except one *Reſbrook*, who three or four of the plaintiff's witneſſes ſwore they believed was there, but he himſelf ſwore poſitively, that he was not there at the time Sir *Chriſtopher Muſgrave* was elected alderman, but came in after he was ſworn, giving a particular account of the circumſtances of the time he was ſent for that evening, and of the time of his coming into the room, and that he was told, Sir *Chriſtopher* was ſworn as he came along, and after he came they never aſked his vote) met at a publick houſe in *Appleby* to drink ſome punch, and the mayor had invited one or two of them to be there, to treat Sir *Chriſtopher Muſgrave*, who was preſent; that at the time of their meeting none of the common-council knew there was a vacancy of an alderman, for one *Warcup* had ſigned and ſealed a reſignation of his office of alderman but the day before. After a glaſs or two had gone round, Mr. *Chriſtopherſon*, a clergyman then in company, acquainted them, *Warcup* had reſigned, and produced his reſignation, and propoſed the chuſing Sir *Chriſtopher Muſgrave* alderman: whereupon he aſked every common-council-man there (for in them only the election of alderman was, and the aldermen had nothing to do in the election, unleſs the common-council were equally divided) and they all conſented, except *Barnes*, *Robinſon*, and *Lamb*, who ſaid it was not convenient at that time of night, nor in that manner: upon which the mayor ſaid, if that was not right he would adjourn to the *Moothall*, to which *Barnes* replied, it was not neceſſary to give Sir *Chriſtopher* the trouble to go to the *Moothall*, if all were agreed; for the marquis of *Wharton* was choſe at his houſe; but *Lamb* or *Robinſon* ſaid nothing: that afterwards the mayor ſent *Carleton* for the books: Sir *Chriſtopher* was entred in the books, and ſworn alderman, and acted as ſuch afterwards in five aſſemblies, till he was elected mayor. No evidence was given that the ſaid three common-council-men ever aſſented to the election, but they were in company all the time after: nor were the common-council-men called over one by one by the proper officer, as was uſual in ſuch elections: nor were the common-council-men ſeparate from the aldermen, as likewiſe was uſual: and *Dean* another common-council-man ſwore, he was there; that he oppoſed it, and no body after aſked him if he conſented: that he did not ſee *Resbrook* there when Sir *Chriſtopher* was ſworn; and *Resbrook* told him ſoon after, that he was not in the room when Sir *Chriſtopher* was ſworn: that the entry in the books of *Warcup*'s reſignation was made by *Carleton* the town-clerk ſome time after Sir *Chriſtopher* was ſworn, a week or more, but it was by direction of the mayor given when Sir *Chriſtopher* was ſworn. This evidence being ſummed up to the jury by lord chief juſtice *Pratt*, with great ſtreſs laid on the evidence for the defendant, they gave a verdict for the plaintiff, to the diſſatisfaction of the court, who looked upon the plaintiff's election to be void. For the body not being corporately aſſembled for want of a previous ſummons, but the meeting only being to drink a glaſs of wine, and not knowing at the time of their meeting of any vacancy of an alderman, and oppoſition being made by three of the common-council, and no proof of their actually conſenting afterwards (which the court held abſolutely neceſſary in ſuch a caſe as this) and it being expreſly ſworn by *Resbrook*, that he was not there at the election or ſwearing of Sir *Chriſtopher*; and in caſe of ſuch an accidental election the court held every member who had a right to vote, ought to be preſent and aſſent; they were of opinion, it was an election obtained by ſurprize, and conſequently void. After which, *Saturday May* 16, Mr. ſerjeant *Pengelly*, and the other counſel for the defendant, moved for a new trial, the verdict being contrary to the evidence; which the court agreed; but then it was inſiſted on by the counſel for the plaintiff, no new trial ſhould be granted after a trial at bar, where facts were only left to the jury. But granting new trials in caſes at bar, is only where the jury determine againſt the law, or give a general verdict againſt the expreſs direction of the court, as in the caſe of the Queen againſt *Bewdley* corporation, the jury found a general verdict, where the court had directed, and the counſel on both ſides agreed, the verdict ſhould be found ſpecially; a new trial was granted, *Trin.* 11 *Ann. B. R.* Beſides, where verdicts are not concluſive to the right, new trials do not uſe to be granted, though the verdict is againſt evidence; as in ejectments, becauſe the party may bring new ejectments: 1 *Salk.* 648. *Argent* againſt Sir *Marmaduke Darrell:* 1 *Salk.* 650. *Fenwick verſ.* lady *Groſvenor:* Sir

Queen againſt Bewdley corporation.

Thomas Jones 224, 5. King *verſ. Foſter*. Now here this verdict being in a *mandamus* does not conclude the right, for it may be tried afterwards in an information in nature of a *quo warranto*. But *per totam curiam* a new trial was granted. For they held, that where the evidence was doubtful, a new trial ſhould not be granted after a trial at a bar; and therefore it was denied in the caſe of *Soams* and *Barnardiſton*, and the Queen *verſ.* the warden of the *Fleet*. But where it is againſt evidence, it may. So is *Stiles* 462, 466, *Wood verſ. Gunſton*, for exceſſive damages, and yet the jury are the proper judges of the damage. And the chief juſtice *Pratt* ſaid, a new trial was granted in the caſe of Sir *Joſ. Tilley* againſt *Roberts* after a trial at bar, becauſe the verdict was againſt evidence, and the queſtion was, *compos* or *non compos*, which was meer matter of fact. And afterwards, *Monday May* 18. Mr. Attorney General moved in behalf of Sir *Chriſtopher Muſgrave* for a trial at bar next term. But upon a treaty the parties entred into a rule by conſent, that the corporation ſhould 11 *June* next proceed to an election of common-council-men, aldermen, and mayor.

Inhabitants of Bamber *againſt* the inhabitants of Hannington.

See Shaw's Par. Law, cap. 33. and Burn's Juſtice, tit. Vagrant. One juſtice cannot ſend a vagrant to the place of his laſt legal ſettlement by 12 Ann. cap. 23. par. 4. but there muſt be two juſtices to make ſuch order.

AN order was made by one juſtice of the peace, reciting that *J. S.* was taken wandring, *&c.* and reciting the place of his laſt legal ſettlement to be at *Bamber*, to ſend *J. S.* to *Bamber*, *&c.* Mr. *Strode* upon the 12th *Ann. cap.* 23. *par* 4. took exception to this order, becauſe it was made by one juſtice; for though one juſtice may make a paſs, to paſs him as a vagrant, yet there muſt be two juſtices to make an order to remove him to the place of his laſt legal ſettlement; the words of the act being, that he is to be ſent to the place of his laſt legal ſettlement by ſuch order, and in ſuch manner, as by the laws of this realm other perſons likely to be chargeable to the pariſh are to be ſent. And upon conſidering the act, and the ſeveral *par.* 4, 5, 6, the court was of that opinion, and the order was quaſhed. Mr. *Huſſey* council with the order.

The King *verſ.* Cawood.

THE defandant was found guilty upon an information, for ſetting up a bubble called the *North Sea*, founded upon the act of 6 *Geo.* 1. *cap.* 18. and was brought up ſeveral terms ago to receive judgment. And it was inſiſted on, that judgment ought to be given againſt him by that act, as if he had been found guilty of a *premunire*. And the court took time to conſider of it, and in the mean time he was committed to the King's Bench priſon, and afterwards eſcaped; but being retaken, he was brought *May* 18 this term to receive judgment. And the court were all of opinion, that they were not obliged by that act, to give the whole judgment as in caſe of a *premunire* againſt him, but only ſuch part of it as in their diſcretions they ſhould think fit. And therefore a fine of 5 *l.* was ſet on the defendant, and judgment, that he ſhould remain in priſon during the King's pleaſure.

S. C. 1 Stra. 472.
It is in the diſcretion of the court, to give judgment of a *premunire* or not againſt a perſon convicted for ſetting up a bubble contrary to 6 Geo. cap. 18.

Jenney and others *againſt* Herle. *Error* C. B.

Intr. *Paſch.* 9 *Geo.* B. R. Rot. 144.

IN an action on the caſe on ſeveral promiſes, there were five ſeveral counts in the declaration; as to four of them the defendants pleaded *non aſſumpſit*, and iſſue was joined upon it; but afterwards the plaintiffs entred a *nolle proſequi* as to them. But the other was upon a bill of exchange, wherein the plaintiff *Herle* in the Common Pleas declared, that the defendants 27th of *September* 1720. at, &c. according to the cuſtom of merchants made a bill of exchange ſigned with their own hands, directed to *John Pratt*, by which the defendants did require the ſaid *John Pratt* to pay to the plaintiff *Herle* 1945 *l.* upon demand, *ex moneta per eandem billam mentionata tum fore* in his hands *ſpectante ad proprietarios quorundam hereditamentorum vocatorum* the *Devonſhire* mines and quarries, *exiſtente parte denariorum vocatorum* the conſideration money *pro emptione*, *Anglice* the purchaſe, *manerii de Weſt Buckland*: that *Pratt* refuſed to accept the bill, whereby the defendants became liable to pay the plaintiff that ſum of money, and being ſo liable promiſed to pay, &c. To this count the defendants demurred in the Common Pleas, and an interlocutory judgment was given for the plaintiff *Herle*, a writ of inquiry executed, and 1945 *l.* damages found, and final judgment in the Common Pleas for *Herle*. Upon which the defendants brought a writ of error. And after argument by Mr. Solicitor General *Wearg* for the plaintiffs

S. C. 8 Mod. 265.
1 Stra. 591. S. C.
Pray pay to *H.* 1945 *l.* upon demand out of the money in your hands belonging to the proprietors of the Devonſhire mines, being part of the conſideration money for the manor of Weſt Buckley; no bill of exchange.

tiffs in error, and by ſerjeant *Chapple* for the defendant, the judgment of the Common Pleas was reverſed by *Pratt* chief juſtice, *Forteſcue* and *Raymond* juſtices, *Powys* being abſent; they being of opinion, this was not a bill of exchange, but a bare appointment to pay money out of a particular fund, with a view of having it paid out of which fund the defendants probably drew the bill, and never deſigned the bill ſhould be payable at all events, but only out of the particular money mentioned in the bill, ſuppoſed to be in Mr. *Pratt*'s hands. And it would be very miſchievous, to make ſuch notes as theſe, which are but appointments, bills of exchange; for at that rate, if a tradeſman applies to a gentleman for money for his bill, ſays the gentleman, I will direct my ſteward to pay you, and writes to him, pay to *J. S.* the money mentioned in his bill out of my rents in your hands; the ſteward has no rents in his hands; it can never be imagined, the gentleman ſhould be liable to be ſued upon this, as upon a bill of exchange. And the caſe of *Jocelin* and *Laſerre* was cited, which was *Paſch.* 1 *Geo.* 1. *B. R.* where a bill was drawn upon an agent of a regiment, pray pay out of my growing ſubſiſtence, &c. and adjudged no bill of exchange. And though the council objected, the reaſon of that caſe was, becauſe it depended upon a contingency, yet juſtice *Forteſcue* ſaid, the reaſon was, becauſe it was payable out of a particular fund; and if that was the reaſon of it, it is the caſe in point. There was alſo cited in the argument of this caſe, the caſe of *Smith verſ. Boheme*, *M.* 1 *Geo. B. R.* where the note was, I promiſe to pay *J. S.* ſo much money, or render the body of *J. N.* to priſon before ſuch a day; and it was adjudged to be no negotiable note within the act of parliament, and that an action could not be maintained on that note within that law; becauſe the money was not abſolutely payable, but it depended upon a contingency, whether he would ſurrender *J. N.* to priſon, or not. Judgment was reverſed, *Tueſday June* 9, 1724.

Pray pay out of my growing ſubſiſtence, no bill of exchange.

See Smith verſ. Boheme. Poſtea cited inter Morris and Lee.

I promiſe to pay *J. S.* 10 *l.* or render the body of *J. N.* to priſon before Michaelmas, no negotiable note.

Morris and others *verſ.* John Watkins.

Intr. *Trin.* 9 *Geo.* B. R.

Declaration againſt a priſoner in cuſtody muſt ſhew at whoſe ſuit he is in cuſtody.

THE plaintiffs declared againſt the defendant, as a priſoner in cuſtody of the ſheriff of *Monmouth*, in debt upon a bond for 100 *l.* and the declaration was, *Bridget Morris* and the other plaintiffs *queruntur de Johanne Watkins clerico, in cuſtodia Henrici Morgan armigeri, vicecomitis comitatus Monmouth, virtute brevis domini regis vocati*, a *latitat*, *e curia banci regis emanantis, et eidem vicecomiti directi, de placito quod reddat eis* 100 *l.* &c. And on demurrer the exception to the declaration was, that by the ſtatute of 4 & 5 *Will. & Mar. c.* 21. *par.* 3. it is enacted, that in all declarations againſt any priſoner detained by virtue of any proceſs iſſued out of the King's Bench, it ſhall be alleged, in cuſtody of what ſheriff, *&c.* ſuch priſoner ſhall be at the time of ſuch declaration, by virtue of the proceſs of the ſaid court, at the ſuit of the plaintiff; and it did not appear by this declaration, that the defendant was in cuſtody at the ſuit of the plaintiff. And after this had hung two or three terms, this term *June* 20. the court gave judgment for the plaintiffs, for they would explain at whoſe ſuit the *latitat* was, by the following words, *de placito quod reddat eis, i. e.* the plaintiffs, the 100*l.* for if the *latitat* was, that the defendant *reddat* to the plaintiffs 100*l.* it muſt be underſtood, at their ſuit.

The King *verſ.* Godfrey.

In an order to maintain a baſtard child, it muſt appear in what pariſh it was born. Shaw's Par. Law, c. 37. ſec. 74.

AN order made upon the defendant to maintain a baſtard child was quaſhed, becauſe though in the complaint it was alleged, the child was born in the pariſh of *Hitchin* in *Hertfordſhire*, yet there was no adjudication by the juſtices, nor no words of the juſtices from whence it could be collected, in what pariſh the child was born. And a caſe was cited by Mr. *Lee*, the Queen *verſ. Biddington, Paſch.* 10 *Ann.* where ſuch an order was quaſhed for this very exception. Mr. *Lee* for quaſhing the order, Mr. *Coningesbye* for maintaining it.

The King *verſ.* Crowhurſt.

In an indictment for diſobeying an order of juſtices, if the order is ſet out with a *quod cum*, it is ill.

THE defendant was indicted at the quarter-ſeſſions of the county of *Kent*, as overſeer of the pariſh of *Swanſcombe* in that county, for diſobeying an order made by two juſtices of that county, whereby they ordered the church-wardens and overſeers of that pariſh to pay 4*s. per* week to the keeper of the houſe of correction there for the maintenance of one *Baker* a lunatic committed to that houſe of correction, as long as *Baker* ſhould continue there in cuſtody: and the indictment ſet out, that the defendant was one of the overſeers, *&c.* and had notice of the order, and was requeſted to pay the 4*s. per* week by the keeper of the houſe of correction, but had not paid it, *&c.* And upon a demurrer to this indictment, it being removed into the King's Bench by *certiorari*, exception was taken by ſerjeant *Baines*, that there was no poſitive averment in the indictment, that the two juſtices had made ſuch an order; for it was only by way of recital, *quod cum* the two juſtices made an order, *&c.* and for this reaſon two indictments were quaſhed for not obeying an order for receiving a baſtard child. *Salk.* 371. the King *verſ. Whitehead.* And unleſs there was ſuch an order, which ought to be poſitively alleged, there could be no diſobedience of it. Mr. *Reeve* for the King inſiſted, that in treſpaſs the declaration will be ill, if it is laid with a *quod cum*, becauſe then the whole declaration is but recital, and there is no poſitive averment at all. But an action for diſturbing the plaintiff in enjoyment of his common laid with *cumque etiam* the plaintiff had a right of common, is good. 2 *Mod.* 142. *Styleman verſ. Patrick.* And he cited the caſe of the Queen *verſ. Goddard* and *Carleton*, *Trin.* 2 *Ann. B. R.* where in an indictment for forging the aſſignment of a leaſe, it was, *quod cum teſtatum exiſtit per quandam indenturam*, that *J. S.* demiſed, *&c.* the defendant *falſo fabricavit quandam aſſignationem in ſcriptis* of that leaſe, *cujus tenor ſequitur in haec verba*, and then ſet out the aſſignment, *&c.* and exception being taken, that the leaſe was ill ſet out, becauſe it was with a *quod cum*, which is not poſitive; yet *Holt* chief juſtice and the other judges held, it was well enough, becauſe it was only by way of recital that the leaſe was laid, but the forging of the aſſignment was laid poſitively, which was ſufficient. So here the order is only ſet out by way of recital, but the non-payment of the 4 *s. per* week, *&c.* is poſitively alleged. *Sed non allocatur*, for *per curiam* if there was no order, there could be no breach of that order, and therefore that ought to be poſitively alleged. And as to the caſe of the Queen *v. Carleton*, the forgery was the offenſe, and that was poſitively averred; however, though the court ſeemed then to be of that opinion in that caſe, yet it was never adjudged, for the cauſe was not determined, nor judgment ever given upon that indictment. And the caſe cited out of *Salkeld* is in point. And judgment was given for the defendant.

The King *verſ.* Burridge.

S. C. 8 Mod. 245. 1 Stra. 593. If in an indictment the proſecutor and defendant enter into a rule by conſent, that the maſter ſhall take forty eight out of the freeholders book, and each party ſhall ſtrike out twelve of them, and that the ſheriff ſhall return the reſidue of the forty-eight to try the cauſe at the aſſiſes; and at the trial the defendant challenges the array for want of hundredors, it is a contempt, and an attachment ſhall be granted.

AN information was filed in this court againſt the defendant late mayor of *Tiverton*, for voluntarily abſenting himſelf the day appointed by the conſtitution of the borough for electing a perſon to ſucceed him in that office for the year enſuing, whereby the corporation was hindred from proceeding to the election, *&c.* And iſſue being joined, on not guilty, a rule was entred into by conſent of the council on both ſides, that the ſheriff of *Devon* ſhould attend the maſter of the office with the freeholders book, and that he ſhould name forty-eight out of the book, and each party ſhould ſtrike twelve apiece, and that the ſheriff ſhould return twenty-four reſidue of the forty-eight, *pro triatione exitus in hac cauſa juncti ad proximas aſſiſas in et pro comitatu praedicto tenendas.* Accordingly the maſter ſtruck the forty-eight, and each party ſtruck out twelve, but the defendant's agent ſtruck out three of the four hundredors. Notice of this was took, when they were before the maſter, that there were but four hundredors; and the defendant's agent was told, that if they were partial, they might be challenged upon the trial, and that they ſhould ſtand the laſt in the panel; and the proſecutor offered to conſent, that they ſhould not be upon the jury at the trial; and there was an attendance before lord chief juſtice *Pratt* about it. Yet notwithſtanding this, the defendants perſiſted in ſtriking them out. And when the cauſe came down to trial at laſt *Lent* aſſiſes held for the county of *Devon* before Mr. juſtice *Denton*, the council for the defendant challenged the array for want of hundredors. The council for the proſecutor produced the rule of court, and inſiſted, the challenge ſhould not be received. But the judge ſaid, he would receive the challenge, and leave the parties, if it was a breach of the rule, to proſecute for the contempt. Upon which the council for the proſecutor pleaded the rule as a counterplea to the challenge; but Mr. juſtice *Denton* being of opinion, that the rule did not bar the defendant from taking this challenge, he allowed it, and the panel was quaſhed. Upon which a motion was made for an attachment againſt the defendant, for a contempt in taking this challenge, in breach of the rule by conſent, And a day being given to ſhew cauſe, Serjeants *Chapple*, *Shepherd*, and *Eyre*, and Mr. *Huſſey*, and Mr. *Fazakerly*, for the defendant inſiſted, that the taking this challenge was no expreſs breach of the rule within the words of it, becauſe the words do not ſhew, there was any conſent to wave any challenge. The conſent imports no more, than that the maſter ſhould ſtrike the jury in the manner mentioned in the rule, inſtead of the ſheriff returning it in the uſual way; and in theſe ſort of rules in the Common Pleas they make the parties expreſly conſent, not to challenge for want of hundredors; which ſhews the opinion of that court to be, that without theſe expreſs words the rule would not reſtrain ſuch challenges, and ſo have ſome rules been drawn up in this court. In Queen *Elizabeth*'s time the rule was, *quod nulla calumnia ſit ex utraque parte panello*, as 3 *Keb.* 740. the King *verſ. Kiffin*, after a trial at bar was ordered, a motion was made, that it might be added to the rule for the maſter to ſtrike the jury, that the defendant ſhould not challenge for want of hundredors; but the court held, they could not deprive the defendant of the privilege of challenge, which the law allowed him. And ſo is *Stile* 233. and that the defendant was juſtly intituled to all legal advantages, if by his own conſent he has not barred himſelf from them, which he has not done in this caſe. And in the firſt of this King, between the King and *Sherwood*, a motion was made, that the defendant ſhould conſent not to challenge for want of hundredors, and the rule was drawn up ſo by conſent. Beſides, if it was a doubtful caſe, it would be hard to grant an attachment, now the judge of aſſiſe allowed the challenge, notwithſtanding the counter-plea of this rule. On the other ſide Mr. ſerjeant *Pengelly*, Mr. *Reeve*, ſerjeant *Glide*, Mr. *Worth*, and Mr. *Webber*, argued for the King, that this was a plain breach of the rule, and a contempt to the court, and only a contrivance to put off the trial. And of that opinion was *Pratt* chief juſtice, and *Forteſcue* and *Raymond* juſtices. For the conſent in the rule is, that the ſheriff ſhall return the twenty-four, reſidue of the forty-eight, for trial of the iſſue of the cauſe; but the challenge to the array is a challenge to the return of this jury by the ſheriff, which the defendant had conſented the ſheriff ſhould return; and therefore it plainly defeats the effect, the defendant had before conſented the rule ſhould have. And though it is not in words expreſſed in the rule, that the defendants ſhould wave this ſort of challenge; yet it is a ſtrong implied waver of it, becauſe if this challenge is allowed, the trial cannot proceed, as the rule by conſent intended: and it looks very like a concerted contrivance, only to put off the trial; becauſe if this array ſhould not be quaſhed for this challenge, the defendant would not be prejudiced; for if any of thoſe hundredors had been partial, and not indifferent perſons, the defendant might have challenged them by the poll; but that would not have put off the trial, for then the jury might have been made up by the *tales*; but there can be no *tales*, when the panel is quaſhed. The caſes of the King *verſ. Kiffin*, 3 *Keb*. 740. and *Stiles* 233. were of trials at bar, where the party's conſent is not added to the rule, but the court makes it by their authority without ſuch conſent. But for trials at *niſi prius* the conſent of the parties is required. And an attachment was granted againſt the defendant abſolutely, *June* the 10th this term, by the ſaid three judges, *Powys* juſtice being abſent.

S. C. 1 Stra. 594. Articles to ride without a ſtick or whip, or other weapon: the averment was, that the plaintiff rid *abſque baculo et flagel'o, vel aliis armis*, good after verdict.

Burgeſs *verſ.* Bracher.

DEBT for a penalty of 40 *l.* for non-performance of articles entred into between the plaintiff and defendant, for running a horſe-race. Upon *nil debet* pleaded, and a verdict for the plaintiff, ſerjeant *Chapple* moved in arreſt of judgment, that one of the agreements in the articles was, that the rider of each horſe ſhould ride *abſque flagello vel baculo, vel aliis armis, Anglice* weapons, *praeter ocreas et calcaria*; and the plaintiff among the other neceſſary facts alleged in the declaration avers, that the rider of his horſe came at the time to the ſtarting place upon the back of his horſe *cum ocreis et calcaribus, ſed ſine flagello et baculo, vel aliis armis*, ready to ride the courſe; and then ſets out, that the defendant was then and there upon his horſe juſt in the ſame manner, and that the plaintiff's rider and the defendant then and there *in forma praedicta* being upon the ſaid horſes did ſtart and run, and the plaintiff's horſe won the race, *&c.* ſo that this averment being, that the plaintiff's rider did ride *abſque baculo et flagello*, he might have either a ſtick or a whip, for the averment is, he had not both; but if he had either, he did not ride according to the agreement; and therefore the plaintiff has not intituled himſelf to this action, becauſe he has not ſhewn, he ran according to the agreement in the articles. But the court ſeemed all to incline, this would have been good upon a demurrer, becauſe the averment being, that he rid *abſque flagello et baculo, vel aliis armis, &c.* that *vel* made the whole ſentence disjunctive, and was as much as ſaying, he rid without a whip or a ſtick, or other weapon: however, all the judges were clear of opinion, it was ſufficient after a verdict; and whether it would be good or not on a demurrer, it is certainly good after a verdict; for they could not but intend, that it was proved upon the trial, that the rider rid without either whip or ſtick, according to the articles; otherwiſe the judge who tried the cauſe would not have permitted the jury to have found for the plaintiff. And ſo the truth was, for it was tried before juſtice *Raymond*, *Lent* aſſiſes, at *Taunton*. And therefore judgment was given for the plaintiff, *June* the 15th, 1724. 1 *Salk.* 325. *Holt*'s opinion; 1 *Bulſtr.* 293. *Cox*'s caſe; *Cro. Eliz.* 229. *Hopkins verſ. Stafford*; and *Moore* 239. were cited. And for the defendant *Cro. Eliz.* 348. 1 *Leon.* 124, 5. were cited.

Mich. Term

11 Georgii regis, B. R. 1724.

The King *verſ.* Hen. Chaveney.

Conviction for ſwearing, in Engliſh, Oaths not ſet out. Hil. 8 Geo. 1. B. R. 1721. Rex v. Sparling, ſame reſolution.

THE defendant was convicted before a juſtice of peace of the county of *Leiceſter*, for curſing and ſwearing a great number of oaths. And the conviction being removed into this court by *certiorari*, it was quaſhed *November* the 9th, 1724. firſt, becauſe it was in *Engliſh*; ſecondly, becauſe the oaths were not ſet out in the conviction; on the motion of Mr. *Fazakerley* for the defendant.

The King *verſ.* Will. Chaundler.

S. C. 8 Rep. 336. 1 Stra. 612. S. C. Indictment againſt Chaundler, for ſecreting *A. H.* who was with child by the defendant, to hinder her evidence, and to elude the execution of the law for the crime aforeſaid.

THE defendant was indicted at the general quarter-ſeſſions of the peace for the county of *Wilts*, for that *Alice Hunt exiſtente gravida cum foetu illegitimo*, which ſhe affirmed to be by the ſaid *William Chaundler* of *Uphaven* in the ſaid county begotten; he the ſaid *William Chaundler praemiſſorum non ignarus, ea intentione ad impediendum et obſtruendum evidentiam* of the ſaid *Alice, de et concernente praemiſſa, et executionem juris pro crimine praedicto eludere,* 18 *Novembris anno domini Georgii regis* 10, *vi et armis apud Uphaven praedictum in comitatu praedicto duxit et duci cauſavit* the ſaid *Alice ad loca incognita, et perſonam ipſius Aliciae occultavit, Anglice* did ſecrete, and the ſaid *Alice continue poſtea hucuſque occultavit, et adhuc occultat; in malum exemplum aliorum, et contra pacem dicti domini regis, coronam et dignitatem ſuas, &c.* To this indictment removed into this court by *certiorari*, the defendant demurred: and judgment was given for the defendant, that this indictment was not maintainable; it being no offenſe, for which an indictment would lie, as this fact is charged.

Richard Aſton, Eſq; *againſt* Joſeph Blagrave.

S. C. 8 Mod. 270. 1 Stra. 617. S. C.

Mr. *A.* is a raſcal, a villain, and a lyar; ſpoke of a juſtice of peace in execution of his office.

IN an action on the caſe for words, the plaintiff after the uſual character of his good behaviour ſet out, that whereas the firſt of *October* in the fifth year of his Majeſty's reign, and for many years before, he was and yet is a juſtice of the peace for the county of *Berks*, and behaved himſelf juſtly and honeſtly in that office, that the defendant, intending to ſcandalize him, and bring him into diſrepute, the ſaid firſt of *October* at *Wantage* in *Berks*, having a diſcourſe with divers of the King's ſubjects *de praefato Richardo, et de executione ſua officii ſui juſticiarii ad pacem praedicti, adtunc et ibidem in praeſentia et auditu quamplurimorum dicti domini regis nunc ſubditorum tunc ibi praeſentium, falſo et malitioſe dixit et propalavit, et alta voce publicavit, de praedicto Richardo, adtunc uno juſticiariorum pacis ut praefertur exiſtente, et de executione ſua officii ſui praedicti, haec ficta ſcandaloſa et defamatoria verba Anglica ſequentia, viz.* Mr. *Aſton* (*innuendo* the plaintiff) is a raſcal, a villain, and a lyar; *ad damnum* 20 *l.* On not guilty pleaded, verdict was found for the plaintiff, and damages given 2 *l.* 10 *s.* And after ſeveral motions in arreſt of judgment, that theſe words were not actionable, becauſe they were general words of an uncertain ſignification; and words of heat only ought to be took *in mitiori ſenſu*, and could not be properly applied to the plaintiff as in execution of his office: for which purpoſe ſerjeant *Girdler* for the defendant cited 1 *Lev.* 52. *Bill verſ. Neal*, in an action for words ſpoke of a juſtice of peace; he is a fool, an aſs, and a beetle-headed juſtice: after verdict for the plaintiff judgment was arreſted by *Foſter* chief juſtice, *Windham* and *Twiſden* juſtices, contrary to the opinion of *Mallet*. *Cro. Ja.* 58. Sir *John Hollis verſ. Briſcow*, "Your maſter is a baſe raſcally villain, and is neither nobleman, "knight, or gentleman, but a moſt villainous raſcal, and by un-"juſt means doth moſt villainouſly take other mens rights from "them, and keeps a company of thieves and traitors to do miſ-"chief," &c. ſpoke of a juſtice of peace, held not actionable by three juſtices againſt two. *Caſes in parl. Price verſ. Devall*, 12. But he admitted, the defendant might have been bound to his good behaviour for ſpeaking the words in the declaration. But *November* the 26th this term lord chief juſtice *Pratt*, my brothers *Powys* and *Forteſcue*, and myſelf, gave our opinions, that the words were actionable, they being laid to have been ſpoken of the plaintiff in the execution of his office, and ſo found: ſo that it is the ſame as if the defendant had ſaid, that the plaintiff is a villain in the execution of his office, a raſcal in the execution of his office, and a liar in the execution of his office; which carry with them a great ſcandal, and in common underſtanding import a great imputation againſt the plaintiff's integrity and behaviour in that office; and therefore none of the caſes cited come up to this caſe. And judgment was given for the plaintiff. Serjeant *Webb* council for the plaintiff.

The King *verſ.* Pollard and Taylor.

S. C. 8 Mod. 264.

The proſecutor may indict a receiver of ſtolen goods, knowing them to be ſtolen, either for a felony or miſdemeanor, at his election.

1 Ann. c. 9.

THE defendants were ſeverally indicted for receiving goods ſtole by one *Foſter*, knowing them to be ſtolen, as for a miſdemeanor, *contra formam ſtatuti.* Upon not guilty pleaded they were found guilty at *niſi prius* before lord chief juſtice *Pratt.* And Mr. ſerjeant *Grove*, Mr. *Ketelbey*, and Mr. common ſerjeant *Lingard*, moved in arreſt of judgment, that by the 3 & 4 of *Will. & Mar. c.* 9. *ſect.* 5. this offenſe was made felony; but by a ſubſequent ſtatute, 5 *Ann. c.* 31. the receiver may be tried as for a miſdemeanor, if the principal felon cannot be taken and convicted: but if the principal can be took, then the counſel for the defendants inſiſted, the receiver could not be proſecuted as for a miſdemeanor; and therefore it is neceſſary in ſuch an indictment as this, to aver, that the principal felon could not be taken: but in fact they ſaid *Foſter* was afterwards taken, and tried for the felony, and acquitted; and there is no ſuch averment in the indictment. But the judges held, upon conſideration of the ſtatutes, that the proſecutor had his election, to proſecute either for felony or miſdemeanor; and though there have been ſeveral indictments for ſuch offenſes, yet none have had any ſuch averment, as is inſiſted on to be neceſſary by the counſel for the defendant. Mr. ſerjeant *Whitaker* and Mr. *Reeve* for the King. Judgment was given for the proſecutor, *June* the 17th, 1724.

Serle adminiſtrator of George Serle *verſ.* lord Barrington adminiſtrator of Mr. Wildman.

2 Stra. 826. S. C.
8 Mod. 278. S. C.

New trial cannot be granted for the plaintiff, when he is nonſuited at *niſi prius.*

IN debt upon an old bond dated 1695, the defendant pleaded payment of the money in the condition before the action brought, according to the act for amendment of the law; and iſſue being joined upon it, at the trial the defendant inſiſted on the length of time, as a preſumptive evidence that the money was paid, and ſo put the plaintiff to prove payment of the intereſt, &c. To anſwer which the plaintiff produced the bond, with two indorſements upon it under the obligee's hand of receipts for intereſt, one dated in 1699, and the other in 1707. But *Pratt* chief juſtice ſeemed to be of opinion, that theſe being only entries under the obligee's hand, who had the bond in his cuſtody, and might enter what he pleaſed upon it, could not be evidence for him, nor for his adminiſtrator, though they would have been good evidence againſt him, that the intereſt was paid: and therefore he did not ſuffer them to be given in evidence to the jury, but told the council for the plaintiff, he would give them leave to move the court for their opinion. And thereupon the plaintiff's council ſuffered the plaintiff to be nonſuited. And now the 18th of *June* this term Mr. ſolicitor general *Wearg* and Mr. *Fazakerley* moved the court upon the caſe as before ſtated, and prayed, that the nonſuit might be ſet aſide, and a new trial granted. But *Forteſcue* and *Raymond* juſtices were of opinion, that the nonſuit being recorded, the plaintiff was out of court, and could not have the motion granted. And the motion was denied. Afterwards a new action was brought on the ſame bond, and on the trial before me, I admitted the indorſements to be read, and the jury found for the plaintiff. Upon which a bill of exceptions being tendred, I ſigned it. And afterwards judgment was given for the plaintiff, and on error brought affirmed in the houſe of peers.

The inhabitants of St. John Baptiſt in the Deviſes *againſt* the inhabitants of St. James in Biſhops Cannings.

S. C. 1 Stra. 594. Being bound an apprentice and ſerving will not make a ſettlement without inhabiting.

TWO juſtices by an order removed *Warren* from *St. John Baptiſt* to *Biſhops Cannings*. Upon an appeal to the quarter-ſeſſions they quaſhed the order of the two juſtices, and ſent him back to *St. John Baptiſt*, as the place of his laſt legal ſettlement; which orders being removed into the King's Bench by *certiorari*, the order of ſeſſions ſtated the fact ſpecially, *viz.* that *Warren* was bound by his father apprentice to *J. S.* who lived in *St. John Baptiſt*, by indenture for ſeven years, and *Warren* ſerved his time, but never lay one night in *St. John Baptiſt*, but worked there, and at night came and lay with his father at *Biſhops Cannings*, his father all that time finding him meat and drink (except fair-days, market-days and *Saturdays*, when he eat with his maſter) and waſhing and lodging, according to his covenant in the indenture of apprenticeſhip. And *Forteſcue* and *Raymond* juſtices (*Pratt abſente*, and *Powys dubitante*) quaſhed the order of ſeſſions, becauſe binding an apprentice and ſerving will not make a ſettlement, but the ſettlement muſt be by inhabiting, which cannot be, but where the party lodges. *June* the 22d, 1724.

Stephen Biggs *againſt* William Benger and Richard Greenfield.

S. C. 1 Stra. 610.
Treſpaſs by *A.* againſt *B.* and *C.* for entring his houſe, and taking, carrying away, and converting his goods to their uſe; *B.* lets judgment go by default; *C.* juſtifies, that *B.* demiſed, *&c.* to *A.* rendring rent; and for rent-arrear he as ſervant of *B.* and by his command, entred, *&c.* and took the goods as a diſtreſs, and put them into a pound; and that the plaintiff requeſted and gave licence to *C.* to ſell the goods, and to pay the money, *&c.* to *B.* towards ſatisfaction of the rent, which he did, *&c.* the plaintiff replied *de injuria ſua propria, abſque hoc*, that he gave licence to *C.* to ſell the goods, *&c.* *C.* rejoined, and joined iſſue upon the traverſe: the jury found a verdict for *C.* and aſſeſſed damages againſt *B.* 89 *l.* *&c.* and judgment againſt *B.* was arreſted,

Intr. *Hil.* 9 *Geo.* B. R.

THE plaintiff brought an action of treſpaſs againſt the defendants, for that they the 20th of *September* 4 *Geo.* *vi et armis* the houſe, barn and cloſe of the plaintiff's at *Manningford* in the county of *Wilts* broke and entred, and the goods and chattels of the plaintiff, *viz.* 100 quarters of wheat, *&c.* there found, took and carried away, and converted and diſpoſed to their own uſe; *necnon* that the defendants 21 *September* 4 *Geo.* broke and entred into another houſe and cloſe of the plaintiff's at *Manningford* aforeſaid, and kept him out of poſſeſſion from the ſaid 21ſt of *September* to the exhibiting his bill; damage 200 *l.* And judgment was given againſt the defendant *Benger* by default; but the defendant *Greenfield* pleaded in bar as to the *vi et armis*, and all the treſpaſs *praeter intrationem domus horrei et clauſorum praedictorum, et captionem aſportationem et diſpoſitionem* of the ſaid goods and chattels, not guilty. Upon which iſſue was joined. As to the ſaid entry into the houſe, barn and cloſes aforeſaid, and taking, carrying away, and diſpoſing and converting the ſaid goods to his own uſe, he pleads, that before the ſaid treſpaſs, *viz.* *March* 25, *anno domini* 1713, the ſaid *William Benger* demiſed to the plaintiff one meſuage and five cloſes with the appurtenances, of which the ſaid houſe, barn and cloſes mentioned in the declaration are and at the time when, *&c.* were parcel, to hold to the plaintiff from the ſaid 25th day of *March* for one whole year from thence next following, and from year to year, as long as it ſhould pleaſe the ſaid *William* and *Stephen*, rendring 20 *l.* *per annum* rent, payable at every year's end that the plaintiff ſhould occupy the premiſſes: that the plaintiff entred 26 *March* 1713. and held them to the 25th of *March* 1717. and becauſe 80 *l.* for four years rent was in arrear, he as ſervant of the ſaid *William Benger* and by his command entred into the ſaid houſe, barn and cloſes (the doors being open) and took the ſaid goods as a diſtreſs, and carried them away, and put them into a pound *overt*; and thereupon the plaintiff requeſted and gave licence to the defendant *Richard* to ſell the ſaid goods, and to pay the money ariſing thereby to the ſaid *William* towards ſatisfaction of the ſaid 80 *l.* to him ſo due for rent; *per quod* the ſaid defendant *Richard virtute requiſitionis et licentiae praedictarum* then and there ſold the ſaid goods and chattels, and the money from thence ariſing, amounting to 40 *l.* and no more, he paid to the ſaid *William* towards ſatisfaction of the ſaid 83 *l.* *&c.* *quae ſunt eaedem* *fractio et intratio domus horrei et clauſorum praedictorum et bonorum et catallorum captio aſportatio et diſpoſitio, &c.* The plaintiff replied, *quod praedictus Richardus de injuria ſua propria diebus et anno ſupradictis* in the declaration mentioned *praedicta domum horrea et clauſa fregit et intravit, et bona et catalla* of the plaintiff took, carried away, and converted to his own uſe; *abſque hoc* that the plaintiff *licentiavit eundem Richardum ad vendendum bona et catalla praedicta,* as in the ſaid defendant's plea is alleged, *&c.* The defendant rejoined, that the ſaid *Stephen licentiavit* the ſaid defendant *Richard* to ſell the ſaid goods and chattels, as he had alleged; *et de hoc ponit ſe ſuper patriam.* And the plaintiff joined iſſue, and a *venire* was awarded, as well to try that iſſue, as to inquire what damages the plaintiff ought to recover againſt *William Benger*; and a verdict was found for the defendant *Richard* upon the iſſue, and the jury aſſeſſed damages againſt *W. Benger* 89 *l.* coſts 40 *s.* A motion having been made, that the judgment ought to be arreſted againſt *Benger,* ſince the jury had found, that the plaintiff had licenſed the defendant *Greenfield* to ſell the goods, which went to the whole, the jury having aſſeſſed intire damages againſt *Benger*; a rule was made to ſtay judgment, until, *&c.* The 8th of *November* ſerjeant *Webb* and Mr. *Gapper* moved for the plaintiff, that the rule might be diſcharged, and that the plaintiff might have his judgment againſt *Benger.* And they ſaid, the difference was, where an action was brought upon a contract, which was joint in its nature, againſt ſeveral defendants, and where upon a *tort,* as for a treſpaſs; in the firſt caſe, if one pleads a plea that goes to the whole, and upon iſſue joined it is found for him, and the other lets an interlocutory judgment go againſt him by default, the plaintiff cannot have final judgment againſt him; ſo is 1 *Lev.* 63. *Porter* againſt *Harris.* In covenant againſt two for not building a houſe for the plaintiff according to their covenant, judgment was againſt one by default, and the other defendant pleaded performance, and it was found for him, and judgment was arreſted as to him who let judgment go by default, becauſe in covenant debt or other contract, which is joint, one cannot be convicted without the other, and by the verdict for one defendant, that the covenant is performed, it appears, the plaintiff has no cauſe of action. But ſays that caſe, in treſpaſs one defendant may be guilty and the other not. In *Cro. Jac.* 134. *Marler verſ. Ayliffe* and *Eylett:* treſpaſs for taking of a gun and dagger from him; *A.* juſtified, becauſe the plaintiff aſſaulted *J. S.* with them, and for the ſafe guard of *J. S.* he took them from the plaintiff; *E.* pleaded not guilty; the plaintiff replied againſt him who juſtified, *de ſon tort demeſne,* and the iſſue was found for the defendant *A.* and the ſame jury found *E.* guilty, and aſſeſſed damages and coſts; and upon a motion in arreſt of judgment for *E.* the court held, that the plaintiff ſhould have judgment, becauſe *E.* is found guilty, and cannot take advantage of *A.*'s juſtification; for it ſhall be intended, he took the gun, *&c.* at another time without cauſe: but if one defendant juſtifies by the gift of goods, ſo that he deſtroys the plaintiff's title, and ſhews that he has no cauſe of action, which is found for that defendant; no judgment can be againſt the other defendant, though he is found guilty; becauſe it appears to the court, the plaintiff had no cauſe of action. They cited alſo 1 *Salk.* 23. where in an *indebitatus aſſumpſit* againſt *A.* and *B.* and judgment againſt *A.* by default; *B.* pleaded payment, and iſſue thereupon; *Holt* chief juſtice at *niſi prius* ſaid, that no finding upon that iſſue could diſcharge *A.* for he had confeſſed the whole. To apply this to the preſent caſe, they ſaid this was an action of treſpaſs, and therefore judgment might be againſt one defendant, and the other found not guilty at all; that the matter upon which iſſue was taken and a verdict found for the defendant *Greenfield*, did not go to the whole, but only as to the converting and diſpoſing of the goods to his uſe, *viz.* that it was done by licence of the plaintiff; but the licence did not go to the breaking and entry of the houſe, *&c.* And as in the before cited caſe in *Cro. Jac.* the court intended, that *E.* who was found guilty, took the gun, *&c.* at another time; ſo here the court would intend, *Benger*'s treſpaſs was committed by him at another time; and therefore the plaintiff ought to have his judgment againſt *Benger*. *E contra* it was argued by ſerjeant *Eyre* for the defendant *Benger*, that if in a plea perſonal againſt divers defendants the one defendant pleads in bar to parcel, or which extends only to him that pleads it, and the other pleads a plea that goes to the whole; that laſt plea ſhall firſt be tried, becauſe it goes to the whole, and the other defendant ſhall have advantage of it; for in a perſonal action the diſcharge of one is the diſcharge of both. *Co. Lit.* 125. So it is held in that caſe in *Cro. Jac.* 134. that if one of the defendants juſtifies by a gift of the goods, which is found for that defendant, no judgment can be given againſt the other defendant, becauſe it appears to the court, the plaintiff had no cauſe of action. So in this caſe, the verdict having found, that the goods were ſold by the defendant *Greenfield* by the plaintiff's licence; that goes to the whole, as to the diſpoſing and converting the goods to the defendant's uſe; and the damages being aſſeſſed intire againſt *Benger*, no judgment could be given for the plaintiff againſt him. Of which opinion was the whole court for thoſe reaſons, and judgment was abſolutely arreſted.

The King *verſ.* Theed.

S. C. 8 Mod. 319.
S. C. 1 Stra. 608.
Conviction on 8 An. c. 9. par. 10. for not permitting, and refuſing to aſſiſt, an officer of the exciſe to weigh candles.

By 9 Ann. an exciſe officer may by day or night, but if in the night it muſt be with a conſtable, enter into a houſe, *&c* it was laid, the officer entred into the houſe lawfully, and not ſaid, whether it was in the day or night; and good.

EDward Harriſon 18 *December* 10 *Geo.* informed two juſtices of the peace for the county of *Bucks*, reſiding near the pariſh of *Princes Riſeborough* in the ſaid county, that the defendant the 30th of *Auguſt* then laſt paſt at the ſaid pariſh was, and long before had been, a maker of candles for ſale, and upon the ſaid 30th of *Auguſt* at *Princes Riſeborough* aforeſaid did make uſe of a certain houſe in *Princes Riſeborough* aforeſaid, for the making and keeping of candles for ſale; that *Caleb Wilſon* being then and there an officer of and for the duties of exciſe, and for the duties laid upon candles in and by the ſtatute duly appointed, purſuant to and in execution of the power to ſuch officer given by the ſaid ſtatute, upon the ſaid 30th of *Auguſt*, at *Princes Riſeborough* aforeſaid, did lawfully enter into the ſaid houſe (ſo made uſe of by the defendant for making and keeping of candles for ſale) to take an account of the quantity of the candles, which had been there made; and that the ſaid *Wilſon* then and there finding ſeveral quantities of candles lately made by the defendant (of which no account had been before taken) and certain ſcales and weights being then in the ſaid houſe proper for weighing of candles, the ſaid *Wilſon* did then and there requeſt the defendant to permit him to uſe, and to aſſiſt him in uſing, the ſaid ſcales and weights, for weighing the candles aforeſaid, to take an account of the quantity thereof; but the defendant then and there did not permit the ſaid *Wilſon* to uſe, nor aſſiſt him in uſing, the ſaid ſcales and weights for weighing the ſaid candles, in order thereby to take an account of the juſt quantity thereof; but did then and there refuſe ſo to aſſiſt the ſaid *Wilſon* in weighing the ſaid candles, and alſo refuſed to permit him to weigh the ſame; contrary to the form of the ſtatute, *&c.* whereupon the defendant forfeited 10 *l.* *&c.* Upon this information the defendant was regularly convicted of the facts therein contained, and they gave judgment, that he ſhould forfeit 10 *l.* one moiety to the informer, *&c.* To this conviction removed into the King's Bench by *certiorari* Mr. *Lee* for the defendant took an exception, that it did not appear, that the entry of *Wilſon* the officer into the houſe was lawful; for by the ſtatute of 8 *Ann. cap.* 9. *par.* 10. the officer may by day or night (but if it is in the night it muſt be in the preſence of the conſtable, *&c.*) enter into the houſe, *&c.* now here it is laid, that *Wilſon* entred the 30th of *Auguſt*, but it is not ſaid, whether by day or night; it might be in the night, and then it was not lawful, becauſe it is not ſaid to be in the preſence of the conſtable, *&c.* and if the officer's entry was not lawful, the defendant

dant was not obliged by the act to aſſiſt him in weighing the candles, or to let him have the ſcales. But to this it was anſwered by Mr. *Reeve*, and held by the court, that the entry in the houſe is laid in the information to have been made *lawfully*, and it does not appear upon the face of the information that it was wrong, and therefore the court will not intend it was ſo, when the information and conviction ſay, he entred lawfully. If it had been unlawfully, the defendant would have had the benefit of it in his defenſe before the juſtices. The information purſues the clauſe of the act, for this conviction is founded on *par.* 1. And the conviction was affirmed *October* 25, 1724, by *Pratt* chief juſtice, *Forteſcue* and *Raymond* juſtices, *Powys* juſtice abſent.

The King *verſ.* Roberts.

S. C. 1 Stra. 608.
Conviction for ſwearing 100 ſame oaths.

The witneſs *praeſtitit ſacramentum*, inſtead of *praeſtat*, ill.

THE defendant was convicted upon 6 & 7 *Will.* 3. *c.* 1. for ſwearing a hundred oaths, *viz.* by G——d, and a hundred curſes, *viz.* G—d d——n you. And ſerjeant *Darnall* took exception to this conviction, that the oaths and curſes ought to have been ſet out a hundred times each particularly. *Sed non allocatur*; for it is ſufficient to ſay, he ſwore ſuch an oath, or made ſuch a curſe, a hundred times. But then the conviction was quaſhed, becauſe the record was, that the witneſs *praeſtitit ſacramentum*, &c. whereas it ought to have been in the preſent tenſe *praeſtat*.

Richard Elliot *verſ.* Matthew Cooper.

Intr. *Trin.* 10 *Geo.* B. R.

S. C. 8 Mod. 307.
S. C. 1 Stra. 609.
Poſt. 1484.
In caſe by the indorſee of a promiſſory note, he declares that the defendant *fecit quandam notam ſuam in ſcriptis' per quam quidem notam* he promiſed to pay to C. who indorſed it to the plaintiff, without ſaying that the defendant ſigned it, and held good on demurrer.

IN caſe upon a promiſſory note the plaintiff declared, that the defendant the 9th of *September* 1723, *apud*, &c. *fecit quandam notam ſuam in ſcriptis, vocatam* a promiſſory note, *per quam quidem notam* the defendant promiſed to pay to *Matthew Coates vel ordini* three months after date 22 *l.* 10 *s.* for value received; that the money being unpaid, the ſaid *Coates* afterwards indorſed it to be paid to the plaintiff or order for value received, of which the defendant had notice; whereby and by force of the ſtatute, &c. the defendant became liable to pay the note to the plaintiff, &c. To this count the defendant demurred; and demurrer being joined, Mr. *Crowle* for the defendant took an exception, that the ſtatute of 3 & 4 *Ann. cap.* 9. which enables parties, to whom or order promiſſory notes are payable, to indorſe the ſame, and intitles the indorſee to bring an action in his own name, extends only to notes made and ſigned by the perſon that makes the note; but in this caſe it is not alledged that the defendant ſigned the note, and therefore it is not ſuch a note as by the ſtatute is indorſable over, nor can the indorſee maintain an action upon it. It is poſſible indeed, it may be a ſufficient note to be evidence of money lent, *&c.* by proving the note to be writ by the defendant or his direction; but that will not be a note within that act. But *non allocatur*, for my brother *Forteſcue* citing the late caſe of *Taylor verſ. Dobbins*, as exactly being this caſe in point, wherein notwithſtanding this very exception the plaintiff had judgment, becauſe it was ſaid, *fecit notam ſuam per quam promiſit ſolvere*, which implied it was ſigned by the defendant, which caſe *Pratt* chief juſtice remembred, judgment was given for the plaintiff.

Taylor verſ. Dobbins.

The King *verſ.* Plympton.

Intr. *Paſch.* 10 *Geo.* n. 17.

AN information was exhibited againſt the defendant, which ſet out, that King *James* I. by his letters patent dated the 10th of *Auguſt* in the thirteenth year of his reign, incorporated the inhabitants of *Tiverton in comitatu Devon*, by the name of the mayor and burgeſſes of the town and pariſh of *Tiverton in comitatu Devon*, that they ſhould have a mayor, twelve capital burgeſſes, and twelve aſſiſtants, who ſhould be the common-council; that the mayor, capital burgeſſes and aſſiſtants, or the greateſt part of them, every year, on *Tueſday* next after St. *Bartholomew*, ſhould chuſe one of the capital burgeſſes to be mayor for a whole year next enſuing, and then appoints him to be ſworn, *&c.* which letters patent the inhabitants accepted, and ever ſince acted under; that the 10th of *Auguſt* 10 *Geo.* one *John Upcott*, Eſq; was and is a capital burgeſs of the ſaid town and pariſh, and alſo one *William Hewett* was then and is one of the aſſiſtants, before that time *in officium illud debito modo electus et praefectus*; and the ſaid *William Hewett* as ſuch aſſiſtant had a vote in the election of the mayor and other members of the town and pariſh aforeſaid, *viz.* at the town and pariſh aforeſaid: and that then there were and are now within the ſaid town and pariſh and among the members thereof parties diſagreeing among themſelves, and mutually promoting contrary intereſts to one another; that the defendant being then and ſtill one other of the aſſiſtants of the ſaid town and pariſh, intending the free election of a mayor then next to be made, and the free election of other members of the ſaid town and pariſh, then ſoon to be made, to diſturb, and to raiſe confuſion in the government of the

To promiſe a member of a corporation money, *&c.* to give his vote for the election of a mayor of a corporation, is an offenſe for which an information will lie.

town and pariſh aforeſaid, a little before *Tueſday* next after *St. Bartholomew* (that day being the day appointed by the ſaid letters patent for electing the mayor) and upon and about which day the election of the other members of the ſaid town and pariſh was then intended to be made, *ſcilicet* 10 *Auguſti* 10 *Geo. apud villam et parochiam praedictam nequiter adviſate et corrupte tentavit inſtigavit urgebat et ſollicitavit praedictum Willielmum Hewett*, then and there being one of the aſſiſtants of the ſaid town and pariſh, and having a vote in the election of the mayor of the ſaid town and pariſh, and alſo in the election of the other members of the ſaid town and pariſh ſoon to be choſen, *ſuffragium ſuum ad electionem majoris villae et parochiae praedictae adtunc proxime fiendam, ac in electione aliorum membrorum villae et parochiae praedictae tunc cito eligendorum, dare pro et in intereſſe adtunc promoto* within the ſaid town and pariſh as well by the ſaid defendant as the ſaid *John Upcott:* and to perſuade and promiſe the ſaid *William Hewett* to give his vote *in electione illa* for and in that intereſt, the defendant then and there unlawfully and corruptly promiſed, to pay the ſaid *William Hewett* 500 *l.* upon condition that he would give his vote *ad electionem illam pro et in intereſſe illo*; *in magnam obſtructionem liberae et pacificae electionis majoris et aliorum membrorum villae et parochiae praedictae, et in incitationem confuſionis in eadem et ſubverſionem boni regiminis et gubernationis villae et parochiae illius, et magnam violationem libertatis et privilegiorum inhabitantium ejuſdem, &c.* Upon not guilty pleaded, the defendant was found guilty. And Sir *Thomas Pengelly* the King's ſerjeant moved in arreſt of judgment, that by ſo much of the charter as was ſet out in the information it did not appear, that the defendant or *Hewett* as aſſiſtants had a right to vote at any election but of that of a mayor; and if there are any clauſes in the charter, which enable aſſiſtants to vote at the election of other officers, they ſhould have been ſet out; for want of which it is informal: and it is not ſufficient to aver, that *Hewett* had a right to vote at the election of the other members of the corporation; but the offenſe charged is, for ſoliciting *Hewett* to vote, not only at the election of a mayor, but alſo of the other members; which is laid as one intire offenſe, and the fine muſt be for the whole; but it ought not to be for ſoliciting *Hewett* to vote at the elections of the other members, becauſe he had no right to vote at them. Then ſerjeant *Pengelly* urged, here was no offenſe at all charged; for it is lawful for one member of a corporation to aſk or perſwade another to vote for his friend, and if he made ſuch a promiſe as in this information, it will be no crime, without ſhewing the fact done, that the money was paid, and accepted by *Hewett*. Beſides the election of the other members might be only of common-council-men, who are not magiſtrates, but only in the nature of private perſons: and in ſuch caſe the offer of money to vote for them would be no offenſe puniſhable by information. Inticing an apprentice to leave his maſter's ſervice is not indictable: 1 *Salk.* 380. the King *verſ. Daniel.* And the promiſe here is void, becauſe there is no good conſideration for it. But the court were of opinion, that to bribe perſons, either by giving money or promiſes, to vote at elections of members of corporations, which are created for the ſake of publick government, is an offence, for which an information will lie, and that *Hewett*'s right to vote was ſufficiently laid. And judgment was given againſt the defendant.

The King *verſ.* Sympſon.

S. C. 1 Stra. 609.

The court cannot take notice, any particular town, &c. is within any particular dioceſe, unleſs it is ſo averred to be.

Poſt. 1405.

A *Mandamus* iſſued out of this court directed to Dr. *King* archdeacon of *Colcheſter* in *Eſſex*, to the defendant his ſurrogate, *aut alii judici in hac parte competenti*, commanding him to ſwear Mr. *Rodney Fane* one of the churchwardens of the pariſh church of *All Saints* in *Colcheſtor*. To which the defendant returned, that before the writ came to him, and before the writ iſſued, *viz.* 20 *April* laſt, the biſhop of *London inhibuit* the ſaid Dr. *King* then and yet archdeacon of *Colcheſter*, *cujus miniſter et officiarius* the defendant *Barnaby Sympſon ad tunc fuit et adhuc eſt, ab ulterius procedendo de vel in re ſive negotio praedicto, et perinde totam juriſdictionem in ea parte ſuper ſe ſuſcepit; quodque inhibitio praedicta adhuc remanet in ſuo vigore et virtute, et his de cauſis* the ſaid *Rodney Fane* into the ſaid office, *&c. admittere et jurare non poteſt nec debet prout per breve praedictum praecipitur.* Mr. *Reeve* took exception to this return, that it is not averred, that *Colcheſter* is within the dioceſe of *London*; for if it is not, the biſhop's inhibition is void; and the court cannot judicially take notice, that *Colcheſter* is within the dioceſe of *London*. *Quod fuit conceſſum per curiam*, and a peremptory *mandamus* was granted *November* 16.

The King *verſ.* White.

Non fuit electus **returned by an archdeacon, to ſwear a church warden.**

TO a *mandamus* directed to the archdeacon, to ſwear a churchwarden, he returned *non fuit electus*; upon opening which Mr. juſtice *Forteſcue* ſaid, that it was ſettled, and had been often ruled, that the archdeacon could not judge of the election, and therefore this return was ill. Whereupon a peremptory *mandamus* was granted. But note, it was certainly wrong, for the return was a good return, and has often been made to ſuch *mandamus*, and actions brought upon the return, and tried: *vide poſt*, the King *verſ. Harwood*, 1405.

Memorandum, January 1724-5, *The earl of* Macclesfield *ſurrendered the great ſeal into his Majeſty's hands, who was pleaſed to deliver it in council at* St. James's *the 7th day of* January *to Sir* Joſeph Jekyll *maſter of the Rolls, Mr. baron* Gilbert, *and myſelf, where we took our oaths of office as lords commiſſioners of the great ſeal.*

Note, *All* Hilary *term* 1724-5, *I attended in Chancery as one of the commiſſioners of the great ſeal.*

Eaſter

Eaſter Term

11 Georgii regis, B. R. 1725.

MEmorandum, *That Sir* John Pratt *knight, chief juſtice of the King's Bench, died* Wedneſday February *the 24th laſt paſt, and I was created chief juſtice in his place by a writ bearing* teſte March 2. *and was ſworn into the office* March 3. *following before Sir* Joſeph Jekyll *knight, maſter of the Rolls, and Sir* Jeffery Gilbert *knight, one of the barons of the Exchequer, then two of the lords commiſſioners for the cuſtody of the great ſeal, at the* Rolls; *notwithſtanding which I continued one of the commiſſioners of the great ſeal. And* James Reynolds *eſquire, ſerjeant at law, was ſworn at the* Rolls *one of the judges of this court in my place, before the three lords commiſſioners of the great ſeal, after his return from the* Weſtern *circuit.*

William Maddox and Robert Godfrey *verſ.* John Taylor and others.

THE plaintiffs brought an action of treſpaſs againſt the defendants, and declared, that the defendants the 24th of *May*, 8 *Geo.* at *Ighſam* in *Kent*, *clauſa domum et horreum ipſius Willielmi Maddox fregerunt et intraverunt, ac diverſa bona et catalla ipſorum Willielmi Maddox et Roberti Godfrey, viz. unam vaccam*, and ſeveral other goods particularly mentioned in the declaration, *adtunc et ibidem ceperunt et aſportaverunt, &c.* On not guilty pleaded, the jury found a verdict for the plaintiffs againſt all the defendants, and gave them 20 *l.* 9 *s.* damages beſides coſts. And *Hilary* term 10 *Geo.* 1723, Mr. *Fazakerly* moved in arreſt of judgment, that the two plaintiffs had joined in an action of treſpaſs for breaking and entring the cloſes, houſe and barn to which one of them, *viz. Robert Godfrey* had no title; and by conse-

S. C. 8 Mod. 370.
Treſpaſs by *A.* and *B.* for breaking and entring the houſe of *A.* and taking away the goods of *A.* and *B.* On not guilty pleaded, verdict for the plaintiff, and intire damages, judgment ſhall be arreſted.

conſequence, if judgment ſhould be given for the plaintiffs, *Godfrey* would recover damages for breaking the houſe, &c. to which he had no right, and had ſuſtained no damage by the breaking and entry thereof. Of which opinion the lord chief juſtice *Pratt* and the other judges ſeemed to be, and therefore a rule was made, to ſtay the judgment, till it ſhould be moved by the plaintiffs. And afterwards it being moved this term *May* the 7. my ſelf and my brothers *Powys* and *Forteſcue* being clear of that opinion, judgment was arreſted abſolutely, *abſente Reynolds*.

S. C. 8 Mod. 366.
1 Stra. 623. S. C.
Inquiſition on a *ſcire fieri* inquiry was ſet aſide, becauſe no notice was given of the time of execution of the writ.
No notice neceſſary either of execution of *elegits* or extents.

Steed *verſ.* Layner.

THE execution of a writ of *ſcire fieri* inquiry was ſet aſide, upon a motion of my brother *Whitaker*, becauſe no notice was given of the time the writ was to be executed, for which purpoſe it is neceſſary to give notice; and ſo it was held before in the like caſe, *Trin.* 9 *Geo. B. R.* and an inquiſition took on ſuch a writ ſet aſide. And it is not like executions by *elegit*, or on extents, in which caſes notice is not uſually given.

Baker *verſ.* Bache.

Intr. *Mich.* 11 *Geo.* B. R. Rot. 200. *Error* C. B.

Damages given on the writ of inquiry for more time than laid in the declaration.

THE plaintiff brought an action on the caſe againſt the defendant for money laid out and neceſſaries provided by the plaintiff for the defendant's ſons, to whom the plaintiff was by the defendant appointed their tutor, &c. and the plaintiff laid the promiſe to be made by the defendant to the plaintiff 19 *June* 1718. to pay the plaintiff for the neceſſaries he ſhould provide for the ſons, and the money he ſhould lay out for them, &c. and avers he continued their tutor for five years and nine months, and during that time found them neceſſaries, &c. which came to 140 *l.* Judgment was given againſt the defendant by *nil dicit* in *C. B.* and the writ of inquiry was executed the 3d of *February*, 10 *Geo.* 1723. and the inquiſition found, that the plaintiff ſuſtained damages *occaſione praemiſſorum ultra miſa et cuſtagia* 129*l.* 9 *s.* and 11 *d.* And final judgment being given for the plaintiff in the Common Pleas, the defendant brought a writ of error in the King's Bench. And *Monday May* 3. this term the judgment of the Common Pleas was reverſed, becauſe the jury on the writ of inquiry have given damages for neceſſaries provided after the action commenced, and to a time after the writ of inquiry was executed;

for the promiſe being laid to have been made the nineteenth of *June* 1718. and that the plaintiff had provided the neceſſaries, *&c.* from that time for five years and nine months next following; that time did not expire till the nineteenth of *March* 1723. computing calendar months, and not till about the 25th or 26th of *February*, computing lunar months.

Brace *verſ.* Daniel. *Error* C. B.

Treſpaſs *vi et armis* for taking and detaining the plaintiff's cattle. The plaintiff declared, that the defendant *Samuel Daniel*, *March* 20, 1718. *vi et armis* at *Averton* in *Eſſex*, *ceperunt*, *abduxerunt et aſportaverunt* a mare, a bull, *&c.* of the plaintiff's. After judgment by *nil dicit* a writ of inquiry was executed, and damages found for the plaintiff, and final judgment given for him. Upon which the defendant *Daniel* brought a writ of error in the King's Bench, and the judgment was reverſed *May* 7. this term; becauſe the verbs being in the plural number, there was no poſitive charge that the defendant took the cattle.

Declaration in treſpaſs againſt one defendant, that *ceperunt*, *abduxerunt*, *&c.* ill.

John Mayne *verſ.* Daniel Harvey.

In an *indebitatus aſſumpſit*, and *quantum meruit*, for goods ſold and delivered by the plaintiff to the defendant; the defendant pleaded, that the plaintiff *actionem ſuam inde habere ſeu manutenere verſus eum non debet*, and then ſet out the act of parliament of the ninth of the King, intituled an act for more effectual execution of juſtice in a pretended privileged place in the pariſh of *St. George* in the county of *Surrey*, commonly called the *Mint*, and then brings himſelf within the benefit of that act. And on demurrer *April* 21 in this term judgment was given for the plaintiff, becauſe this plea cannot be pleaded in bar of the action, but only in bar of the execution. Mr. *Martin* council for the plaintiff.

Mint act no plea in bar of the action, but only of the execution.

Robert

Robert Kerry and Mary his wife, formerly wife of Robert Allfounder, *againſt* William Kent and others.

Intr. *Mich.* 11 *Geo.* B. R. Rot. 291.

S. C. 8 Mod. 355.
S. C. 1 Stra. 625.
Dower does not lie of a tenement.
Touts temps priſt pleaded.

ERROR upon a judgment given on a writ of *dower*, brought by the demandants, wherein the demandant *Mary* demanded her dower of fifteen acres of land, three meſuages, three tenements, a brewhouſe, *&c.* in *Debenham* and *Winſton* in *Suffolk* (as being formerly wife of *Robert Allfounder*, *&c.*) The tenants confeſſed the action, and pleaded, that from the time of the death of *Robert Allfounder* they always were and yet are ready to render the demandant *Mary* her dower. Whereupon judgment was given for the demandants to recover ſeiſin of one third part of the ſaid fifteen acres of land, three meſuages, three tenements, *&c.* and a writ of ſeiſin iſſued returnable *March* 15. and a writ of inquiry of damages, to inquire what damages the demandants had ſuſtained by reaſon of the detaining the dower from the day of ſuing the original writ to the iſſuing the writ of inquiry, returnable *March* 15. To which the ſheriff returned, he had delivered ſeiſin of one third of the land, meſuages, tenements, *&c.* and he alſo returned an inquiſition, finding that the demandants had ſuſtained damages by the detaining of the dower from the day of ſuing the original writ to the iſſuing of the writ of inquiry 30*l.* 15*s.* beſides coſts, for which and coſts judgment was entred for the demandants. And now upon a writ of error brought in the King's Bench ſerjeant *Comyns* for the plaintiff in error inſiſted, that a writ of dower would not lie of a tenement, it being a word of an uncertain ſignification, and therefore the ſheriff could not give ſeiſin of it. Secondly, that the judgment for the recovery of damages was erroneous; firſt, becauſe by the ſtatute of *Merton*, 20 *Hen.* 3. *cap.* 1. the demandant in dower is not to recover damages, unleſs her husband died ſeiſed; and upon this record it does not appear, the husband died ſeiſed. *Co. Lit.* 32. *b.* ſecondly, the tenants have pleaded, they always were ready, and yet are ready, to render the dower, in which caſe they ſhall anſwer no damages. Mr. *Reeve* for the demandants in dower and the defendants in the writ of error inſiſted, that the plea of *touts temps priſt*, *&c.* can be only pleaded by the heir in bar of damages, *Co. Lit.* 32, 33. and it does not appear, that any of the tenants was heir at law, and therefore this plea in this caſe could not prevent the demandants from recovering damages. He admitted, that the judgment for the damages could not be maintained, becauſe it was not ſug-

Ejectment does not lie *de meſuagio ſive tenemento.*
3 Leon. 228.
Wood verſ. Payne
Cro. Jac. 125, 621.
Noy 186.
2 Mod. 238.

geſted, that the huſband died ſeiſed; but yet he ſaid, the judgment might be reverſed as to that, and be affirmed as to the dower, if the demand was rightly made. For the judgment for the damages was founded on the ſtatute of *Merton*, and the judgment for the dower is a judgment at common law; and therefore though the judgment for the damages ſhould be reverſed, yet the judgment for the dower might ſtand. And he compared it to *Specot's* caſe, 5 *Co.* 58, 59. where in a *quare impedit* judgment for the recovery of the preſentation was affirmed, though there was an error in the judgment for the recovery of the damages. Then Mr. *Reeve* inſiſted, that a writ of a third part *trium tenementorum* was good in dower (where the ſame certainty is not required as in other writs) and therefore a demand of dower *de libero tenemento* is good. *F. N. B.* 148. *A.* So an aſſiſe or writ of dower lies of a croft or cottage, 8 *Hen.* 6. 3. *Bro. dower* 92. and yet a *praecipe* does not lie of a cottage; and if this declaration had been ill on a demurrer, yet now the tenants have confeſſed this demand as laid, and therefore that makes the count good; like the caſe of *Slack verſ. Bowſal, Cro. Jac.* 668. the plaintiff declared, that the defendant being indebted to the plaintiff in 5 *l. pro redditu antetunc debito*, promiſed to pay the 5 *l.* when requeſted, *&c.* the defendant pleaded payment, and on iſſue joined verdict againſt the defendant; and the court held the declaration was made good by this plea of payment, though it was not ſhewn, when the rent became due, nor for what term, nor upon what contract. So *Cro. Jac.* 682. *Buckland verſ. Otely*, debt for rent upon a demiſe of lands at *Creek*, and of ſeveral other cloſes, and did not ſhew where thoſe cloſes lay; the defendant pleaded, the plaintiff had entred into part of the lands at *Creek*, *&c.* and on iſſue thereupon verdict for the plaintiff; and the court held this plea of collateral matter had aided this omiſſion in the declaration, which would have been good cauſe of demurrer.

But the court was of opinion, that this declaration was ſo uncertain, that the confeſſion could not help it; becauſe the ſheriff could not tell of what he was to give ſeiſin; for theſe tenements might be houſes or lands, or any thing elſe that might be held; and therefore the caſe cited by Mr. *Reeve* does not come up to the preſent caſe. And judgment was reverſed for this reaſon, *May* 4. and no opinion given as to the other points made by him. See *Cro. Jac.* 621. *Herward verſ. Cavendiſh.*

The King *verſ.* John Tucke.

S. C. 8 Mod. 366.

Conviction for curſing and ſwearing.

The information deſcribed the defendant to be a gentleman and above 16. and though the oath of the witneſs did not expreſly ſwear that, yet ſince it was, that *praedictus* the defendant did ſwear, &c. held good.

THE defendant *Tucke* was convicted upon the ſtatute of 6 & 7 *Will.* 3. *c.* 11. for profane curſing and ſwearing, by Mr. *Tuthill* a juſtice of peace for *Axbridge* in *Somerſetſhire.* The conviction being removed by *certiorari* into this court ſet out, that the 20th of *July* 10th of the King, *John Flower* of the ſaid town and pariſh of *Axbridge* comes before the ſaid juſtice of the peace, and informs him, that *John Tucke* of the ſaid town and pariſh of *Axbridge*, then or at any time after *non exiſtens ſervus, nec laborator, nec miles communis, Anglice* a common ſoldier, *nec nauta, Anglice* a common ſeaman, *ſed adtunc exiſtens generoſus et ultra aetatem ſexdecim annorum*, within ten days then laſt paſt, *viz.* the ſaid 20th of *July* at the town and pariſh aforeſaid, did profanely ſwear four profane oaths, and ſets them out; *contra formam ſtatuti in hujuſmodi caſu nuper editi et proviſi, et ſuperinde praedictus Johannes Flower, adtunc et adhuc exiſtens credibilis teſtis, poſtea, ſcilicet* 27th of the ſame *July*, in his proper perſon comes before me the ſaid *John Tuthill*, then being a juſtice of the peace, &c. *et ſacramentum ſuum corporale ſuper ſacroſancta Dei evangelia ad dicendum veritatem de et ſuper praemiſſis praedictis in informatione praedicta ſuperius praeſtat* before me the ſaid juſtice, &c. *praedictuſque Johannes Flower ſic juratus exiſtens dicit deponit et jurat ſuper ſacramentum ſuum praedictum de et ſuper praemiſſis praedictis in informatione praedicta ſuperius ſpecificatis*, that the ſaid *John Tucke* the ſaid 20th day of *July* at the town and pariſh aforeſaid, did then and there profanely ſwear four profane oaths, and ſets them out; *contra formam ſtatuti in hujuſmodi caſu editi et proviſi; ſuper quo praedictus Johannes Tucke poſt ſummonitionem ei ad reſpondendum de et ſuper praemiſſis praedictis in informatione contentis prius in hac parte debito modo factam, poſtea, ſcilicet* the ſaid 27th day of *July* at the town and pariſh aforeſaid, before me the ſaid *John Tuthill* then being a juſtice, &c. comes in his proper perſon, *ac omnibus et ſingulis materiis in informatione praedicta contentis et evidentiis praedictis ſuperinde datis per praedictum Johannem Tucke auditis et plene intellectis exiſtentibus, idem Johannes Tucke per me praefatum juſticiarium allocutus eſt, quomodo ſe vellet de et in materiis praedictis in informatione praedicta verſus eum objectis et ſpecificatis defendere et acquietare, et ſiquid pro ſe habeat vel dicere ſciat, quare ipſe idem Johannes Tucke de praemiſſis praedictis in informatione praedicta contentis, et ei in forma praedicta ſuperius impoſitis, non convincatur; et quia per me praefatum juſticiarium auditis et plene intellectis omnibus et ſingulis per ipſum Johannem Tucke in defenſione ſua de et ſuper praemiſſis in*

The oath of the witneſs.

Defendant heard.

in informatione praedicta ſuperius allegatis, manifeſte mihi praefato juſticiario conſtat, praedictum Johannem Tucke eſſe culpabilem de praemiſſis praedictis in informatione praedicta ſpecificatis et ei impoſitis, modo et forma prout in et per informationem praedictam ſuperius allegatur; ideo conſideratum eſt per me praefatum juſticiarium, quod praedictus Johannes Tucke per teſtimonium praefati Johannis Flower credibilis teſtis ſuper ſacramentum ſuum praedictum coram me praefato juſticiario ut praefertur praeſtitum de praemiſſis praedictis in informatione praedicta ſpecificatis, et ei ut praefertur impoſitis, convincatur et convictus ſit ſecundum formam ſtatuti in hujuſmodi caſu editi et proviſi; et quod praedictus Johannes Tucke forisfaciat ſummam octo ſolidorum pro offenſis ſuis praedictis, ſcilicet duos ſolidos pro quolibet offenſo praedicto, levandam et ſolvendam ſecundum formam ſtatuti praedicti in hujuſmodi caſu editi et proviſi: in cujus rei teſtimonium ego praefatus Johannes Tuthill generoſus juſticiarius praedictus huic recordo manum meum et ſigillum meum appoſui, apud villam et parochiam praedictam, dicto viceſimo ſeptimo die Julii, anno regni dicti domini regis nunc decimo ſupradicto.

Convicted.

Mr. *Fazakerley* for the defendant took two exceptions to this conviction; firſt, that it did not appear, of what degree the defendant was, for the ſtatute of 6 & 7 *Will.* 3. *cap.* 11. makes a difference in the puniſhment according to the degree of the offender; for a ſervant, labourer, common ſoldier, or common ſeaman, for the firſt offenſe is, if convicted, to pay one ſhilling, every other perſon for the firſt offenſe two ſhillings; ſecond exception, it did not appear of what age the defendant was, for if he was above ſixteen, if he did not pay the money, and no diſtreſs was to be found, he was to be ſet in the ſtocks; if under ſixteen, in ſuch caſe he is to be whipt: now although in the information ſet out in the conviction *John Flower* informs the juſtice, that the defendant was not a ſervant, nor labourer, nor common ſoldier, nor common ſeaman, but a gentleman, and above ſixteen years of age; yet that was not proved by the evidence given by the witneſs as ſet out in the information, which he inſiſted it ought to be; as in conviction for deer-ſtealing, the county where the offenſe was committed was only mentioned in the information, and not in the evidence of the witneſs; and therefore that not appearing to be proved, the conviction was quaſhed. But the court were of opinion, that ſince it was alleged in the information, that the defendant *non exiſtens ſervus nec laborator, nec miles communis, nec nauta, ſed adtunc exiſtens generoſus et ultra aetatem ſexdecim annorum, &c.* and the witneſs ſwore, that *praedictus Johannes Tucke* did ſwear, &c. that was ſufficient, and much different from the caſe of the conviction of deer-ſtealing; for here the perſon as deſcribed in the information is deſcribed by the *praedictus*, but in that caſe the juſtices of the peace

If the county where deer-ſtealing was committed is not proved by the witneſſes, though laid in the information, ill.

have no juriſdiction, unleſs it is proved to be committed in th
county; and mentioning the county in the information, with
proving it, is not ſufficient. And the conviction was confirm
niſi, &c. and no cauſe was afterwards ſhewn, *April* 21, 1725.

Phillibrown *againſt* Ryland and others.

Intr. *Paſch.* 8 *Geo.* B. R. Rot. 243.

S. C. 8 Mod. 351.
S. C. 1 Stra. 624.

Caſe for hindering an inhabitant and veſtryman to meet the veſtry of the pariſh in a houſe, where the veſtry was met.

The plaintiff as inhabitant and pariſhioner intituled to be at veſtries.

The buſineſs of the veſtry.

Veſtry held 11 July in a room called the veſtry room.

Plaintiff offered to enter the room.

CASE. The plaintiff declares, that 11 *July* 1721. and l
before and always from that time *hucuſque*, he was and n
is an inhabitant and pariſhioner paying ſcot and bearing lot in
pariſh of *St. Botolph Biſhopſgate* in the ward of *Biſhopſgate Lond*
and as ſuch inhabitant and pariſhioner he the ſaid plaintiff *jus et*
vilegium habet et habere debuit et debet conveniendi et praeſens
ſtendi ad conſulendum tractandum et deliberandum, et votum et
fragium ſuum dandum, in every veſtry of the inhabitants and
riſhioners of that pariſh held and to be held for, in and within
ſaid pariſh, *pro de et concernente res materias et negotia pub*
ſpectantia et pertinentia ad ſive tangentia reparationem eccleſiae
rochialis parochiae praedictae, aut monetam collectam ſeu colligend
levatam ſeu levandam, ac ratas aſſeſſamenta vel taxationes facta
facienda pro tali reparatione, aut pro de et concernente aliquas a
res materias et negotia in vel per talem aſſemblationem aut congre
tionem negotianda tranſigenda ſive ordinanda ſpectantia et pertinen
ad ſive tangentia commodum et bonum publicum parochiae praedict
vel pro de et concernente aliqua alia res materias et negotia paroc
alia, quae in vel per talem aſſemblationem aut congregationem ne
tiari tranſigi ſeu ordinari ſolent et debent: and whereas a veſtry
the inhabitants and pariſhioners of the ſaid pariſh was held the
11th of *July in quodam loco vocato romea veſtiaria, Anglice*
veſtry room, *prope adjungente* to the ſaid pariſh-church *exiſte*
uſuali loco ubi tales aſſemblationes aut congregationes teneri et hab
ſolitae et conſuetae fuerunt, viz. apud London praedictum, in pa
chia et warda praedictis, et adtunc et ibidem diverſi inhabitantes
parochiani dictae parochiae parochialiter convenerunt et praeſen
fuerunt, Anglice, a veſtry was held, *ſecundum notitiam eis inde pr*
datam, ad conſulendum, tractandum et deliberandum, et vota et ſ
fragia ſua dandum, pro de et concernentia diverſa publica res ma
rias et negotia ſpectantia et pertinentia ad ſive tangentia reparation
eccleſiae praedictae ac commodum et bonum publicum parochiae pr
dictae; and that the ſaid *Thomas Phillibrown* then and there bei
an inhabitant and pariſhioner of the ſaid pariſh, paying ſcot a
bearing lot as aforeſaid, *paratus fuit et ſeipſum obtulit, durante a*
ſemblatione aut congregatione illa, intrare in praedictum locum voc

tum romeam veſtiariam, where the ſaid veſtry was then held, *ad conſulendum, tractandum et deliberandum, et votum et ſuffragium ſua dandum in aſſemblatione aut congregatione illa, de et concernentia res materias et negotia parochialia, quae ibidem tum tranſacta et tractata fuerunt aut forent*; but the defendants *praemiſſa praedicta bene ſcientes, ſed machinantes et intendentes*, the ſaid *T. P. in ea parte damnificare, et de jure et privilegio ſuis de et in praemiſſis praedictis impedire et totaliter fruſtrare et deprivare* the ſaid *T. P. e loco praedicto* where the ſaid veſtry was held, *excluſerunt et extratenuerunt*, that they the ſaid *T. P. in eundem locum durante aſſemblatione aut congregatione illa intrare adtunc et ibidem obſtruxerunt et penitus recuſaverunt, ac oſtium loci illius verſus ipſum T. P. occluſerunt, et praedictum oſtium ſic occluſum diu, ſcilicet per ſpatium duarum horarum, continuaverunt*; *per quod* the ſaid *T. P. ex eadem aſſemblatione aut congregatione parochiali penitus excluſus fuit, et conſulere, tractare vel deliberare, aut votum et ſuffragia ſua ibidem dare, dum diverſa publica res materiae et negotia ſpectantia et pertinentia ad ſive tangentia reparationem eccleſiae praedictae, ac commodum et bonum publica parochiae praedictae per alios inhabitantes et parochianos, ſic ut praefertur parochialiter conventos et praeſentes exiſtentes, negotiata tranſacta et ordinata fuerunt, abſque aliqua legitima cauſa totaliter impeditus fuit.* Then there was another count for keeping the plaintiff out of a veſtry held the 15th of *Auguſt* 1721, in the ſame manner; damages 50 *l.* To this declaration the defendant demurred, and ſhewed for cauſe of demurrer, that it did not appear by the declaration, that the plaintiff was damnified in any manner, and that the declaration was uncertain, doubtful, and wanted form. The plaintiff joined in demurrer. Serjeant *Branthwaite* for the defendant inſiſted, that this action could not be maintained, becauſe veſtries are voluntary meetings of pariſhioners only, and looked on in law as ſuch, and therefore it was neither an injury or damage to the plaintiff, to keep him out of ſuch a meeting of the pariſhioners. In the next place, if ſhutting the door, and keeping the plaintiff out, was a damage, it was no more than a publick damage, for which no action on the caſe would lie; but to maintain ſuch an action, there ought to be a particular damage; as if a common highway is ſtopped, every perſon that goes that way receives a damage by the obſtruction; but yet becauſe the damage is common to all perſons paſſing that way, no one can maintain an action on the caſe for it, unleſs he ſuffers ſome damage particular to himſelf. 5 *Co.* 73. *Williams*'s caſe; *Co. Lit.* 56. *Cro. Jac.* 446. *Fowler* againſt *Saunders*. So *Williams*'s caſe, 5 *Co.* 72. was an action brought by the lord of the manor againſt a vicar, for not celebrating divine ſervice in his chapel in his manor, and it was laid, that the vicar and all his predeceſſors time out of mind had uſed to celebrate divine ſervice in that chapel, and to adminiſter the ſacrament, to the

Defendants kept him out, and ſhut the door upon him.

Noy 120. Stone verſ. Toakeman.

the plaintiff and his anceſtors, *&c. ac hominibus ſervientibus et tenentibus ſuis*; and held the action would not lie, becauſe by the ſame reaſon as the lord might have an action, every tenant might have an action, and ſo an infinite number of actions for one default. So *Cro. Jac.* 368. *Ford verſ. Hoskins*, caſe will not lie againſt a lord of a manor, for refuſing to admit a copyholder, by the perſon to be admitted. Nor does an action lie againſt the owner of a common ferry-boat, for refuſing to let a perſon paſs, *Salk.* 12. *Payne verſ. Partridge*, unleſs he receives ſome particular damage thereby. And if ſuch ſuits as theſe ſhould be allowed, it would occaſion a multiplicity of actions, which the law always diſcountenances. Secondly, he inſiſted, that if an action of ſuch a nature would lie, yet the plaintiff has not ſufficiently intituled himſelf to it; becauſe it does not appear by the declaration, that the pariſhioners had a right to hold their veſtries in this room; for notwithſtanding any thing alleged therein, the room might be a part of the defendant's houſe; and it is not alleged, that the pariſhioners uſed time out of mind to meet in this room, and hold their veſtries there.

Mr. *Bowes* for the plaintiff inſiſted, that the inhabitants of a pariſh paying ſcot and lot might aſſemble in veſtry, and make rates; and every ſuch inhabitant had a right to be preſent at ſuch meetings, and give his vote. In 5 *Co.* 63. it is argued by the counſel, and not denied by the court, that inhabitants of a *ville* without any cuſtom may make by-laws for repairs of the church, or of a highway, or of any ſuch thing, which is for the publick good. See 44 *Ed.* 3. 19. And to this purpoſe they are a corporation. 1 *Mod.* 194. *Rogers verſ. Davenant.* 2 *Mod.* 8. 5 *Co.* 67. *Jeffery*'s caſe. The church-wardens ought to ſummon the pariſhioners to meet and make a rate for the repair of the church, and that need not be from houſe to houſe, but a general publick ſummons at church is ſufficient. 1 *Mod.* 236. and the caſe of *St. Mary Magdalen Bermondſey.* 2 *Mod.* 222. *Gibſ. Codex* 220. 1 *Salk.* 165. The pariſhioners have a right to chuſe officers, as by cuſtom church-wardens, 5 *Mod.* 325. *Salk.* 166. and thoſe pariſhioners that have a right to elect, have a right to be at the meeting, which is the veſtry. That an action ſhould therefore lie, for obſtructing and hindering the pariſhioners from being preſent at ſuch an aſſembly, falls within the reaſon of the caſe of *Aſhby* and *White*, *Salk.* 19. 6 *Mod.* 45. And an information or indictment will not lie, as in caſe of a common nuſance. Secondly, as to the exception to the declaration he argued, it was well enough, becauſe it is laid that this room was the uſual place where ſuch aſſemblies *teneri et haberi ſolent et conſuetae fuerunt*, and that the pariſhioners were then there aſſembled; and if it was the defendant's room, yet if he had let it out for the pariſhioners to hold their veſtry in, he could not ſhut the door againſt any of them; and that there was no occaſion to lay an expreſs cuſtom for all the pariſhioners, for if their veſtry was a ſelect veſtry (if by law there can be any ſuch) the defendant ought to have pleaded it; though he looked upon it that ſelect veſtries were only encroachments. Whether the action would lie or not, if the declaration had been good, the court came to no reſolution. And judge *Forteſcue* ſeemed to be ſtrong in opinion, that the action would not lie. But as to the declaration, the court was unanimous, that it was ill; becauſe it is not ſhewn, the pariſhioners had a right to hold their veſtry in this room; for in actions of this nature the plaintiff muſt ſhew a right in the thing claimed, and then a diſturbance. And for this reaſon judgment was given for the defendant, *April* 27, 1725.

John Burland *againſt* Jo. Tyler and Mary his wife.

Debt in the *debet et detinet* brought by an adminiſtrator againſt the heir of the obligor, wherein he bound himſelf and his heirs, is good upon a general demurrer, ſince 4 Ann. cap. 16.

THE plaintiff as adminiſtrator of *Jo. Burland* brought an action of debt in the *debet et detinet* upon two ſeveral bonds entred into by *John Hobbs* deceaſed, by which he bound him and his heirs, to whom the defendant *Mary* was daughter and heir. The defendants prayed *oyer* of the bonds and the conditions; the firſt bond was dated 21 *December* 1704, of the penalty of 400 *l.* with condition, that *Jo. Hobbs* ſhould pay 103 *l.* to one *Nath. Brewer*, for payment whereof the inteſtate and *Jo. Hobbs* were bound in a bond of 200 *l.* penalty to the ſaid *Jo. Brewer*, but for the debt of the ſaid *Jo. Hobbs*; the other bond was dated 17 of *September* 1712, of the penalty of 300 *l.* with condition, that *Jo. Hobbs* ſhould pay *David Yea* 103 *l.* the debt of the ſaid *Jo. Hobbs*, for payment whereof the ſaid *Jo. Hobbs* and the inteſtate were bound in a bond of 200 *l.* penalty to the ſaid *David Yea*: after which the defendants, *proteſtando* that the ſeveral ſums were paid to the ſaid *Jo. Brewer* and *David Yea*, according to the ſeveral conditions of the ſaid bonds, pleaded, that the defendant *Mary nec habet aliqua terras ſive tenementa per haereditarium deſcenſum de praedicto Jo. Hobbs patre ſuo in feodo ſimplici, neque habuit die impetrationis billae praedictae, nec unquam poſtea, praeter unum meſuagium cum pertinentiis in Storgurſey praedicto, omnia et ſingula quae praemiſſa non valent in toto centum et quadraginta libras:* then they farther plead, that the ſaid *Jo. Hobbs* the father, in his life by his obligatory writing being lawfully indebted became bound to one *William Clark* in 140 *l.* and ſo being indebted died, that debt to the ſaid *William Clark* not being paid; whereupon one *Margaret Hobbs*, widow of the ſaid *Jo. Hobbs*, mother and guardian of the ſaid *Mary*, paid the ſaid debt of the ſaid *Jo. Hobbs* to

the ſaid *William Clark*, and that that payment was made by t
ſaid *Margaret* as guardian of the ſaid *Mary*, and while the ſa
Mary was under the age of twenty-one years; and that neith
the ſaid *Jo. Tyler* nor *Mary* his wife, nor the ſaid *Margaret*, n
any of them, had any notice, nor ever knew of the bonds me
tioned in the declaration, nor either of them, from the ſaid *Bu*
land the inteſtate, nor from the plaintiff, nor from any other p
ſon whatſoever, before the payment of the ſaid bond of the ſa
Jo. Hobbs as aforeſaid made by the ſaid *Margaret* to the ſa
William Clark; and therefore pray judgment, if they *de deb*
praedicto virtute ſcripti obligatorii praedicti onerari debeant. T
this plea the plaintiff demurred generally, and the defendants join
in demurrer.

Mr. *Top* for the defendants offered nothing to maintain the pl
but admitted that to be ill; but inſiſted the declaration was naug
becauſe the action was brought by the plaintiff as adminiſtrator
the *debet* and *detinet*, whereas it is laid down as a rule in 5
Allen 34, 42. 31. *b*. *Hargrave*'s caſe, that in all caſes where executors are forc
to name themſelves executors in actions brought by them, t
writ ſhall be in the *detinet* only; becauſe the thing or damag
recovered ſhall be *aſſets*. So debt for an eſcape brought by an a
miniſtrator for an eſcape in the life of the inteſtate muſt be in t
detinet only, *Stiles* 232. *Martin* againſt *Hendlye*, becauſe t
plaintiff does not recover to his own uſe. *Cro. Jac.* 545. Sir *G*
Reynell againſt *Lanycaſtle*; held that bringing an action by an ex
cutor in the *debet* and *detinet* where it ought to be in the *deti*
only, is not matter of form only, but a fault in ſubſtance after
verdict, and not aided by the ſtatute of 18 *Eliz. c.* 14.

Serjeant *Chapple* for the plaintiff ſaid, in reſpect of the debt
the heir, the action was rightly brought; for as to her it ought
1 Lev. 224. be in the *debet* and *detinet*, becauſe it is brought upon the *lien* b
1 Sid. 342. which the heir is bound, and is not brought againſt her *en a*
Coomber verſ. Watton. *ter droit*, as if the defendant had been an executor. And yet
ſuch an action is brought againſt an heir in the *detinet* only, y
after verdict for the plaintiff that would be cured by 16 & 17 *Car.*
c. 8. Then in reſpect of the plaintiff's being an adminiſtrator,
an adminiſtrator brings an action in the *debet* and *detinet*, whe
it ought to be in the *detinet* only, after a verdict that is helped b
the ſame ſtatute. 1 *Lev*, 250. *Frewin et uxor verſ. Paynton.* 1 *Si*
379. And by the ſame reaſon he ſaid, it would be good by th
ſtatute for amendment of the law, 4 *Ann. cap.* 16. the defenda
not having demurred ſpecially, and aſſigned this cauſe of his de
murrer.

The court were of opinion, that this would have been ill upon a general demurrer before the ſtatute made for the amendment of the law; but ſince that ſtatute, they all agreed, that an action brought as this is, would be good upon a general demurrer; and that in this caſe the defendant having pleaded in bar, and not having taken advantage by demurring ſpecially, and ſhewing it for cauſe, it was well enough. That it would be good after a verdict by the 16 & 17 *Car.* 2. *cap.* 8. the caſe cited 1 *Lev.* 250. is expreſs; and yet this is none of the defects particularly mentioned in that ſtatute, but came under the words [all other matters of the like nature not being againſt the right of the matter of the ſuit.] Then that reſolution has determined, that this defect is not againſt the right of the matter of the ſuit, but is of the like nature with the omiſſion of a *profert in curia* of a bond or indenture, and the other things mentioned particularly in that ſtatute of 16 & 17 *Car.* 2. *cap.* 8. Then comes the act of 4 *Ann. cap.* 16. for amendment of the law, and enacts, that notwithſtanding many of the ſame defects (ſpecifying them) mentioned in the act of 16 & 17 *Car.* 2. *c.* 8. the court ſhould proceed to give judgment according to the very right of the cauſe, without regarding any ſuch defects, or any other of like nature, except the ſame ſhall be ſpecially ſhewn for cauſe of demurrer. This defect then not being againſt the right of the ſuit, as was adjudged in that caſe of 1 *Lev.* 250. ought to be ſhewn ſpecially for cauſe of demurrer, if the party would take advantage of it. Beſides, the act for the amendment of the law takes notice, that a defect in matter of ſubſtance ſhould not be took advantage of without a ſpecial demurrer; for it enacts, that the court ſhall proceed to give judgment according as the very right of the cauſe and matter in law ſhall appear to them, without regarding any defect, *&c.* except, *&c.* notwithſtanding ſuch defect, *&c.* might have been heretofore taken o be matter of ſubſtance, and not aided by the 27 *Eliz. cap.* 5. ſo s ſufficient matter appear by the pleadings, upon which the court nay give judgment according to the very right of the cauſe. Now ere it appears, the plaintiff has a right to recover, and to recover s adminiſtrator, and what is recovered will be *aſſets.* And judgnent was given for the plaintiff, 7 *May* 1725.

The King *verſ.* Sheringbrook.

Shaw's Pariſh Law, c. 46.

In an order appointing a perſon an overſeer of the poor, it muſt ſet out, he is a ſubſtantial houſholder.

AN order of juſtices of the peace, made for appointing the defendant overſeer of the poor, being removed into this court by *certiorari*, was quaſhed upon motion, becauſe it did not appear by the order, that the defendant *Sheringbrook* was a ſubſtantial houſholder, which is expreſly required by the words of the act 43 *Eliz. cap.* 2.

The King *verſ.* Shearing.

Indictment for treſpaſs in taking *tres juvencas coloris* brown, ill.

The like caſe cannot happen while the law is in Engliſh.

THE defendant was indicted for a treſpaſs in taking *vi et armis tres juvencas, Anglice* yearlings, *coloris* brown, &c. And upon Mr. *Gapper*'s motion the indictment was quaſhed, becauſe all indictments ought to be in *Latin*, and there is a proper *Latin* word for brown, *viz. fuſcus* or *ſubniger*; and therefore the *Latin* word for brown being omitted, it vitiates the indictment. And although the indictment would have been good, as Mr. *Reeve* urged for the King, without inſerting the colour of the yearlings; yet ſince it is put in, it cannot be rejected, and a taking only of brown yearlings could be given in evidence on this indictment.

Trin. Term

11 Georgii regis, B. R. 1725.

Eliz. Morfoot *verſ.* Phil. Chivers, and Elizabeth his wife.

THE plaintiff *Eliz. Morfoot* ſpinſter, as executrix of *Eliz. Morfoot* widow, ſued out a *ſcire fieri* inquiry againſt *Phil. Chivers* and *Elizabeth* his wife, adminiſtrators of *Henry Clark* deceaſed, upon a judgment for 2000 *l.* recovered by the plaintiff as executrix of the ſaid *Eliz. Morfoot* widow, againſt the defendants as adminiſtrators of the ſaid *Henry Clark*. To which the ſheriff returned, that the defendants had no goods in their hands, *&c.* of the ſaid *Henry Clark*; then he returned an inquiry taken by him, which found, that divers goods and chattels, which were the ſaid *Henry Clark*'s at his death, to the value of the debt in the writ mentioned, came to the hands of the ſaid *Philip* and *Elizabeth* his wife to be adminiſtred, *quae quidem bona et catalla poſtea* the ſaid *Philip* and *Elizabeth* his wife *vendiderunt devaſtaverunt elongaverunt et in uſum ſuum proprium converterunt*, *&c.* Upon which the defendants came in and demurred to the writ of *ſcire fieri* inquiry, and ſhewed ſpecially for cauſe of demurrer, that it does not appear nor was expreſly alleged in the writ, that the ſaid *Elizabeth Morfoot* widow was dead, and becauſe it did not appear, that the jurors in the ſaid writ and inquiſition named *fuerunt jurati et onerati ad inquirendum de praemiſſis*. As to the cauſe aſſigned in the demurrer, that it did not appear, that *Elizabeth Morfoot* the widow was dead, the court over-ruled it; becauſe the *ſcire fieri* inquiry ſet out a judgment obtained by the plaintiff as executrix of *Elizabeth Morfoot* widow againſt the defendants, by which judgment the defendants were concluded to ſay, the plaintiff was not executrix of *Elizabeth Morfoot*, and by conſequence are concluded to ſay, that ſhe was not dead. Mr. *Martin* council for the defendant inſiſted, that it was neceſſary to allege, that the jury, which found the waſting, were ſworn *de et ſuper praemiſſis*; and compared

S. C. 1 Stra. 631.

In a *ſcire fieri* inquiry, if the executor of *A.* recover a judgment againſt *B*, as adminiſtrator of *J. S.* it need not be expreſly averred that *A.* is dead.

compared it to the caſe in *Stiles* 164. *Crible verſ. Orchard*, whe
the jury after finding the iſſue for the plaintiff in an inferior cou
aſſeſs damages *pro miſis et cuſtagiis*, &c. and do not ſay *circa ſect*
expenſis; and *Rolle* chief juſtice held, this was ill, becauſe it d
not appear, by reaſon of the omiſſion of thoſe words, for wh
theſe *miſa et cuſtagia* were aſſeſſed. *Sed non allocatur per curia*
for it being alledged in the inquiſition, that the jurors *jurati et on*
rati exiſtentes ſuper ſacramentum ſuum dicunt, that the defendan
had waſted, &c. they could not upon their oaths ſay the defe
dants had waſted, unleſs they had been ſworn to inquire wheth
they had waſted or not, as the writ requires; and the inquiſition
ſaid to be taken *virtute praedicti brevis* to the inquiſition annex
ad inquirendum de et ſuper materiis in eodem brevi contentis per ſ
cramentum of *Tho. Salmon*, &c. Then Mr. *Martin* for the defe
dants took another exception, that the ſaid *Philip* and *Elizabeth* h
wife *vendiderunt devaſtaverunt elongaverunt et in uſum propri*
converterunt, &c. whereas the defendant *Elizabeth* neither cou
ſell nor convert to her own uſe, being a *feme covert*. *Sed non al*
catur; for though a *feme covert* cannot convert to her own uſe, y
ſhe may waſte, which is a *tort*, and that a *feme covert* may
guilty of, *Cro. Car.* 518, 526. lord *Monſon verſ. Bourn*, 2 *Vent.* 4
Judgment was given for the plaintiff, *June* 9, 1725.

A *feme covert* may waſt goods as executrix, though not convert them to her own uſe.

1 Roll. Ab. 930. C. pl. 9.

Morris *verſ.* Lee.

S. C. 8 Mod. 362.
S. C. 1 Stra. 629.

An action lies by a ſecond indorſee upon a note, whereby the defendant promiſed to be accountable to *J. S.* or order for 100 *l.* value received, upon the ſtatute 3 & 4 Ann. c. 3.

Smith verſ. Boheme. *Ante*, 1362.

IN an action upon the caſe brought by the plaintiff as ſecond i
dorſee of a note ſigned by the defendant, whereby the defe
dant promiſed to be accountable to *A.* or order for 100 *l.* value r
ceived; the plaintiff declared upon the note, and alſo an *inſim*
computaſſet; and on *non aſſumpſit* pleaded, verdict was given for th
plaintiff, and intire damages. Mr. *Lee* laſt term, and Mr. *Faz*
kerley this term, moved for the defendant in arreſt of judgmen
that this action could not be maintained by the plaintiff as indorſee
this note; becauſe this was not negotiable nor aſſignable by the a
3 & 4 *Ann. cap.* 9. for a note within that act muſt neceſſarily an
originally import a promiſe to pay money; and therefore it w
held *Mich.* 1 *Geo. B. R.* between *Smith* and *Boheme*, that a no
ſigned by the defendant, whereby he promiſed to pay ſuch a ſu
of money, or render the body of *J. S.* to priſon, was not ſuch
note as that an action could lie upon it by the ſtatute, after failu
of rendring the body to priſon; becauſe it was not neceſſarily an
originally for payment of money, but by matter *ex poſt facto* be
came a note for payment of money only, *viz.* the body not bein
ſurrendered to priſon. So here, this note importing only a pro
miſe to be accountable for the money, the defendant is not oblige

pay the money to the perſon to whom it was firſt given, or to
e indorſee; but may account for it another way, by having laid
out in goods for the party as a factor. If a man receives money
r a ſpecial purpoſe, as to account, or to merchandize (which may
this caſe for any thing appearing to the contrary) it cannot be
manded as a duty, till he has neglected or refuſed to apply it ac-
rding to the truſt. 1 *Salk.* 9. *Poulter verſ. Cornwall*, though it
as held there good after a verdict; becauſe the court would in-
nd, there was proof to the jury, that the defendant had done
mething to make himſelf an abſolute debtor; and therefore an
debitatus aſſumpſit for money received *ad computandum* was held
od after a verdict for the plaintiff. They inſiſted likewiſe, that
would be more for the benefit of trade, that the form of this ſort
notes ſhould be certain. But *per curiam*, there are no preciſe
rds neceſſary to be uſed in a promiſſory note or bill of exchange:
ſt. 338. Deliver ſuch a ſum of money makes a good bill of ex-
nge. But if the promiſſory note is within the intent of the act
s ſufficient, though it does not follow the very words of the act.
w by the receiving the value, the defendant became a debtor;
when he promiſes to be accountable for it to *A.* it is the ſame
g as a promiſe to pay to *A.* And it is the ſtronger, becauſe it
be accountable to *A.* or order, which is the proper expreſſion
in ſuch notes, and mentioned in the act of parliament, where
s intended the note ſhould be indorſable or negotiable. But it
ld be an odd conſtruction, to expound the word accountable,
give an account, when there may be ſeveral indorſees. But
this note had been value received upon account, it might
e had a different conſideration. *Sed quaere.* *Powys* juſtice re-
much upon the verdict in this caſe; but *Forteſcue* juſtice,
nolds juſtice, and *Raymond* chief juſtice, were of opinion, that
he note was not within the act, the verdict could not help it;
the note would be within the act, or not, upon the words of
note. Judgment for the plaintiff. Mr. *Gapper* counſel for
plaintiff.

No preciſe words neceſſary to be uſed in a promiſſory note or bill of exchange.

Note, value received upon account.

Iles *verſ.* Pitt.

RROR upon a judgment given in the Common Pleas by de-
fault; and one of the errors aſſigned was the want of a writ of
iiry of damages; and upon a *certiorari* taken out by the plain-
in error, to verify his error, it was certified, that there was no
of inquiry. But *per curiam*, *viz.* *Raymond* chief juſtice,
ys, *Forteſcue*, and *Reynolds* juſtices, the judgment was affirm-
becauſe the want of a judicial writ was helped by 18 *Eliz. c.* 14.
a verdict; and by 4 *Ann. cap.* 16. for the amendment of the

Want of a writ of inquiry of damages aided after judgment by default, by 4 Ann. c. 16.

law, *&c.* all the ſtatutes of jeofails are extended to judgments given upon default. Mr. *Reeve* counſel for the defendant in error. And afterwards in *Michaelmas* term 4 *Geo.* 2. 1730. *November* the 10th, the very ſame point was adjudged, *Mallory verſ. Jennings*, *intr. Trin.* 3 & 4 *Geo.* 2. *B. R.* and *Hil.* 3 *Geo.* 2. *C. B. Rot.* 496. by *Raymond* chief juſtice, *Probyn* and *Lee* juſtices; and the judgment of the Common Pleas affirmed.

Mallory verſ. Jennings.

Timothy Drew and Jane his wife *verſ.* Joſ. Roſe.

Intr. *Paſch.* 11 *Geo.* B. R. Rot. 21.

No advantage can be took of an erroneous writ of privilege upon the bare recital in the record, but the writ ought to be before the court by *certiorari.*

ERROR upon judgment given for *Drew* and his wife againſt *Roſe* in the Common Pleas by default. The entry on record was, *Middleſex, ſſ. Joſephus Roſe attachiatus fuit per breve domini regis nunc de privilegio e curia hac emanans ad reſpondendum Timotheo Drew generoſo, uni clericorum Richardi Foley armigeri prothonotarii curiae domini regis de banco, juxta libertates et privilegia ejuſdem curiae hujuſmodi clericis et aliis miniſtris de eodem banco a tempore quo non extat memoria uſitata et approbata in eadem, et Janae uxori ejus, de placito tranſgreſſionis ſuper caſum*; and then the plaintiffs declare on a promiſſory note for 76 *l.* 10 *s.* made by the defendant *Roſe* to the plaintiff *Jane dum ſola, &c.* and judgment was given by default for the plaintiffs *Drew*. And upon error brought by *Roſe* in the King's Bench on this judgment he aſſigned for error the want of a writ of privilege; and took out a *certiorari* to make good his error, but did not procure it to be returned. Mr. *Lee* for the plaintiff in error inſiſted, that the judgment ought to be reverſed; becauſe it appears, the ſuit was by writ of privilege; and although the plaintiff *Drew* as clerk to one of the prothonotaries of the Common Pleas might ſue by ſuch writ; yet if a privileged perſon joins in ſuit with another, or ſues *en auter droit*, as here he does in right of his wife, he cannot ſue by writ of privilege. And for this he cited *Dier* 377. *Noy* 68. *Eldrington* againſt *Aſhton* and his wife. 2 *Roll. Ab. Privilege* 274. *G.* And the court were of opinion, that if this ſuit was by writ of privilege, it was ill; but they held, that it does not ſufficiently appear to them, that it was by writ of privilege; for the recital in the declaration is not ſufficient for them to found a judgment upon, but the writ of privilege ought to have been brought before the court by return to the *certiorari*. And therefore judgment was affirmed.

If an attorney ſues in right of his wife, and joins her in the action, he cannot ſue by writ of privilege.

Will.

Will. Reynolds *verſ.* Edw. Clarke.

Intr. *Trin.* 8 *Geo.* B. R. Rot. 474.

S. C. 1 Stra. 634. Where an action upon the caſe, and not an action of treſpaſs is the proper action. S. C. 8 Mod. 272.

TReſpaſs. The plaintiff declared, that the defendant the firſt of *June* 7 *Geo.* and divers days and times between that day and the 20th of *October* then next, at *Abingdon* in the county of *Berks*, *vi et armis* the plaintiff's manſion houſe, in which he inhabited, and his backſide to the ſaid houſe belonging, did break and enter, and laid filth in the backſide, and placed a ſpout, *quod ratione inde aqua per tempeſtates pluviales in compluvium praedictum a domo* of the defendant *deſcendens per compluvium illud atrio praedicto currebat et ſtabulum et pandoxatorium ipſius Willielmi in atrio praedicto ſuperfluxit*; *ac ratione inde muri et fundamenta ſtabuli et pandoxatorii praedicti corrupta putrida et ſpoliata devenerunt*, *&c.* The defendant as to all the treſpaſs but entring into the backſide and ſetting up the ſpout, pleaded not guilty: and as to the entring into the backſide and placing the ſpout, *&c.* he pleads, that long before the ſuppoſed treſpaſs, *viz.* 25th of *Auguſt* 1708, one *John Fountaine* was ſeiſed in fee of the ſaid manſion houſe and backſide, and of two meſuages adjoining to the backſide, in which backſide there then were and yet are a houſe of office, a well, and a pump to the ſaid well belonging; that the ſaid *John Fountaine* the ſaid manſion houſe and backſide with the appurtenances, excepting and reſerving the free uſe of the backſide and houſe of office, pump and well in the ſaid backſide to the ſaid *John Fountaine*, his heirs and aſſigns, and all the tenants and occupiers of the ſaid two meſuages and each of them in common with the plaintiff and *John Tyler*, their heirs and aſſigns, occupiers of the ſaid manſion houſe and backſide, did by leaſe and releaſe convey to the plaintiff and the ſaid *John Tyler* and their heirs and aſſigns; that *John Fountaine* afterwards, *viz.* 24th of *February* 1710, being ſo ſeiſed of the ſaid meſuages with the uſe of the backſide, houſe of office, well, and pump aforeſaid, *ut ad eadem duo meſuagia virtute reſervationis praedictae ſpectantibus et pertinentibus*, by his laſt will deviſed the ſaid two meſuages with the appurtenances to one *Daniel Yeates* in fee: that *John Fountaine* died, and *Daniel Yeates* entred; and then by ſeveral conveyances ſet out in the plea he brings down a title to him and his heirs to the two meſuages with the appurtenances aforeſaid, by virtue whereof the defendant the time when, *&c.* was ſeiſed in his demeſne as of fee of the ſaid two meſuages with the appurtenances, and had one of the ſaid meſuages with the appurtenances the time when, *&c.* in his actual poſſeſſion and occupation, and that at the time of the making the leaſe and releaſe from

Fountaine to the plaintiff and *John Tyler*, and before and always after, the rain water came down from the ſaid one meſuage into the ſaid backſide; and that the defendant being ſo ſeiſed of the ſaid meſuage with the appurtenances, the ſaid defendant *tempore quo, &c. atrium praedictum intravit, et atrio praedicto utendo compluvium praedictum pro neceſſario uſu ejuſdem meſuagii in et ſuper idem meſuagium in atrio praedicto poſuit et locavit et ad meſuagium illud affixit, ad conveiandum aquas pluviales ab eodem meſuagio in atrium praedictum*; *prout ei bene licuit*; which entry of the backſide, and placing of the ſpout aforeſaid, are the ſame entry of the backſide, and placing of the ſpout, whereof the plaintiff complains, *&c.* To which plea the plaintiff demurred, and the defendant joined in demurrer.

This cauſe was argued *Trinity* term 1724 by Mr. ſerjeant *Hawkins* for the plaintiff, and Mr. *Reeve* for the defendant; and this term by Mr. *Fazakerley* for the defendant, and by Mr. *Lee* for the plaintiff. And the counſel for the plaintiff inſiſted, that this was not a good juſtification; for where a man has a right for the rain water to fall from the eves of his houſe into a yard or backſide belonging to another perſon, yet he cannot juſtify putting up a ſpout, and collecting the water into a larger body, and then make it fall into the yard. Beſides, here is no preſcription laid for rain water to fall into the yard off of the defendant's houſe, nor any grant ſet out for that purpoſe. By unity of poſſeſſion preſcriptions for intereſt and profits, as rents, commons, *&c.* are extinguiſhed; but preſcriptions for eaſements, as for lights, air, gutters, dropping of eves, *&c.* are not extinguiſhed by unity of poſſeſſion; but after the unity of poſſeſſion is determined, and the things ſevered, the eaſements will revive. *Hob.* 131. *Robins verſ. Barnes.* 11 *Hen.* 7. 25. *pl.* 6. *Br. extinguiſhment* 60. But then when the houſes come into ſeveral hands, the eaſement cannot be altered or enlarged, though it being of neceſſity may be enjoyed as before the unity of poſſeſſion: and therefore the defendant could not ſet up a ſpout, if he had had a preſcription for the eaſement before the unity of poſſeſſion. As if a man has *eſtovers* belonging to his houſe, and he builds new chimneys, he cannot uſe the *eſtovers* in the new chimneys; 4 *Co.* 87. *Luttrel*'s caſe; nor can intitle himſelf to more *eſtovers* by the encreaſe of his chimnies: *New Dier in margine* 295. In this caſe the coming down of the rain water has done the plaintiff great damage, for it is laid in the declaration, and not denied by the defendant, that the rain water coming through the ſpout overflowed the plaintiff's ſtable and brewhouſe, *ac ratione inde muri et fundamenta ſtabuli et pandoxatorii praedictorum corrupta putrida et ſpoliata devenerunt, &c.* The counſel for the defendant gave no anſwer to what was inſiſted on by the counſel for the plaintiff

Dav. 5. b.
Jones 145.
Sury verſ. Pigott.
Poph. 166.
3 Bulſtr. 339.

plaintiff by way of objection to the plea, but put the caſe upon another point; and therefore the point of the juſtification was not expreſly determined. But *Forteſcue* and *Raymond* juſtices upon the argument of *Trinity* term 1724 ſeemed to be of opinion, that if the plaintiff's action had been an action of the caſe, as for a nuſance, the defendant could not juſtify the alteration made by him in ſetting up a ſpout.

But the counſel for the defendant inſiſted, that this action of treſpaſs *vi et armis* would not lie. But if the plaintiff was injured by the water that came out of the ſpout, he ought to have an action on the caſe, and not an action of treſpaſs *vi et armis.* For by the exception in the conveyance of the houſe to the plaintiff the defendant has a right to enter into the yard, and therefore this is well juſtified; then the defendant fixing a ſpout to his own houſe, though the plaintiff receives never ſo much damage by the conſequence of it, cannot be a treſpaſs to the plaintiff; and therefore treſpaſs *vi et armis* cannot lie for it. The exception in the deed is a licence to the defendant to enter; and that licence being by the act of the party, though he did an illegal act after injurious to the plaintiff, that will not make his entry unlawful, nor him a treſpaſſer *ab initio*; the difference in ſuch caſe being, where a perſon enters by licence of the party, and by licence of the law: 8 *Co.* 14. *Six carpenter's* caſe: then the fixing the ſpout to the defendant's own houſe cannot be a treſpaſs done to the plaintiff, nor can the flowing of the water out of the ſpout be a treſpaſs done by the defendant to the plaintiff; becauſe the flowing of the water is not the defendant's immediate act; but indeed it was the conſequence of the defendant's act, *viz.* fixing the ſpout; but the conſequence of an act will not make the act itſelf a treſpaſs, for which treſpaſs *vi et armis* will lie; but an action upon the caſe may lie. 1 Roll. A. 105. pl. 3, 4. Keilw. 98. Poph. 46. As to the allegation in the declaration, that the rain water coming through the ſpout overflowed the plaintiff's ſtable and brewhouſe, *ac ratione inde* the walls and foundation were rotted and ſpoiled; they ſaid if that could be conſidered as a diſtinct treſpaſs, it was anſwered by the not guilty, that going to the whole declaration, except the entry into the backſide and fixing the ſpout: but if it was only to be looked on as laid in aggravation of damages, as it certainly muſt, it is not traverſable, and no particular anſwer ought to be given to it. 10 *Co.* 10. 1 *Ventr.* 54, 340. 2 *Jones* 110.

To this objection the counſel for the plaintiff argued, that though caſe, or *quod permittat*, would lie, yet treſpaſs *vi et armis* might lie alſo. They ſaid, the freehold inheritance and poſſeſſion of the backſide was in the plaintiff, and the defendant had only the uſe of it for particular purpoſes, as to make uſe of the pump or privy;

and if he enters to commit a treſpaſs, he will be a treſpaſſer *ab initio* by his entry; as if he entred to pull down the pump or houſe of office, and did ſo; and by the ſame reaſon he ſhould be a treſpaſſer, if he makes an unreaſonable uſe of his entry, to fix up a ſpout to bring down ſo much rain as overflowed the plaintiff's ſtable and brewhouſe, and rotted the walls and foundation. As if *A.* lends *B.* ſheep to compeſter his land, if *B.* kills them, an action of treſpaſs will lie againſt him. And Mr. *Lee* ſaid, that though the defendant's fixing a ſpout to his houſe was lawful, yet if he fixed it in ſuch a manner, as that the rain water muſt fall into it off of the houſe, and ſo come into the plaintiff's yard, whereby he is prejudiced; it is the ſame thing as if the defendant poured it into the plaintiff's yard out of a pail, in which caſe no doubt treſpaſs would lie. And he cited *Hardr.* 60. *Preſton verſ. Mercer*, as in point; where in treſpaſs *vi et armis* the plaintiff declared, that the defendant, filth and ſtinking water, being in the yard of the defendant's houſe near adjoining to the plaintiff's meſuage, did make to run, which water pierced the walls of the plaintiff's houſe, and ſunk into his cellar, *&c.* after a motion in arreſt of judgment, after a verdict, that the action ought to have been caſe and not treſpaſs, the plaintiff had judgment.

This *Trinity* term 1725 upon the ſecond argument my brothers *Forteſcue* and *Reynolds* (*Powys* being abſent) and myſelf were unanimous of opinion, that the plaintiff could not maintain an action of treſpaſs *vi et armis* for the damage he ſuſtained by the rain water flowing out of this ſpout, but ought to have brought an action on the caſe. And that as to the entry into the backſide, and fixing the ſpout, that was ſufficiently juſtified. The diſtinction in law is, where the immediate act itſelf occaſions a prejudice, or is an injury to the plaintiff's perſon, houſe, land, *&c.* and where the act itſelf is not an injury, but a conſequence from that act is prejudicial to the plaintiff's perſon, houſe, land, *&c.* In the firſt caſe treſpaſs *vi et armis* will lie; in the laſt it will not, but the plaintiff's proper remedy is by an action on the caſe. As if *A.* in his own ground ſtops the current of a watercourſe, to the benefit of which *B.* is intitled, and thereby hinders the water coming to *B.*'s ground; treſpaſs will not lie, but caſe will; becauſe the ſtopping by *A.* of this watercourſe in his ground was no wrong to *B.* but the conſequence of it, *viz.* hindring the water from coming to *B.* was. And I cited a caſe adjudged *Mich.* 8 *Ann. B R.* between *Loveridge* and *Hoskins*, where in an action on the caſe the plaintiff declared, and ſet out a title to a farm and a river in *Dorſetſhire*, and that the defendant in a cloſe called *Davis*'s cloſe dug two trenches, whereby he diverted the water from the plaintiff's river, *per quod*, *&c.* and after a verdict for the plaintiff, the late lord chief juſtice *Pratt*, then council for the defendant, moved in arreſt of judgment, that the plaintiff ought to have brought an action of treſpaſs, and that this action of the caſe was not a proper action: but *Holt* chief juſtice held, that treſpaſs would not lie, becauſe it did not appear, that *Davis*'s cloſe, where the trenches were dug, was the plaintiff's land, and then the digging the trenches was not a treſpaſs to the plaintiff; but the damage he ſuſtained was by diverting the water, which was the conſequence of digging the trenches; and therefore he ſaid this was properly an action on the caſe: but he held, that if *A.* brought treſpaſs againſt *B.* for entring his meadow, and mowing his graſs there, and making it into hay, *per quod* he loſt the whole profit of his meadow; there the action of treſpaſs *vi et armis* would be the proper action, and caſe would not lie; for the *per quod* would only be in aggravation of damages: and in that caſe of *Loveridge* and *Hoſkins* the plaintiff had judgment. And upon this diſtinction that point in *Hardr.* 61. may be law; becauſe it is laid, the defendant made the water to run, which is the ſame as if it had been laid, the defendant poured the water; and therefore if it had been laid, the defendant poured the rain water into the plaintiff's yard, treſpaſs would have lain, becauſe the immediate act of pouring by the plaintiff would have been a treſpaſs. If *J. S.* lays a log of wood in the highway, and *J. N.* receives hurt by it, treſpaſs will not lie, becauſe the injury is only a conſequence of the act done; but caſe will lie. Judgment was given for the defendant.

Ginger *verſ.* Cowper and Miles.

S. C. 1 Stra. 606. Vide 12 Mod. 370.

One of the defendants brings a writ of error without the other; though the writ ſhall be quaſhed, the record is removed.

JUdgment was given in the Common Pleas againſt both the defendants, in an ejectment. *Miles* brought a writ of error alone upon this judgment; and the writ of error was quaſhed by the King's Bench, becauſe *Cowper* did not join in it. Afterwards they both brought a writ of error, *coram vobis reſidet*. And Mr. *Reeve* in *Michaelmas* term laſt moved for coſts, upon quaſhing the writ of error, upon the act for the amendment of the law; and alſo that they might take out execution upon the judgment, notwithſtanding the writ of error *coram vobis reſidet*. And as to the coſts he inſiſted, that the defendant in error ought to have, not only the coſts of the motion made about quaſhing the writ of error, but coſts in the ſame manner as if the judgment had been affirmed. *Quod fuit conceſſum per curiam.* For ſo are the words of 4 *Ann. cap.* 16. *par.* 25. And a rule for that purpoſe was made accordingly. Then as to the taking out execution, notwithſtanding the writ of error *coram vobis reſidet*, he argued laſt *Michaelmas* term, at which time this caſe was firſt moved, that the record was never removed by the firſt writ of error; for he argued, that if the record is removed by writ of error, and afterwards is abated, as by death of one of the parties, or by plea, then error *coram vobis reſidet* lies; but not if the record is never removed; as in caſes of variance between the record and the writ of error, the record is not removed, but the writs of error in theſe caſes are quaſhed. In this caſe the matter appears upon the face of the record and writ of error, without plea or ſhewing any thing *dehors*, and it thereby appears to have never been a good writ. Suppoſe judgment is given for *A.* againſt *B.* in the Common Pleas, and *C.* brings a writ of error, the record will not be removed thereby, becauſe *C.* cannot maintain a writ of error upon a judgment given againſt *B.* and this caſe, he ſaid, was like that; for one defendant, when there are two defendants to the original action, can no more maintain error on that judgment, than a mere ſtranger. In 3 *Mod.* 134. *Hacket verſ. Herne*, though the book ſays the writ abated, yet it was quaſhed as in this caſe. He ſaid this was only a contrivance to avoid putting in bail upon the writ of error, for the bail put in upon the firſt writ of error was gone, becauſe the condition of the recogniſance was to proſecute that writ of error; but that writ is now gone it being quaſhed, and they do not put in bail upon writs of error *coram vobis reſidet*; and therefore he concluded, no writ of error *coram vobis reſidet* would lie.

Godb. 375.

Serjeant *John Comyns* for the plaintiff in error inſiſted upon it, that the record was well removed, becauſe there is no variance in the title or ſubſtance of the record and the writ of error; only it is laid in the writ of error to be *ad damnum* of one of the defendants, whereas it ought to be *ad damnum* of both, becauſe they ought to join in it. When one defendant without the other brings a writ of error, the writ muſt abate. 3 *Mod.* 134. And where a writ of error abates, error *coram vobis*, &c. lies. 1 *Roll. Abr.* 753. Q. As to bail he ſaid, it might be done in this caſe as in all other caſes of writs of error *coram vobis*, &c.

Pratt chief juſtice ſeeming to incline, that the record was not removed, contrary to the opinion of the other judges, *adjournatur*. Afterwards my brothers *Forteſcue* and *Reynolds* having conſidered this, it being ſtirred again, we were unanimous of opinion, that the record was removed into the King's Bench by the firſt writ of error, and conſequently that error *coram vobis reſidet* well lay, for the reaſons given by my brother *Comyns*. And for an authority in point we relied on the caſe of *Walter verſ. Stoco*, *Hil.* 7 & 8 *Will.* 3. *B. R.* 1695-6. where in judgment in treſpaſs againſt five, four brought error, for which the writ was quaſhed; and afterwards they brought a writ of error *coram vobis reſidet*, which writ of error *coram vobis*, *&c.* was quaſhed, *Hil.* 8 *&* 9 *Will.* 3. *B. R.* 1696-7. [See before, 71, 151.] And we gave our opinions (*abſente Powys* juſtice) that the writ of error *coram vobis*, *&c.* in this caſe was well brought. And we gave the plaintiff in error time to put in bail.

The King *verſ.* Harwood.

To a *mandamus* directed to the defendant Dr. *Harwood*, as commiſſary of the dean and chapter of *St. Paul's*, commanding him to ſwear *William Folbigg* one of the church-wardens of the pariſh of *St. Giles Cripplegate*, *London*, being duly elected, *&c.* the defendant returned, *non fuit electus*. And it was inſiſted on behalf of *Folbigg*, that the return was ill; that the archdeacon, who was only to obey the writ, could not judge of the election, and therefore upon ſuch a return to ſuch a writ a peremptory *mandamus* was granted laſt *Michaelmas* term. [See before, 1379.] That the archdeacon, *&c.* could not judge of the qualities of a perſon choſen by the pariſh, *Hil.* 8 *Will.* 3. the King *verſ. Rice.* 5 *Mod.* 325. But both my brother *Reynolds* and myſelf took the return to be good. But upon the importunity of the council for *Folbigg*, and preſſing the authority of that caſe of the King *verſ. White*, and no council for the defendant appearing, a rule was made for a peremptory *mandamus*, *niſi*, *&c.* At which afterwards my brother *Reynolds* and I were much diſſatisfied; but the council for the defendant at another day coming to ſhew cauſe againſt the rule, we diſcharged the rule. And the court not being unanimous, it was ordered to come on again in the paper. But I never heard it ſtirred again. But there can be no doubt, but ſuch a return is good.

S. C. 8 Mod. 380. *Non fuit electus* church warden a good return to a *mandamus* to ſwear in a churchwarden.

The King *againſt* Venables.

An order was made by two juſtices of the peace for the county of *Hertford*, 15 *November* 1723, reciting, that whereas it appeared upon oath, that the defendant kept a common alehouſe in the borough of *Hertford*, and that he kept it as a diſorderly houſe; whereupon the ſaid juſtices, for the reaſon aforeſaid, and by reaſon a greater number of alehouſes was kept in the ſaid borough than were neceſſary, by the ſaid order diſcharged and put away the ſelling ale from the ſaid houſe, and did ſuppreſs the ſaid *Robert Venables* from keeping a common alehouſe, *&c.* Afterwards the juſtices the third of *June* 1724 made another order, reciting the former orders, and a warrant under their hands and ſeals commanding the conſtable to give notice of that order, and that oath had been made

S. C. 1 Stra. 630, 678.
S. C. 8 Mod. 377.
Upon an order to ſuppreſs an alehouſe it is neceſſary that the party ſhould be ſummoned.

before them, that the defendant was ſerved with that order, and reciting, that it appeared to them by the oath of two perſons named in that order, that ſince the defendant had notice of that order, he had continually to the date thereof uſed the ſaid houſe as an alehouſe, and uſed commonly the ſelling of ale and beer therein, contrary to the former orders; the ſaid juſtices therefore, by virtue of the ſtatute, *&c.* ordered that the defendant ſhould be committed to gaol for three days, and until he ſhould enter into a recogniſance, not to ſell ale, *&c.* The defendant having removed theſe orders by *certiorari* into this court, Mr. *Reeve* took exception to both the orders, that it did not appear by either of them, that the defendant was ſummoned, and had an opportunity of making his defenſe; whereas if he had been heard, poſſibly he might have ſatisfied the juſtices, that the complaint was groundleſs. That in all ſummary convictions, of which nature theſe orders were, a ſummons was neceſſary to be ſhewn. So is 1 *Salk.* 151. the Queen *verſ. Dier*, where it is held by the court, that upon the complaint, the juſtices ought to make a *memorandum*, and iſſue a ſummons, and if the party will not appear, or cannot be found, they may proceed; but there the conviction was quaſhed, becauſe, in the ſummons ſet out, the time of the appearance therein directed was impoſſible.

On the other ſide it was inſiſted upon by Mr. ſerjeant *Carter*, Mr. *Corbett*, and Mr. *Fazakerley*, in ſupport of theſe orders, that as to the firſt order no ſummons was neceſſary, becauſe the juſtices were judges what number of alehouſes were proper to be permitted, and they had declared there were too many in the borough. As to the ſecond order they argued, that it was in nature of a commitment in execution, and therefore no ſummons was neceſſary; as in caſes of convictions for deer-ſtealing, if the conſtable returns the party has no goods, *&c.* he is preſently committed, without any previous ſummons. *Sed non allocatur:* for *per curiam*, the ſecond order cannot be conſidered as a bare execution of the firſt; but the commitment is grounded upon a fact done ſince the making the firſt order, *viz.* the defendant's continuing publickly to ſell ale, *&c.* Then the council for the orders inſiſted, that there is no caſe, wherein it has been held, that in orders made by juſtices of the peace, it was neceſſary to ſhew, the party was ſummoned. As in orders for keeping a baſtard child, *Hil.* 1720. the King *verſ. Hawkins*; *Mich.* 1721. the King *verſ. Clegg*; 1722. the King *verſ. Harris*; and *Trin.* 1724. the King *verſ. Auſtin*, in an order to ſuppreſs an alehouſe, that exception was taken; but the order was not quaſhed for that, but becauſe there was no county mentioned, only in the margin; and the Queen *verſ. King*, *Hil.* 1711.

The court were unanimouſly of opinion, that the party in theſe caſes ought to be heard, and for that purpoſe ought to be ſummoned in fact; and if the juſtices proceeded againſt a perſon without ſummoning him, it would be a miſdemeanor in them, for which an information would lie againſt them. But ſince in theſe ſort of orders for ſuppreſſing alehouſes, keeping baſtards, &c. ſummons have not been ſet out, they would intend the juſtices having juriſdiction had proceeded regularly, and that there was a ſummons; it not appearing by the order, that there was none, or that there had been an ill ſummons; for where it appears there was an ill ſummons, that will be fatal, and leave no room to make it good by intendment: which anſwers the caſe, 1 *Salk.* 181. And *Forteſcue* juſtice ſaid, the caſe of the Queen *verſ. King* was the very caſe in point. And the orders were confirmed, *June* 10, 1725. But afterwards it being made appear to the court by *affidavits*, that the juſtices had proceeded in making the laſt order, without ſummoning *Venables*; after having heard council for the juſtices, the court gave leave to file an information againſt them.

Earl of Hindford *verſ.* Charteris.

Matter of practice.

THE regularity of entring judgment againſt the defendant being referred to the maſter, it appeared upon his report, that the declaration was left in the office, but no declaration was delivered to the defendant's attorney, though the plaintiff's attorney knew the defendant's attorney, and where to find him. And this the court held not to be a regular delivery of the declaration; for before the making the rule in this court in the late King *William*'s time, that the defendant's attorney ſhould pay the plaintiff's attorney for the declaration, the practice never was to leave the declaration in the office, if the defendant's attorney could be found, but the declaration was to be delivered to him; and therefore ſince that rule, it is not regular to leave the declaration in the office, unleſs the defendant's attorney cannot be found, or refuſes to pay for the declaration. The like caſe happened this term between *Peach* and *Hobbs*. And therefore the court, for ſettling the practice as to delivery of declarations, made this following rule, which I pronounced in court, and which was drawn up as follows: *Regula generalis. Ordinatum eſt, quod ubi ſpeciale vel commune ballium affiletur pro aliquo defendente, et notitia inde datur; attornatus pro querente narrationem deliberet attornato pro tali defendente, qui ſolverit proinde. Sed ſi attornatus pro defendente, vel clerici ſui in abſentia ejus, recuſaverint ſolvere proinde, vel ſi locus habitationis talis attornati pro defendente ignotus fuerit attornato pro querente, tum licebit attornato* *pro querente relinquere narrationem in officio cum clerico narrationum, ſed immediate dabit notitiam inde in ſcriptis defendenti vel ejus attornato, et talis narratio aeſtimata fuerit bene deliberata tantum a tempore talis notitiae.*

Vaughan *verſ.* Evans.

S. C. 8 Mod. 374. and 1 Stra. 630. The defendant lived in *England*, was ſerved with proceſs out of the grand ſeſſions in *Wales*, and not appearing his lands were ſequeſtred, but a prohibition was granted. Hutton 59.

EVANS brought a bill of foreclosſure in the court of grand ſeſſions for the county of *Montgomery* againſt *Vaughan* and others, to foreclosſe *Vaughan* of his equity of redemption, upon a mortgage of lands that lay in that county. And laſt term a motion was made for a prohibition, upon ſuggeſtion that *Vaughan* did not inhabit in that county, but lived in *England*, and that *Evans* had ſued out proceſs in order to get a ſequeſtration of *Vaughan*'s lands that lay in *Montgomeryſhire*. And after having heard Mr. *Reeve*, ſerjeant *Probyn*, and Mr. *Cowper*, againſt the prohibition, the court made the rule for the prohibition abſolute; becauſe the ſuit is in nature of a ſuit in Chancery, and the proceſs is perſonal, to ſummon the party; which cannot be ſerved in this caſe, Mr. *Vaughan* living in *England* out of the juriſdiction of the court of grand ſeſſions; and if he could not be ſerved with the proceſs, he could not be guilty of a contempt in not appearing upon it; and then by conſequence no ſequeſtration ought to go againſt his lands, though they lay in that county. And this is the ſame caſe in effect, as that in *Comberbach* 468. *Tranter verſ. Duggen*, in lord chief juſtice *Holt*'s time. And though it was objected, that the court of Chancery of *England* had their proceſs ſerved beyond ſea, and brought parties into contempt, and this of the grand ſeſſions was an original juriſdiction; the court ſaid, this was not to be compared to the Chancery (if they did proceed ſo) becauſe this juriſdiction, though it was an original one, yet it was a limited one, and confined to that county. The rule for the prohibition was made abſolute, *June* the 9th, 1725.

Mich. Term

12 Georgii regis, B. R. 1725.

Sir William Lowther's caſe.

MR. *Fazakerley* moved for leave to file an information in nature of a *quo warranto* againſt Sir *William Lowther*, to ſhew by what authority he had made and ſet up a warren. But it was denied by the court; becauſe it was of a private nature, and therefore proper to be proſecuted only in the name of the Attorney General by information, if His Majeſty thought fit. And the like motion was denied in the caſe of the lord *Liſburn*, not long ago; *October* 28, 1725.

S. C. 1 Stra. 637.
Cro. El. 548.

Hughes *verſ.* Alvarez.

THE defendant put in a plea in abatement, after having had *oyer* of the original, that the original was not returned, and that the plaintiff had not found pledges. And upon motion this plea was ſet aſide, becauſe it was put in without an *affidavit* of the truth of it; for though Mr. *Lee* and Mr. *Huſſey* ſaid, this appeared by the writ upon the *oyer*; and in caſes where a matter is pleaded in abatement, which appears upon the record (as variances) there needs no *affidavit* by the act for the amendment of the law; yet the court held, that this did not appear upon the *oyer* of the writ, for nothing appears but the writ itſelf; but this is a fact, which ought to be verified by *affidavit*.

S. C. 1 Stra. 639.
Plea of abatement ſet aſide, becauſe no affidavit of the truth thereof.

The King *verſ.* Collingbourn.

S. C. 1 Stra. 663. *A.* is bound apprentice to *B.* a freeman of *London*, and *A.* is bound and inrolled there, then goes and lives with his maſter in *Middleſex*; the juſtices for the county may diſcharge him.

UPON a ſpecial order of ſeſſions removed into the King's Bench by *certiorari*, for diſcharging an apprentice, who appeared by the order to have been bound to a glaſier a freeman of the city of *London*, before the chamberlain of *London*; Mr. *Urlin* moved to quaſh the order, inſiſting that the apprentice, being bound before the chamberlain of *London*, the juſtices of peace had no power to diſcharge him, but he ought to be diſcharged by the chamberlain; for in the act of 5 *Eliz. c.* 4. *par.* 40. the liberties and privileges of the citizens of *London* as to having and retaining apprentices are expreſly ſaved, and it is declared that ſtatute ſhall not be prejudicial to them. *Sed non allocatur*; for *per curiam*, the apprentice being out of *London*, and ſerving his maſter out of the city, there can be no proceedings againſt him before the chamberlain; but the juſtices of the peace have a juriſdiction to diſcharge him, notwithſtanding he was bound in *London*.

2. Exception was taken to the order, that the juſtices could not diſcharge the apprentice, becauſe the trade to which he was bound, *viz.* a glaſier, was not within the ſtatute of 5 *Eliz. Sed non allocatur*; for though formerly it was held, the trade ought to be a trade within the ſtatute, yet the later reſolutions have been otherwiſe. And a caſe was cited, where it was held, the trade need not be a trade within the ſtatute, 6 *Geo.* in the caſe of *Hone* an apprentice. The King *verſ. Taunton.*

Parker *verſ.* Thornton.

S. C. 1 Stra. 640. A juryman challeng'd, the challenge allow'd, afterward ſworn as a tales-man, the verdict ſet aſide.

AFTER a verdict for the plaintiff, a new trial was granted, becauſe one *Hooper*, who was challenged upon the principal panel, and the challenge allowed, was afterwards ſworn upon the jury as a tales-man by the name of *Hook*; although it was inſiſted upon by the council for the plaintiff, that the verdict was given to the ſatisfaction of my brother *Denton*, who tried the cauſe.

Wiat *verſ.* Eſſington.

S C. 1 Stra. 637. Treſpaſs for taking divers goods, not ſaying what goods, judgment arreſted after a verdict.

IN treſpaſs for breaking the plaintiff's houſe, and taking away *diverſa bona et catalla* of the plaintiff *ibidem inventa*, verdict was given for the plaintiff, and intire damages aſſeſſed; and upon Mr. *Ward*'s motion the judgment was arreſted, for the uncertainty in the declaration, in not ſpecifying what the goods were, ſo that this recovery could not be pleaded in bar of another action brought for the ſame goods. Serjeant *Darnall* and Mr. *Ketelbey* for the plaintiff.

Baſs *verſ.* Bradford.

In ejectment the declaration with regard to the demiſe cannot be altered.

IN ejectment the demiſe in the declaration againſt the caſual ejector, and afterwards delivered to the tenant in poſſeſſion, was laid of the ſecond of *June* laſt, to commence from *Lady-day* before; and after the tenant in poſſeſſion had entred into the common rule, in the declaration in the iſſue delivered to the defendant the demiſe was laid to be of the ſecond of *Auguſt* laſt, the title of the leſſor of the plaintiff being upon a breach of a condition for non-payment of rent due *Midſummer* laſt. And ſerjeant *Baines* moved for the defendant, that the iſſue might be made according to the declaration delivered to the tenant in poſſeſſion, becauſe the plaintiff ought not to recover upon a title accrued ſubſequent to the delivery of the firſt declaration. Mr. *Fazakerley* for the plaintiff inſiſted, that the firſt declaration was only in nature of a notice, and therefore the ſecond declaration might vary from the firſt as to the demiſe. But *per totam curiam*, by the courſe of this court there can be no alteration in the declaration in the iſſue from the firſt declaration delivered, only in the defendant's name. And a rule was made, that the iſſue ſhould be made according to the declaration delivered againſt the caſual ejector.

Powell *verſ.* Hord.

S. C. 1 Stra. 650.
In an action againſt the ſheriff for a falſe return the officer cannot be a witneſs, becauſe he is intereſted as giving ſecurity to the ſheriff.

IN caſe againſt the ſheriff of *Oxfordſhire*, for a falſe return of *non eſt inventus* to an *alias capias ad ſatisfaciendum* upon a judgment of the Common Pleas, recovered by the plaintiff againſt one *Edward Jones* for 21 *l.* 10 *s.* and upon error brought in the King's Bench affirmed, upon which the whole ſum amounted to 43 *l.* upon not guilty pleaded, the cauſe was tried before me at *niſi prius* in *Middleſex* this term. And it appeared upon the evidence, that the ſheriff's bailiffs upon the firſt *capias* had frequent opportunity of taking *Jones*; and that when that return was out, the under-ſheriff deſired Mr. *Atwood* the plaintiff's attorney to take out another *capias ad ſatisfaciendum*, and he promiſed to arreſt *Jones*, but did not, though he had opportunities to arreſt him upon that writ. And the defendant upon the trial attempted in mitigation of damages to prove, *Jones* might yet be taken, but failed in that proof, it appearing *Jones* had abſconded. Upon which by my direction the jury gave the whole 43 *l.* debt in damages. And the defendant moved for a new trial; firſt, becauſe I refuſed to admit the ſheriff's bailiff to be a witneſs upon the trial, to prove that he often endeavoured to have arreſted *Jones* on this *capias ad ſatisfaciendum*, but could not. *Sed non allocatur*; for my brothers agreed with me, the bailiff was no legal witneſs, becauſe he is intereſted in the cauſe, having given ſecurity for his due executing proceſs, and by conſequence could not be a witneſs in his own cauſe. Then it was inſiſted upon by the counſel for the defendant, that the damages were exceſſive, becauſe the jury had given damages for the whole debt; whereas they ſaid the jury ought to have given only the charges the plaintiff had been at in the ſuing the *capias ad ſatisfaciendum*, *&c.* in damages. *Sed non allocatur*; for upon the circumſtances of the caſe the court thought it very proper, the whole debt ſhould be given in damages. Note, upon giving the verdict, the plaintiff entred into a rule by conſent, that the ſheriff ſhould have liberty to uſe his name, in order to recover the debt againſt *Jones*, the ſheriff conſenting to indemnify the plaintiff againſt all coſts, *&c.*

Hilary Term

12 Georgii regis, B. R. 1725.

Will. Dobbs *verſ.* John Edmunds.

IN treſpaſs the plaintiff declared, *quod cum* the defendant ſuch a day broke and entred his houſe, *&c. necnon de eo quod* the defendant *poſtea*, ſuch a day, *vi et armis* entred his ſhop, *&c.* Upon not guilty pleaded a verdict was found for the plaintiff, but damages were given ſeverally, *viz.* 1 *d.* on the firſt fact, and 40 *s.* for the ſecond fact. And now it was moved in arreſt of judgment, that the taking the damages ſeverally would not help the fault in the declaration; for the *quod cum* went through the whole declaration, and ſo no fact was poſitively alleged; which is ill in treſpaſs, and has been often ſo adjudged, 1 *Roll. rep.* 55. But it was held *per curiam*, that the *necnon* ſhould not bring in the ſecond fact into the *quod cum*, but ſhould be took to be a poſitive averment, as if the *queritur* had been repeated again, *viz. necnon queritur de eo quod*, *&c.* which had certainly been good. And therefore the plaintiff had his judgment for the damages found for the ſecond fact. And the court declared, they would be bound by what had been already often determined; but they ſhould be very cautious of extending this exception after a verdict further than it had been carried before.

S. C. 1 Stra. 681. *Quod cum* in treſpaſs in *B. R.* by bill ſeems to be ill after verdict.

But in the *C. B.* where the writ is ſet out, the *quod cum* in the declaration is help'd thereby, and ſo determin'd in *C. B. Mich.* 4 *G.* 3. And ſee Douglas and Hall in error in *B. R. Trin.* 18, 19 *Geo.* 2. the S. P. ſo held.

Portman *verſ.* Cane.

AN executor brought debt upon a bond entred into by the defendant to the teſtator in 1676; and a breach was aſſigned to be made by the defendant in the executor's time about a year before the action brought. And on iſſue thereupon verdict was given for the defendant. And ſerjeant *Chapple* moved, the plaintiff might pay coſts, becauſe the breach was aſſigned to be done after the teſtator's death in the executor's time. *Sed non allocatur*; for

S. C. 1 Stra. 682. Plaintiff executor ſhall not pay coſts on a verdict againſt him in debt on bond, tho' breach aſſigned in the executor's time.

per curiam the bond is the cauſe of action, and the plaintiff could not ſue but as executor. And therefore the motion was denied. 1 *Ventr*. 92.

Parker *verſ.* Stanton.

S. C. 1 Stra. 679. Practice in error.

TO a *ſcire facias* ſued by the defendant in error, *quare executionem non, &c.* in order to compel the plaintiff in error to aſſign his errors, the plaintiff in error pleaded, that the defendant in error had ſued execution in the Common Pleas, and levied his debt recovered. And upon Mr. *Strange*'s motion this plea was ſet aſide as a ſham plea, (as a plea of payment in the like caſe was ſet aſide in *Hil*. 10. *Geo*.) for the meaning of ſuing out this writ, is only to compel the plaintiff in error to aſſign his errors; and if ſuch pleading as this ſhould be encouraged, it would occaſion great delays and vexation in the recovery of debts.

Helbut *verſ.* Held. *Error* C. B.

Intr. *Hil.* 11 *Geo.* C. B. Rot. 339. and *Hil.* 12 *Geo.* B. R. Rot.

S. C. 1 Stra. 684. No error to be aſſigned contrary to the record.

HELD brought an action of aſſault and battery in the Common Pleas againſt *Helbut*, and upon his pleading the general iſſue verdict and judgment was given for *Held*. Upon which *Helbut* brought this writ of error in the King's Bench, and aſſigned for error, *quod per recordum praedictum apparet, quod praedictus Edwardus Richier* [mentioned in the *poſtea* to be the only juryman who appeared on the principal panel] *jurator nominatus in panello praedicto de habendo corpora juratorum ſummonitorum inter praedictum Hugonem et Iſaacum annexo exactus venit*, and was ſworn on the jury, and gave his verdict *ſimul cum juratoribus praedictis de novo appoſitis*; whereas by the record of the *venire facias* it appeared, that the ſaid *Edward Richier* was not returned, nor impanelled by the ſheriff of *London* in the panel to the ſaid writ of *venire facias* annexed, and returned, as by law he ought, &c. Then he alleges diminution of the *venire facias* and *habeas corpora*, and prays a *certiorari* to the *cuſtos brevium* of the Common Pleas; but does not get the *certiorari* returned. The defendant in error pleaded, *in nullo eſt erratum, &c.*

Mr. *Parker* for the plaintiff in error argued, that this verdict, being given by a perſon not named in the panel upon the *venire*, is ill, and the judgment thereupon given is erroneous. And for this he cited 5 *Co.* 42. *b.* the counteſs of *Rutland*'s caſe, where it is held, that if a perſon is well returned in the panel of the *venire facias*, and is miſnamed in the *diſtringas*, or *habeas corpora*, the proceſs was diſcontinued, before 32 *Hen.* 8. *c.* 30. and 18 *Eliz.* *c.* 14. But now after verdict judgment ſhall not be ſtaid, becauſe all diſcontinuances after verdict are helped by thoſe ſtatutes; and therefore in that caſe the *venire facias* and *diſtringas* being right, and the miſtake in the name being in the panel before the juſtice of *niſi prius*, and the *poſtea*, it appearing upon examination of the ſheriff, that the perſon who gave the verdict was rightly named in the *venire*, it was amended; the motion there being in arreſt of judgment. But it is there held, that even then if a juror was miſnamed in the *venire facias*, though he was rightly named in all the ſubſequent proceſs, it was not amendable. Now here the perſon who gave the verdict is not named in the panel of the *venire*, and therefore it muſt be error: and the ſtatute of 21 *Jac.* 1. *c.* 13. does not help this caſe, for that ſtatute only helped where any of the jurors, who tried the cauſe, is miſnamed in any of the ſaid writs; but here he is not named at all.

But it was inſiſted upon by Mr. *Strange* for the defendant in error, and ſo adjudged by the court, that this was not aſſignable for error, it being againſt the record, the *venire facias* and *habeas corpora* not being returned upon the *certiorari* to the *cuſtos brevium*. And judgment was affirmed *February* 9, 1725.

Mich. 3 *Geo.* 2. *B. R.* *Plommer* verſ. *Webb* and *Cripp.* Debt on a bond; *non eſt factum* pleaded, verdict and judgment for the plaintiff in the Common Pleas; on error on this judgment, error was aſſigned, that *Webb* died before the day of *niſi prius*; and held it was not aſſignable for error, becauſe the record mentioned that he appeared that day. Judgment was affirmed *November* 7, 1729.

The King *verſ.* John Hill.

Conviction for killing game, muſt aver that defendant had not the qualifications in the ſtatute as to degree and eſtate.

THE defendant was convicted by Sir *Henry Bateman*, a juſtice of the peace of *Middleſex*, for unlawfully keeping a lurcher and a gun to kill and deſtroy the game, *non exiſtens qualificatus per leges hujus regni ad hoc faciendum, contra formam ſtatuti in hujuſmodi caſu editi et proviſi.* And this conviction being removed into the King's Bench by *certiorari*, was quaſhed *Saturday, February* 12, 1725. becauſe it was only averred generally, that he was not qualified, and did not aver that the defendant had not the particular qualifications mentioned in the ſtatute as to degree, eſtate, *&c.*

White

White *verſ.* Clever.

S. C. 1 Stra. 681. Where a plea is general *quod indempnem conſervavit*, it muſt be ſhewn for cauſe that it doth not ſay how.

DEBT on a bond for 400 *l.* The defendant prayed *oyer* of the bond, and of the condition, which was, that the defendant ſhould do ſeveral particular things, and alſo indemnify and ſave harmleſs the plaintiff from, *&c.* As to the things to be done, the defendant pleaded he did them; and as to the indemnifying the plaintiff, and ſaving the plaintiff harmleſs from, *&c.* the defendant pleaded, *quod indemnificavit ac indemnem ſervavit* the plaintiff *ab, &c.* To which plea the plaintiff demurred generally, and the defendant joined in demurrer. And ſerjeant *Whitaker* for the plaintiff took exception to the plea, that it was ill, becauſe the defendant did not ſhew, how he indemnified the plaintiff. *Cro. Jac.* 165. *Allington verſ. Yearkner. Hob.* 296. And it is ill on a general demurrer. *Cro. Jac.* 165, 363, 340, 503, 634. But if the defendant had pleaded in the negative, that the plaintiff *non fuit damnificatus*, it had been good. *Cro. Jac.* 634. 2 *Co.* 4. 1 *Lev.* 194. But Mr. *Lee* for the defendant inſiſted, that it was but form, and was good upon a general demurrer. So it is held 1 *Lev.* 194. *Cutler* againſt *Southern*, and 1 *Lutw.* 428. *Lovelace verſ. Bickham.* And all the court were unanimous of opinion, that ſuch pleading is well upon a general demurrer ſince the act for the amendment of the law, 4 & 5 *Ann. c.* 16. And therefore, becauſe the defendant had not demurred ſpecially, and ſhewed it for cauſe, judgment was given for the defendant, *Paſch.* 12 *Geo. B. R. Apr.* 29, 1726. Note, this action was brought upon the ſame bond as the plaintiff afterwards brought another action upon, and obtained judgment *Mich.* 13 *Geo. B. R.* 1726. *poſt.* 1499.

Eaſter Term

12 Georgii regis, B. R. 1726.

Ludwell *verſ.* Hole.

S. C. Stra. 696. Words not actionable.

CASE for theſe words ſpoke by the defendant of the plaintiff, *viz.* "You are a cheating old rogue, and have "cheated the fatherleſs and widow." After verdict for the plaintiff, ſerjeant *Belfield* moved in arreſt of judgment, that theſe words are not actionable, there being no *colloquium* laid of the plaintiff's trade; and cited 5 *Mod.* 398. *Savage verſ. Roberts.* 1 *Ro. Ab.* 62. *pl.* 25. *Hardr.* 8. *Wake verſ. Chapman:* and that difference was took, *Raym.* 62. *Davis verſ. Jones.* On the other ſide Mr. *Gapper* argued for the plaintiff, that the words ſhould not be took *in mitiori ſenſu* now, and quoted *Cro. Jac.* 673. and *Raym.* 86. *Terry verſ. Hooper.* But the court held, the words would not be actionable, unleſs ſpoke of the plaintiff in his trade, for which the caſes cited by ſerjeant *Belfield* are in point. And therefore judgment was arreſted, *May* 17, 1726.

Eden *verſ.* Wills.

S. C. 1 Stra. 694. The *ſcire facias* in error muſt be returnable as the original proceſs was.

MR. *Parker* moved to quaſh a *ſcire facias quare executionem non, &c.* ſued by the defendant in error, to make the plaintiff aſſign his errors; becauſe the original ſuit in the Common Pleas was by bill of privilege, and the *ſcire facias* therefore ought to be returnable at a day certain, but this was made returnable upon a common return. And of that opinion was the court, becauſe *ſcire facias's* ought to be made returnable according to the nature of the original ſuit below in the Common Pleas. And *Trin.* 11 *Ann.* between *Vavaſor* and *Parker*, it was adjudged ſo by the court of King's Bench in the very ſame caſe. And the writ of error was quaſhed. Mr. *Acherley* for the defendant in error.

Vavaſor verſ. Parker, Trin. 11 Ann.

Trin. Term

12 Georgii regis, B. R. 1726.

Goodright *verſ.* Shuffill.

IN ejectment, plea of antient demeſne was allowed to be well, without an *affidavit* to verify the fact. And ſuch plea had been before allowed to be good in earl *Coningeſby*'s caſe.

Godfrey *verſ.* Philpot.

MR. *Fazakerly* moved to change the *venue* into *Cheſter*; and it was granted *per curiam*, becauſe this court can ſend down the record by *mittimus*.

Martha Frontin *verſ.* Small. *Covenant.*

Intr. *Hil.* 12 *Geor.* B. R. Rot.

S. C. 1 Stra. 705. Where a warrant of attorney is given to execute a deed, it muſt be executed in the name of the principal.

THE plaintiff declared, *quod cum* by a writing of agreement *factum* 17 *Dec.* 1723. between herſelf attorney of *James Frontin* of the one part, and the defendant of the other part, which ſhe produces in court under the ſeal of the defendant, ſhe for and in the name, and as attorney of the ſaid *James*, demiſed to the defendant a houſe in *Villers ſtreet* in *York buildings* for ſeven years from the twenty-fifth of *December* next, and that the defendant for himſelf, his heirs, executors and adminiſtrators, covenanted and agreed, that he, *&c.* would pay for the ſaid meſuage to the ſaid *James Frontin* 60 *l.* *per annum*, at four quarterly payments, *&c.* by virtue of which writing of agreement the defendant entred, and was and yet is poſſeſſed; and aſſigns for breach, that the defendant did not pay the ſaid rent, but 45 *l.* due to the ſaid *Frontin* for three quarters of a year was and yet is due and unpaid, *&c.* The defendant

dant demurred generally, and the plaintiff joined in demurrer. And Mr. *Strange* for the defendant inſiſted, that the plaintiff could not maintain this action, for the leaſe was void, becauſe the plaintiff acting only as attorney to *James Frontin*, it ſhould have been made as a leaſe from him and in his name. *Moor* 70. *pl.* 191. 9 *Co. Rep.* 77. *Combe*'s caſe. If an attorney has a power by writing to make leaſes by indenture for years, *&c.* he cannot make an indenture in his own name, but in the name of him who gives him his warrant. And of this opinion was the whole court, and that therefore it appeared upon the face of the declaration, that the leaſe was void. And then Mr. *Strange* inſiſted, that if the leaſe was void, the covenant in it to pay the rent was void alſo. But Mr. *Reeve* for the plaintiff argued, that though the leaſe was void, yet covenant might be maintained on the agreement. *James Frontin* could not maintain an action of covenant, becauſe he was no party to the deed. 2 *Inſt.* 673. *Scudamore verſus Vandenſtene.* But he ſaid covenant would lie on the word *demiſit*, which implies a covenant. But if there be an expreſs covenant particular, *viz.* that he ſhould quietly enjoy againſt all claiming under him, that reſtrains the general implied covenant. 1 *Mod.* 113. *Deering verſus Farrington.* *Ante* 1241. *Hale* held, that where a man *aſſignavit et tranſpoſuit* all the money that ſhould be allowed him by any order of a foreign ſtate, to come to him in *lieu* of his ſhare of a ſhip; this was void as an aſſignment, but was a covenant, and was all one as if the defendant had covenanted, the plaintiff ſhould have all the money the defendant ſhould recover for loſs of ſuch a ſhip. Beſides, the agreement being under ſeal, the defendant was eſtopped to ſay, the plaintiff did not demiſe, and it was very hard the defendant ſhould enjoy the houſe as he did, and not be forced to pay the rent. But the court held, that it appearing on the declaration, that the leaſe was void, becauſe it was not made in the name of *James Frontin*, whoſe houſe it appeared to be, and that the plaintiff only made it as his attorney, there could be no *eſtoppel*; and then the covenant to pay the rent was void, and the plaintiff could not maintain the action. And judgment was given for the defendant, *June* 21, 1726.

Mich. Term

13 Georgii regis, B. R. 1726.

MEmorandum, *that* Robert Dormer *eſquire, one of the juſtices of the court of Common Pleas, died* September 18 *laſt,* anno aetatis 77. *And Sir* Jeffery Gilbert *knight, lord chief baron of the court of Exchequer, died* October 14 *laſt,* anno aetatis 52. *And juſt before the beginning of this term Sir* Thomas Pengelly *knight, his Majeſty's* primier *ſerjeant at law, was ſworn lord chief baron of the Exchequer, and Mr. baron* Price *was ſworn one of the juſtices of the Common Pleas. And on* Wedneſday October 26*th Sir* Littleton Powys *knight, one of the juſtices of the court of King's Bench, and the honourable* Robert Tracy *eſquire, one of the juſtices of the Common Pleas, reſigned both their offices by reaſon of their ill ſtates of health. And his Majeſty,* as a *reward for their paſt ſervices, granted each of them a penſion of* 1500 l. per annum. *And* Friday November *the* 4*th Sir* Francis Page *knight, one of the barons of the Exchequer, was ſworn a judge of the Common Pleas in the room of Mr.* juſtice Tracy; *and* Monday November *the* 7*th Sir* Lawrence Carter *knight, one of his Majeſty's ſerjeants at law, and ſolicitor general to his royal highneſs the Prince of* Wales, *was ſworn a baron of the Exchequer in the room of Mr. baron* Price. *And Mr. ſerjeant* Probyn *was ſworn one of the juſtices of the King's Bench in the room of Mr. juſtice* Powys. *And Mr. ſerjeant* Comyns *was ſworn a baron of the Exchequer in the room of Mr. baron* Page.

John Aſtell *verſ.* John Andrews.

Intr. *Trin.* 11 *Geo.* B. R. Rot. 408.

S. C. 2 Stra. 718. One ſingle act is a ſelling by retale.

THE plaintiff brought an action of debt, *qui tam*, *&c.* againſt the defendant, for 100 *l.* *&c.* for ſelling *French*, *Portugal*, and *Spaniſh* wines, twenty ſeveral times by retale, *viz.* by the pint, the quart, and the gallon, to perſons whoſe names are unknown to the plaintiff, between the firſt of *March* 10 *Geo.* and the firſt of *March* 11 *Geo.* at *Briſtol*, to be drank at *Briſtol*, the defendant not being authorized or enabled in manner and form as by the ſtatute in that caſe made and provided is preſcribed and appointed: *contra formam et effectum ſtatuti praedicti*; *per quod* the defendant forfeited to the King and the plaintiff, *qui tam*, *&c.* 100 *l.* *viz.* 5 *l.* for every one of the ſaid offenſes. Upon *nil debet* pleaded, and iſſue joined thereon, the cauſe was tried before my brother *Denton* at *Briſtol*; and as to 95 *l.* part of the 100 *l.* the jury found for the defendant; but as to 5 *l.* the remaining part of the 100 *l.* the jury found a ſpecial verdict, *viz.* that the defendant the 11th of *November* in the eleventh year of this King, and for nine years then laſt paſt, was, and yet is, a merchant importer of *French*, *Portugal*, and *Spaniſh* wines, and for all that time dwelt and yet dwells in the city of *Briſtol* in the county of the city of *Briſtol*; that the defendant the 11th of *November* in the eleventh of the King, in his manſion houſe ſituate in *Briſtol*, ſold by the gallon to one *Thomas Mills* one gallon of red *Port*, to be drank at *Briſtol*, and that the ſaid *Thomas Mills* carried the ſaid gallon of the ſaid wine from the defendant's houſe to a common inn called the *Guilders Inn* in *Briſtol*, and that there the ſaid gallon of wine was drank; that the ſaid *Guilders Inn* at the time of the ſale of the ſaid gallon of wine, and of the drinking thereof, was in the occupation of one *Charles Selman*, and not in the tenure or occupation of the defendant; that the defendant at the time of the ſale of the ſaid wine was not enabled to ſell wine by retale by force of the ſtatute of the 12th of *Charles* the ſecond, intitled an act for the better ordering the ſelling of wines by retale, and for preventing abuſes in the mingling, corrupting and vitiating of wines, and for ſettling and limiting the prices of the ſame; that the defendant never ſold in any veſſel whatſoever any wine to be drank within his manſion houſe, or within any place whatſoever in his tenure or occupation: but whether the defendant owes the 5 *l.* *&c.* This caſe was argued twice at the bar, firſt by Mr. ſerjeant *Chapple* for the plaintiff, and Mr. *Gapper* for the defendant; and afterwards by Mr. ſerjeant *Pengelly* for the plaintiff, and Mr. *Fazakerley* for the defendant. And *Fri-*

day the 4th of *November* the chief juſtice delivered the opinion of juſtice *Forteſcue*, juſtice *Reynolds* and himſelf, that the plaintiff ought to have judgment, Mr. juſtice *Powys* having ſurrendered his office a little before.

The reaſon upon which the judges founded their reſolution was, that by the facts found in the ſpecial verdict the defendant appears to be guilty of an offence within the expreſs words of the ſtatute of 12 *Car.* 2. *cap.* 25. for by that act it is enacted, that no perſon after the 25th of *March* 1661, unleſs authoriſed as by that act is preſcribed, ſhall ſell or utter by retale, *i. e.* by pint, quart, pottle, or gallon, or by any other greater or leſſer retale meaſure, any kind of wine, to be drank or ſpent within his or their manſion houſe or houſes, or other place in his or their tenure or occupation, or without ſuch manſion houſe or houſes, or ſuch other place in his or their tenure or occupation, by any colour, craft, or mean whatſoever, upon pain to forfeit for every ſuch offence 5 *l.* &c. The jury here have found, that the defendant ſold a gallon of wine, that is a ſelling by retale within the very words of the act, which explains what ſelling by retale is, and mentions ſale by the gallon, as one of the inſtances. 2. They find, the wine was ſold to be drank at *Briſtol*, and that it was drank at the *Guilders Inn* in *Briſtol*; that is a ſale of wine to be drank out of the defendant's houſe, the words of the act being, to be drank within his manſion houſe or place in his occupation, or without ſuch manſion houſe, &c. and then they find the defendant had no licence to ſell, &c.

But it was objected by the counſel for the defendant, that it is found by the ſpecial verdict, that the defendant never ſold any wine to be drank within his manſion houſe, or within any place whatſoever in his tenure or occupation; and they inſiſted the intent of the act was only to reſtrain ſales of wine to be drank in their manſion houſes or places in their tenure or occupation; and though there is afterwards the words, or without, &c. yet that muſt mean ſome yard, &c. belonging to ſuch manſion houſe, &c. for otherwiſe the expreſſion in the act is unaccountable. If it was intended to prohibit ſales of wine to be drank in any place, it was idle to mention manſion houſes and places in their tenure or occupation. Beſides, the defendant is found to be a merchant importer of wine, and therefore more reaſonable he ſhould ſell by retale in his houſe, the act being principally levelled at perſons that keep taverns, &c. But the anſwer to this is, that the words of the act expreſly extend to this caſe, and though perhaps the parliament might have uſed other expreſſions to have made the act as extenſive, without mentioning manſion houſes, &c. yet their throwing in thoſe words do not reſtrain the other extenſive words. And this act is recited by the act of 15 *Car.* 2. *cap.* 14. to have this extenſive conſtruction, both in reſpect of the perſon ſelling, and of the place where the wine was ſold to be drank. For by that act of 15 *Car.* 2. *cap.* 14. it is recited to be enacted by this act of 12 *Car.* 2. *cap.* 25. *par.* 1. that no perſon or perſons whatſoever after the 25th of *March* 1661, unleſs authorized as by the ſaid act is appointed, ſhould ſell wine by retale, to be ſpent in their manſion houſes, or other place, under the penalty of 5 *l.* *&c.*

Another objection was made, that the verdict has found but one ſingle fact, and that the parliament only intended to prohibit the uſing the trade of ſelling wines by retale, which muſt require ſeveral facts; and that appears by the clauſe which directs the granting licences to be to thoſe who uſe the trade of ſelling wines by retale, *par.* 4. But to this it was anſwered, that the clauſe which prohibits the ſelling, is general, and lays a penalty upon every particular offence of 5 *l.* and it is upon that clauſe this queſtion depends; and therefore in expounding acts of parliament where words are expreſs, and plain, and clear, the words ought to be underſtood according to their genuine and natural ſignification and import, unleſs by putting ſuch expoſition a contradiction or inconſiſtency would ariſe in the act by reaſon of ſome ſubſequent clauſe, from whence it might be inferred, the intent of the parliament was otherwiſe. But that is not this caſe, for no inconſiſtency or contradiction will ariſe from the clauſe about granting licences, if the words of this clauſe are conſtrued according to their true ſignification; but both clauſes are very conſiſtent, and the act will be no more than this, that no perſon ſhall ſell by retale but ſuch as have a licence; and that licences ſhall be granted only to thoſe that uſe the trade of ſelling by retale. Judgment was given for the plaintiff.

The King *verſ.* Tenant.

S. C. 2 Stra. 716.
After defendant is diſcharged at ſeſſions, a new order of baſtardy cannot be made.

Several orders of baſtardy being removed into this court by *certiorari*, the firſt order was made by two juſtices of the peace for the *Weſtriding* of *Yorkſhire* upon the defendant, to keep a baſtard child, as being the reputed father. From this order the defendant appealed to the quarter-ſeſſions; and the juſtices at the quarter-ſeſſions upon full hearing of the merits, diſcharged the order of the two juſtices; but bound the defendant by recogniſance to appear at next quarter-ſeſſions, as it was ſuppoſed, under an apprehenſion, that better evidence might be procured againſt him. After this the ſame two juſtices made a new order upon the defendant for keeping this baſtard child. And all theſe orders being removed into this court *November* 10, 1726. the court quaſhed the laſt order of the two juſtices. For they having made an order upon the defendant, to keep the child as reputed father, and that order being regularly diſcharged upon an appeal, upon hearing the merits, the defendant was legally acquitted, and cannot be drawn in queſtion again for the ſame fact. Mr. *Reeve* council for the King, Mr. *Lee* council for the defendant.

Cro Car. 341, 350. Prideon's caſe. Cro. Car. 471. 1 Ventr. 59.

David Griffin *verſ.* Daniel Scott, Humfrey Bodman, John Mauldin, Abraham Purſehouſe, Joaken Falack, and George Shenton.

Intr. *Mich.* 12 *Geo.* B. R. Rot. 352.

S. C. 2 Stra. 717. The landlord muſt remove the goods at the end of five days or he is a treſpaſſer.

IN an action of treſpaſs brought by the plaintiff againſt the defendants, for breaking and entring the plaintiff's houſe at *Bermondſey* in *Surrey* the 18th of *June*, the eleventh of the King, and for continuing in poſſeſſion of the houſe for eight days next following, and for taking and carrying away from thence ſeveral goods of the plaintiff's, *viz.* grates, tongs, tables, a clock, *&c.* the defendants as to all, *praeter fractionem et intrationem domus praedictae et continuationem in poſſeſſione ejuſdem domus per ſpatium octo dierum*, and taking and carrying away the goods of the plaintiff, plead not guilty, and on that iſſue is joined; and as to all the reſt of the treſpaſs aforeſaid, the defendants juſtify, and ſay, that Sir *William Boyer* and *Ebenezer Sadler* the 20th of *April* 1708 were ſeiſed in fee of a meſuage and a piece of ground, *&c.* in the ſaid pariſh of *Bermondſey*, and being thereof ſo ſeiſed demiſed the ſame the ſaid 20th of *April* 1708 to *Anthony Tolat* from 25th of *March* then laſt paſt for ſixty years, who entred and was poſſeſſed, *&c.* and 11 *June* 1708 built a houſe on part of the demiſed premiſſes; that *Anthony Tolat* died inteſtate 1 *Auguſt* 1714; that adminiſtration was granted by the archbiſhop of *Canterbury* 5 *February* 1714 to *Anne Tolat*; that ſhe entred on the demiſed premiſſes, and the new erected houſe, and 15 *March* 1714 ſhe aſſigned the reſidue of the ſixty years term to *John Chamberlain*; that 11 *June* 1720 *John Chamberlain* died poſſeſſed thereof, *&c.* inteſtate; that adminiſtration to him was granted by the archbiſhop of *Canterbury* 5 *July* 1720 to *Robert Chamberlain*; that *Robert Chamberlain* entred, *&c.* and 6 *October* 1720 demiſed part of the premiſſes compriſed in the ſixty years leaſe, of which the houſe in the declaration was part, to *William Rouſe* for ſeven years from 29 *September* 1720, reſerving ſeventeen pounds *per annum* rent, payable the four uſual quarterly payments, *&c.* that *William Rouſe* entred and was and ſtill is poſſeſſed, &c. that *Robert Chamberlain* 12 *September* 1722 bargained and ſold and aſſigned the reverſion of the premiſſes demiſed, &c. for the remainder of the ſixty years term to the defendant *Daniel Scott*, by virtue of which aſſignment the defendant *Daniel Scott*, according to the form of the ſtatute in that caſe made and provided, of the ſaid reverſion of the premiſſes before mentioned to be demiſed to the ſaid *William Rouſe*, whereof the houſe in the declaration is parcel, and of all other the premiſſes demiſed to him aſſigned as aforeſaid was poſſeſſed; and the ſaid *Daniel Scott* being ſo poſſeſſed thereof, 8*l.* 10*s.* of the ſaid annual rent of 17*l.* for the ſaid premiſſes laſt mentioned, *unde praedicta domus in narratione praedicta mentionata eſt parcella*, for two quarters of a year ending at *Lady day* 1725 to the ſaid *Daniel Scott ſolubiles ad idem feſtum praedicto tempore quo*, &c. *in aretro et inſolut. fuerunt*, *per quod* the ſaid *Daniel Scott* for non-payment of the ſaid rent as aforeſaid due, *in jure ſuo proprio*, and the other defendants *in jure ipſius Danielis et per ejus praeceptum*, *praedicto tempore quo*, &c. *in domum praedictam in narratione praedicta mentionatam*, *ut* in parcel of the premiſſes aforeſaid abovementioned to be demiſed to the ſaid *William Rouſe*, *intraverunt*, and finding the ſaid goods and chattels in the ſaid houſe, the ſaid defendants *bona et catalla praedicta nomine diſtrictionis* for the rent as aforeſaid being in arrear *praedicto tempore quo*, &c. *ceperunt*, *ac pro meliori conſervatione eorundem bonorum et catallorum in eadem domo exiſtentium*, *bona et catalla illa in parte ejuſdem domus*, *ubi melius fieri potuit*, *per ſpatium octo dierum extunc proxime ſequentium continuaverunt*, *et poſſeſſionem ejuſdem domus pro propoſito praedicto neceſſario habuerunt*, *et denique eadem bona et catalla ſic diſtricta aſportaverunt ad imparcandum*, *et eadem adtunc et ibidem* in the ſaid pariſh of *Bermondſey imparcaverunt*, *ut diſtrictionem pro redditu praedicto in aretro exiſtente*, *prout eis bene licuit*; *quae quidem intratio domus praedictae*, *ac captio bonorum et catallorum praedictorum*, *et eorum continuatio in eadem domo*, *et poſſeſſio domus illius*, *ac denique aſportatio bonorum et catallorum illorum*, *eſt totum praedictum reſiduum tranſgreſſionis praedictae*, whereof the plaintiff complains, &c.

To this plea the plaintiff replied, and after confeſſing, that *Robert Chamberlain* was poſſeſſed of the reſidue of the ſixty years term, and made the leaſe to *Rouſe* for ſeven years, as in the plea; he ſays, that *Rouſe* 9 *March* 1720 aſſigned his leaſe to the plaintiff *David Griffin*, and that *Robert Chamberlain* aſſigned the reverſion, &c. to the defendant *David Scott* for the reſidue of the ſixty years term, and that the plaintiff *David* upon *Lady day* 1725 at the door of the houſe of the aſſigned premiſſes, out of which the rent aforeſaid was iſſuing, *paratus fuit et obtulit ad ſolvendum praefato Danieli* the ſaid rent of 8*l.* 10*s.* *ad idem feſtum ſolubilem*, and that the ſaid *Daniel*, nor any other perſon of his part, was ready there to receive the ſaid 8*l.* 10*s.* and that he the ſaid *David* afterwards, and before the breaking and entry of the houſe aforeſaid, *&c. viz.* 18 *June* the eleventh of this King at the pariſh of *Bermondſey* aforeſaid, *paratus fuit et obtulit ad ſolvendum eidem Danieli* the ſaid 8*l.* 10*s.* *ſed illos praedictus Daniel adtunc et ibidem totaliter recipere recuſavit, &c.* To this replication the defendants demurred, and ſhewed for cauſe, that it is not alleged in the replication, that the ſaid *David* was always ready, and yet is ready, to pay to the ſaid *Daniel* the ſaid 8*l.* 10*s.* nor is it alleged, that the ſaid *David* brought the money into court, to be paid to the ſaid *Daniel*; and that it is not alleged, that the plaintiff at the time of the ſuppoſed treſpaſs tendered the ſaid 8*l.* 10*s.* The plaintiff joined in demurrer.

This cauſe was argued 25 *June* in laſt *Trinity* term, and again 11 *November* in this term. And the defendant's council took exceptions to the replication, that it was ill for the cauſes ſpecially aſſigned in the demurrer. But the court gave no opinion thereon, being clear of opinion, that the plea was ill. The defendant has juſtified the entry into the houſe, out of which the rent iſſued, and diſtraining the goods in the declaration for the rent; ſo far is right; and the continuing in poſſeſſion of the houſe and goods for eight days. Now although the party might enter and diſtrain the goods, yet in a reaſonable time he ought to remove them, and put them either into a pound overt, or cloſe; but at common law no diſtreſs could be impounded on the premiſſes; and for that reaſon ſheaves or ſhocks of corn were not diſtrainable for rent, becauſe nothing could be diſtrained, but what might be returned in as good a condition, as it was in when the diſtreſs was taken, but after a removal ſheaves of corn could not be reſtored in the ſame condition, *Co. Lit.* 47. *a.* and therefore the ſtatute 2 *Will. & Mar. ſeſſ.* 1. *cap.* 5. gives the leſſor a power to diſtrain ſheaves of corn, *&c.* and to lock up and detain the ſame upon the place where it is found; but that is only in the particular caſes mentioned in that act. Then in this caſe, the defendant not having removed the corn in a reaſonable time, it has made his diſtreſs illegal; much leſs could he juſtify the detaining the poſſeſſion of the houſe eight days upon account of the diſtreſs. And the adding in the plea, that *pro meliori conſervatione eorundem bonorum et catallorum in eadem domo exiſtentium, bona et catalla illa in parte ejuſdem domus, ubi melius fieri potuit,* for eight days then next following *continuaverunt, et poſſeſſionem ejuſdem domus pro propoſito praedicto neceſſario habuerunt, &c.* will not at all mend the caſe; ſince the law does not allow impounding a diſtreſs on the premiſſes, unleſs in the caſes within the ſtatute 2 *Will. & Mar.* which this is not.

And

artwright verſus Comber.

And Forteſcue juſtice cited a caſe between *Cartwright* and *Comber* at *niſi prius*, tried before the earl of *Maccleſfield*, when he was chief juſtice of the King's Bench, where he ruled, that if a landlord diſtrains for rent, and keeps the goods on the premiſſes longer than a reaſonable time which the law allows him to remove them in, he is a treſpaſſer *ab initio*. Six carpenters caſe, 8 *Co.* 146. The plea therefore being ill, the court 11 *November* 1726 gave judgment for the plaintiff. Serjeant *Richard Comyns* for the defendant, Mr. *Gapper* for the plaintiff.

Joſeph Story *verſ.* Daniel Atkins.

Intr. *Paſch.* 12 *Geo.* B. R. Rot. 220.

S. C. 2 Stra. 719. An *indebitatus aſſumpſit* in an inferior court may ſave the ſtatute of limitations on a promiſſory note.

IN an action upon the caſe upon ſeveral promiſes, the plaintiff declared upon a promiſſory note dated 25 *March* 1720. ſigned and ſubſcribed by the defendant, whereby he promiſed to pay the plaintiff or his order 12 *l.* 11 *s.* for value received, *&c.* there was alſo another count on *indebitatus aſſumpſit* for 20 *l.* lent by the plaintiff to the defendant: and the third count was on an *indebitatus aſſumpſit* for 20 *l.* laid out by the plaintiff to the defendant's uſe, *&c.* damage 20 *l.* The defendant *quoad primam promiſſionem et aſſumptionem in narratione praedicta mentionatam*, pleads in bar, *quod ad aliquod tempus infra ſex annos ante diem exhibitionis billae ipſius* the plaintiff *cauſa actionis quoad dictam primam promiſſionem et aſſumptionem in narratione praedicta mentionatam non accrevit eidem Joſepho verſus ipſum Danielem*, *&c.* and as to the ſecond and third promiſes in the declaration mentioned the defendant pleaded *non aſſumpſit*, and iſſue was joined thereon.

As to the plea to the firſt promiſe, the plaintiff replies, that it is true that the cauſe of action as to the firſt promiſe in the declaration mentioned *non accrevit* to the plaintiff againſt the defendant within ſix years before the exhibiting the plaintiff's bill; but the plaintiff ſays further, after ſetting out the cuſtom in *London* to hold plea of all actions of debt and other perſonal actions by plaint levied in the ſheriff's court there, that the cauſe of action as to the ſaid firſt promiſe firſt accrued before the eleventh of *February* 1725. *viz.* 25 *March* 1720 at *London* aforeſaid in the pariſh of *St. Mary le Bow* in the ward of *Cheape*; *quodque ipſe praedictus Joſephus pro recuperatione damnorum ſuorum pro non performatione promiſſionis et aſſumptionis pradictae poſtea, ſcilicet undecimo die Februarii A. D.* 1725. into the ſheriff's court held, *&c. in propria perſona ſua venit, et tum in eadem curia ibidem ſecundum conſuetudinem civitatis praedictae levavit quandam querelam verſus*

praeſatum

praefatum Danielem Atkins in placito tranſgreſſionis ſuper caſum ad damnum ipſius the plaintiff 20 *l. et praedictus Joſephus in eadem curia tunc et ibidem invenit plegios de proſequendo querelam ſuam*, &c. and prayed proceſs againſt the defendant *ſecundum conſuetudinem civitatis praedictae*; that thereupon *praeceptum fuit* (*ore tenus*) by the ſheriff *ſecundum conſuetudinem ejuſdem civitatis* to the ſerjeant of the mace, *quod ipſe ſecundum conſuetudinem ejuſdem civitatis poneret per vadios et ſalvos plegios* the ſaid defendant *Daniel, eſſendum ad proximam curiam dicti domini regis* before the ſheriff, at, &c. 12 *February* 1725 *tenendam*, to anſwer the plaintiff *Joſeph de placito praedicto*, &c. and upon a *nihil habuit*, &c. returned, a *capias* was awarded to the ſerjeant of mace againſt the defendant, returnable 17 *February* 1725, &c. to which a *non eſt inventus* was returned; and then ſets out that the proceſs was continued till 26 *February* 1725, at which day the defendant appeared, and the plaintiff then and there *in eadem curia* by his attorney *in et ſuper querelam ſuam praedictam verſus praedictum Danielem ſecundum conſuetudinem civitatis praedictae narravit modo et forma prout ſequitur, ſcilicet, Joſephus Story per J. D. attornatum ſuum queritur verſus Danielem Atkins in placito tranſgreſſionis ſuper caſum, eo quod cum decimo die Februarii anno domini regis nunc duodecimo in parochia ſanctae Helenae London, praedictus defendens indebitatus fuit praefato querenti in* 20 *l. pro diverſis pecuniarum ſummis per praedictum defendentem praefato querenti prius debitis, praedictus defendens in conſideratione inde tunc et ibidem aſſumpſit ſuper ſe et praefato querenti fideliter promiſit, ad ſolvendum eidem querenti praedictas* 20 *l. cum inde requiſitus eſſet*; *praedictus tamen defendens*, &c. *et ſuperinde* the defendant *praeſens in eadem curia adtunc et ibidem* produced a *habeas corpus cum cauſa* out of the King's Bench, returnable *immediate* before the King's Bench, &c. and then ſets forth, that the defendant was brought up on the *habeas corpus* 26 *February* 1725. and put in bail on the *habeas corpus ad reſpondendum* the plaintiff *de placito praedicto ſecundum conſuetudinem ejuſdem curiae*, as by the record of the *habeas corpus* and return thereof in the King's Bench *de recordo remanens plenius liquet et apparet*; *et ſuperinde idem Joſephus Story exhibuit billam ſuam praedictam in dicta curia dicti domini regis coram ipſo rege verſus praefatum Danielem Atkins modo et forma praedictis pro eadem cauſa actionis pro qua levavit querelam ſuam praedictam ut praefertur*; and then the plaintiff further ſays, that *praedicta cauſa actionis ipſius Joſephi Story verſus praefatum Danielem eidem Joſepho accrevit infra ſex annos ante praedictum tempus levationis querelae ſuae praedictae verſus praedictum Danielem, ſcilicet*, 25 *March* 1720. *in parochia et warda praedictis ultimo mentionatis*, &c. To this replication the defendant demurred, and prays that the plaintiff may be barred as to his action upon the firſt promiſe in the declaration mentioned, and ſhews for cauſe of demurrer, that it manifeſtly appears, that the ſaid *Joſeph* (*viz.* the plaintiff) did not exhibit his ſaid bill in this court as to the ſaid firſt promiſe, *pro eadem cauſa actionis pro qua levavit querelam ſuam in replicatione ſua praedicta mentionatam, &c.* And the plaintiff joined in demurrer.

This cauſe was argued laſt *Trinity* term by Mr. *Ketelbey* for the defendant, and by Mr. *Uſher* for the plaintiff; and this term by Mr. *Reeve* for the defendant, and by Mr. *Blencowe* for the plaintiff.

And the court was clear of opinion, that if an action is properly commenced in an inferior court within the ſix years, and the defendant removes it by *habeas corpus* into the King's Bench, the ſtatute of limitations will be no bar to the plaintiff in the King's Bench, though ſix years were elapſed after the cauſe of action accrued, and before the removal of the ſuit into the King's Bench. *Mich.* 16 *Car.* 2. *B. R. Bevin verſ. Chapman.* 1 *Siderf.* 228. 1 *Lev.* 143.

But the council for the defendant argued, that the plaintiff ought to have averred particularly with a *verificare vult*, that the plaint below and the bill in this court was for one and the ſame cauſe of action; which is a matter traverſable, and the defendant might have took iſſue upon it; but here being no ſuch averment, no ſuch iſſue could be took; and there is no ſufficient averment, that they were for the ſame cauſe of action.

2. It appears upon this record, that the ſuits were for different cauſes of action; for the plaint below is ſet out to have been levied *in placito tranſgreſſionis ſuper caſum ad damnum* of the plaintiff 20*l.* and the declaration below is in an *indebitatus aſſumpſit* for 20 *l. pro diverſis pecuniarum ſummis per praedictum defendentem praefato querenti prius debitis, &c.* but the firſt count in the declaration here is upon a promiſſory note for 12*l.* 11*s.* made by the defendant to the plaintiff the twenty-fifth of *March* 1720. And it was inſiſted upon by the council for the defendant, that ſuch a declaration as was below could not be good, becauſe the plaintiff ought to ſhew, for what the money was due, as money lent, *&c.* for the defendant might be indebted to the plaintiff for ſums of money owing by him to the plaintiff, for which an *indebitatus aſſumpſit* would not lie, as on a bond, *&c.* and the ſaying that he declared *ſecundum conſuetudinem civitatis praedictae*, was not ſufficient; for if upon ſuch a general declaration the party could recover contrary to the rules of the common law, ſuch cuſtom ought to be ſet out ſpecially; as in caſe of a *conceſſit ſolvere*, a cuſtom to recover upon

it muſt be ſet out ſpecially. *Raſt. Intr.* 550. In the next place it was inſiſted on, that this promiſſory note could not be given in evidence to maintain the declaration, if it ſhould be took to be for money lent; for though before the act of 3 & 4 *Ann. cap.* 9. a promiſſory note might be given in evidence on an *indebitatus aſſumpſit* for money lent; yet ſince that ſtatute thoſe notes are made negotiable, and an action will lie on the note itſelf, and the conſideration ſhall not be inquired into; and the note itſelf is now a ſecurity for a debt, whereas before it was but an evidence of a debt. That an *indebitatus aſſumpſit* does not lie on a bill of exchange, by *Powell* juſtice, which the other juſtices did not deny. 2 *Lutw.* 1594. in the caſe of *Bellaſis verſ. Heſter.* 1 *Lev.* 298. 1 *Ventr.* 152. *Brown verſ. London. Hardr.* 487. 1 *Mod.* 286. *Milton*'s caſe. And therefore they concluded, that it appeared on the record, that the ſuit below and the action here were for a different cauſe of action.

The judges all agreed, that ſuch a general *indebitatus aſſumpſit pro diverſis pecuniarum ſummis per praedictum defendentem praefato querenti prius debitis,* without ſhewing for what the money was due, as money lent, *&c.* would be ill in the courts in *Weſtminſter* hall, and not maintainable, becauſe the money might be owing for what an *indebitatus aſſumpſit* would not lie, as for rent, upon a bond, *&c.* But then *Raymond* chief juſtice, and *Reynolds* and *Probyn* juſtices, held that an action brought on a promiſſory note againſt the perſon who ſigned it, payable to the plaintiff or order, for value received, and an action brought againſt him on an *indebitatus aſſumpſit* for money lent, might be averred to be the ſame cauſe of action; for they were of opinion, that in the action on the *indebitatus aſſumpſit* for money lent ſuch promiſſory note might be given in evidence, and would be good evidence to maintain the declaration. That ſuch notes were allowed in evidence in ſuch *indebitatus aſſumpſit* before the ſtatute of 3 & 4 *Ann. cap.* 9. is moſt certain, and before that act an action would not lie upon the note; then they held, that the ſtatute had only given an action upon the notes, and made them negotiable, which they were not before, but had not at all altered the nature of the debt; and therefore *Paſch.* 7 *Geo. B. R.* between *Comber* and *Wain*, *indebitatus aſſumpſit* brought for money lent, the defendant pleaded he had given the plaintiff a promiſſory note ſigned by him, payable to the plaintiff for that ſum of money; and upon a demurrer it was adjudged for the plaintiff, becauſe the note did not extinguiſh the debt, it not being of a higher nature than the promiſe for payment of the money; for the ſtatute had not altered the nature of the debts, nor made the note of a higher nature than a debt on ſimple contract, nor could it have any preference in payment by an adminiſtrator before other debts

Comber and Wain, Paſch. 7 Geo. B. R.

debts upon ſimple contract. And it is held, 1 *Salk.* 23. *Hard's* caſe, *Hil.* 8 *Will.* 3. that an *indebitatus aſſumpſit* will lie againſt the drawer of a bill of exchange, becauſe he was really a debtor by the receipt of the money. And 2 *Lutw.* 1585. in the caſe of *Bromwich verſ. Lloyd,* the chief juſtice *Treby* ſaid, that upon an *indebitatus aſſumpſit* a bill of exchange may be given in evidence, to maintain the action; and *Powell* juſtice ſaid, that on an *indebitatus aſſumpſit* for money received to the plaintiff's uſe, ſuch a bill may be left to the jury, to determine if it was for value received or not. But this muſt be underſtood of *indebitatus aſſumpſit* brought againſt the drawer, not againſt the acceptor, for an *indebitatus aſſumpſit* will not lie againſt the acceptor of a bill of exchange; and the caſes cited of 2 *Lutw.* 1594. *Bellaſis verſ. Heſter*, and 1 *Ventr.* 152. are in caſes of actions brought againſt the acceptor; and ſo is *Hardr.* 487. that debt will not lie againſt the acceptor of a bill of exchange.

But *Forteſcue* juſtice ſaid, he had never known a bill of exchange given in evidence on an *indebitatus aſſumpſit* for money lent, nor a promiſſory note ſince the ſtatute of 3 & 4 *Ann. cap.* 9. and therefore he was doubtful, whether it could be given now in evidence in ſuch *indebitatus aſſumpſit*; for before that act the note was but evidence, on which no action could be maintained, but by that act the note is made a ſecurity for the money, upon which an action will lie, and the conſideration of the note ſhall not be inquired into. And the action upon the note is grounded upon a ſtatute, but the *indebitatus aſſumpſit* is an action at common law; and therefore he was doubtful, whether they could be ſaid to be the ſame cauſe of action. And he cited the opinion of *Hale* chief juſtice, as reported 1 *Ventr.* 252. *A.* in conſideration that *B.* would marry his daughter, promiſed to pay 100*l.* and in an action brought the plaintiff was barred; and in another action brought the promiſe was laid to pay 100*l.* at requeſt, and held it could not be averred to be the ſame. To which the chief juſtice anſwered, that in that caſe the firſt promiſe was upon a particular conſideration, *viz.* marriage of his daughter; and in the ſecond there was no conſideration at all, and therefore it was but *nudum pactum,* and no action would lie upon it: however, the conſideration not appearing, it could not be averred to be the ſame cauſe of action with the firſt.

But then the queſtion was, whether ſuch a declaration as is ſet out in the plaintiff's replication to have been in the ſheriff's court, could be good by cuſtom; and if it could, whether that cuſtom ought not to be ſpecially ſet out; and whether the averment was ſufficient, that the ſuit here and the ſuit in the ſheriff's court were for the ſame cauſe of action? It being ſettled, that by cuſtom an action

Sti. 198. Paſcall verſ. Sparing.

Stevens v. Britland.

action might be maintained on a *conceſſit ſolvere*, the judges held, that there is the ſame reaſon, that by cuſtom an action may be maintained on an *aſſumpſit ſolvere*, and money lent given in evidence; in both the manner of declaring being in ſubſtance the ſame, *viz.* in the firſt, that the defendant *conceſſit ſolvere* to the plaintiff 60 *l. pro diverſis denariorum ſummis* to the plaintiff by the defendant *prius debitis ſolvendis.* 1 *Ro. Ab.* 564. *pl.* 21. and in this, that the defendant *indebitatus fuit* to the plaintiff in 20 *l. pro diverſis pecuniarum ſummis per praedictum defendentem praeſato querenti prius debitis, praedictus defendens in conſideratione inde tunc et ibidem aſſumpſit et eidem querenti promiſit ad ſolvendum* to the plaintiff the ſaid 20 *l. &c.* And the action on the *conceſſit ſolvere* is liable to all the ſame objections as this *aſſumpſit ſolvere* is. In the next place they held, there was no more occaſion to ſet out the cuſtom at large in this caſe, than in the *conceſſit ſolvere*, in which caſe it has been adjudged, the cuſtom need not be ſet out at large, but declaring *ſecundum conſuetudinem, &c.* was ſufficient. *Mich.* 29 *Eliz. B. R. Houtier*'s caſe. 4 *Leon.* 105. And *Forteſcue* juſtice ſaid, it had been not long ſince adjudged in this court between *Stevens* and *Britland*, that there is no neceſſity to ſet out the cuſtom at large in a *conceſſit ſolvere*, but laying it to be *ſecundum conſuetudinem, &c.* was ſufficient.

Then as to the averment, they were of opinion, that the plaintiff has ſufficiently averred, that the ſuit here and the plaint levied in the ſheriff's court were for the ſame cauſe of action. For the defendant's plea of the ſtatute of limitations is pleaded as to the firſt promiſe in the declaration, which is the count upon the promiſſory note, and prays judgment if the plaintiff can maintain his action as to the ſaid firſt promiſe; the plaintiff replies, and ſays, he ought not to be barred of his action as to the ſaid firſt promiſe, becauſe he (after ſetting out the cuſtom to hold the ſheriff's court) *pro recuperatione damnorum pro non performatione promiſſionis et aſſumptionis praedictae, ſcilicet,* 11 *February* 1725, at the court held before the ſheriff, *&c. in propria perſona ſua venit*, and then and there in the ſaid court *ſecundum conſuetudinem civitatis praedictae levavit quandam querelam ſuam* againſt the defendant *in placito tranſgreſſionis ſuper caſum ad damnum* of the plaintiff 20 *l.* (which had been ſufficient, if he had not declared below, but the defendant had removed the cauſe before declaration) then he goes on, and ſets out the proceſs awarded, the arreſt, the appearance, and that *in et ſuper querela praedicta* againſt the defendant *ſecundum conſuetudinem civitatis praedictae* he declared as before, and then ſets out the *habeas corpus*, and bail on the return of it to anſwer the plaintiff *de placito praedicto ſecundum conſuetudinem ejuſdem curiae*; and that thereupon the plaintiff exhibited his ſaid bill in the King's Bench againſt the defendant,

fendant, *modo et forma praedictis, pro eadem cauſa actionis pro qua levavit querelam ſuam praedictam, ut praefertur, &c.* And judgment was given for the plaintiff *November* 11 in this term.

Mr. Juſtice Forteſcue Aland *verſ.* Aland Maſon.

Intr. *Trin.* 11 *Geo.* B. R. Rot. 477.

S. C. 2 Stra. 861. Where error is brought on a judgment that the parol ſhall demur, the nonage cannot be pleaded again.

MR. juſtice *Forteſcue Aland* brought a writ of error returnable in the court of King's Bench in *England*, to reverſe a judgment given by the court of King's Bench in *Ireland*, upon a writ of error brought by the plaintiff returnable in that court, to reverſe a common recovery ſuffered in the court of Common Pleas in *Ireland*, and alſo to reverſe the ſaid common recovery. The writ of error returnable in the King's Bench in *Ireland* ſet out, that *Henry Aland ſenior* by deeds of leaſe and releaſe dated 2 & 3 *June* 1681 conveyed the lands, of which the common recovery was ſuffered, to the uſe of himſelf for life without impeachment of waſte, remainder to *Jonathan Aland* ſecond ſon of the ſaid *Henry Aland* for life without impeachment of waſte, remainder to the firſt ſon of *Jonathan Aland* in tail male, remainder to all the other ſons of the ſaid *Jonathan* in tail male, remainder to *Henry Aland junior* for life, remainder to truſtees and their heirs in truſt to preſerve contingent remainders, remainder to the firſt and all other ſons of the ſaid *Henry Aland junior* in tail male, with other *meſne* remainders not neceſſary here to be mentioned, becauſe they were determined, remainder to the plaintiff by the name of *John Forteſcue*, ſecond ſon of *Edmund Forteſcue* of *London* and *Sarah* his wife then deceaſed, who was eldeſt daughter of *Henry Aland*, for life without impeachment of waſte; that *Henry Aland ſenior* died without leaving any other iſſue male than *Henry Aland junior* and *Jonathan:* then it ſets out a common recovery ſuffered of the lands ſettled as aforeſaid, *Paſch.* 2 *Jac.* 2. in the Common Pleas in *Ireland*, wherein *William Young* was demandant, *Arthur Towers* and *Richard Smith* tenants, and *Jonathan Aland* vouchee, who vouched the common vouchee, and judgment given, and an *habere facias ſeiſinam* awarded, returnable *Trin.* 2 *Jac.* 2. which was returned executed; that *Jonathan Aland* died without iſſue male, and *Henry Aland junior* died without iſſue male, and the other intervening remainders, upon which the plaintiff's remainder was expectant, were determined: and then the plaintiff aſſigns the general error in the recovery, and prays a *ſcire facias* to *Aland Maſon* grandſon and heir of *John Maſon*, which is granted, as alſo a *ſcire facias* againſt the terretenants of the lands in the recovery. After a *ſcire facias* returned as to the heir and terretenants, the heir being an infant appears by his guardian, and the terretenants appear by attorney: and after an imparlance the infant prays *oyer* of the *ſcire facias* and of the return, which being granted, he pleads, that after the making the ſaid indentures of leaſe and releaſe, the ſaid *Henry Maſon* at, *&c.* 31 *Auguſt* 1681 died without any other iſſue male than the ſaid *Henry Aland junior* and *Jonathan Aland*; that afterwards *Henry Aland junior* died at, *&c.* 31 *July* 1683 without any iſſue male of his body, and the ſaid *Jonathan Aland* ſurvived him, and the ſaid *Jonathan Aland* was ſeiſed of all the ſaid lands, *&c.* in his demeſne as of fee, and afterwards, *viz.* 21 *Auguſt* 1691 died at, *&c.* ſeiſed in fee *habens exitum Sarah Aland* daughter and heir of *Jonathan Aland*, and after his death all the ſaid lands, *&c.* deſcended to the ſaid *Sarah Aland*, as daughter and heir of *Jonathan*, and the ſaid *Sarah ratione deſcenſus illius* into the ſaid lands, *&c.* did enter, and was ſeiſed in her demeſne as of fee; and being ſo ſeiſed 20 *October* 1714 died at, *&c.* ſeiſed of the ſaid lands, *&c.* in her demeſne as of fee, *habens exitum praedictum Aland Maſon filium et haeredem praedictae Sarae*, after whoſe death the ſaid lands, *&c.* deſcended to the ſaid *Aland Maſon* as ſon and heir of the ſaid *Sarah*, and the ſaid *Aland Maſon ratione deſcenſus illius* into the ſaid lands, *&c. intravit et fuit et eſt inde ſeiſitus in dominico ſuo ut de feodo*; and the ſaid *Aland Maſon* being ſo ſeiſed, *dicit quod ipſe eſt infra aetatem viginti unius annorum, et non intendit quod durante minori aetate ſua praedictus* the plaintiff *procederet*, *Anglice* ſhould proceed, *et petit quod breve de errore praedictum et loquela ſupradicta remaneant uſque ad aetatem unius et viginti annorum ejuſdem Aland Maſon, et quod* the plaintiff *ulterius in brevi de errore praedicto et loquela praedicta non procedat verſus praedictum Aland Maſon donec pervenerit ad ſuam aetatem unius et viginti annorum.* To which plea the plaintiff ſays, *quod placitum praedicti Aland Maſon ſuperius placitatum materiaque in eodem contenta minus ſufficientia in lege exiſtunt ad ipſum* the plaintiff *ab brevi de errore praedicto et loquela praedicta procedendo verſus* the ſaid *Alland Maſon donec pervenerit ad ſuam plenam aetatem unius et viginti annorum praecludendum, &c.* and prays that the judgment aforeſaid *ob errores in recordo et proceſſu praedicto revocetur adnulletur et penitus pro nullo habeatur, &c.* The defendant *Aland Maſon* by his guardian joins in demurrer, and prays, *quod breve de errore praedictum verſus eum non procedat, donec pervenerit ad plenam aetatem unius et viginti annorum.* The terretenants pray *oyer* of the *ſcire facias* and return, after having which they plead, that the ſaid *Aland Maſon die impetrationis praedicti brevis de ſcire facias, et diu antea, fuit et nunc eſt tenens ut de libero tenemento* of the ſaid lands, *&c.* and of every part thereof in the ſaid writ of *ſcire facias* mentioned; *abſque hoc* that they or any of them the day of ſuing the ſaid *ſcire facias*, or at any time after, were or was tenant *ut de libero tenemento* of the ſaid lands, *&c.* in the *ſcire facias* mentioned, or of any part thereof, as by the return of the ſaid *ſcire facias* is ſuppoſed; and this they aver, *&c.* and pray judgment of the ſaid writ of *ſcire facias* and the return thereof. And after ſeveral continuances the court of King's Bench gave judgment, *quod loquela praedicta ſuper breve de errore praedictum remaneret ad aetatem praedicti Aland Maſon*, *&c.* The writ of error returnable in the King's Bench in *England* ſets out this whole record of the writ of error returnable in the King's Bench in *Ireland*, and then Mr. juſtice *Forteſcue* plaintiff in error aſſigns his errors in perſon in the common recovery in the Common Pleas in *Ireland*, *viz.* that the original ought to have been abated, and alſo in the judgment of the King's Bench in *Ireland*. To this the defendant by guardian pleads his nonage, and that he is but of the age of thirteen and no more, and prays, that proceedings may ſtay on this writ of error, until he attains the age of twenty-one years. To which the plaintiff in error demurs, and prays, that the court will proceed to examine the errors aſſigned, and reverſe both the judgments, *&c.* The defendant joins in demurrer.

Laſt *Trinity* term this was argued by Mr. *Filmer* for the plaintiff in error, and by Mr. ſerjeant *Darnall* for the defendant in error. Mr. *Filmer* ſaid, that this plea was in nature of a plea in bar of the writ of error, and to hinder this court from examining the judgment of the court of King's Bench in *Ireland*, to ſee if it was rightly given. The judgment there was upon the defendant's pleading his nonage, that the proceedings on the writ of error ſhould ſtay, till he attained his age of twenty-one years; then when the defendant pleads here his nonage to this writ of error, he falls within the known rules, that *non debet adduci exceptio ejus rei cujus petitur diſſolutio*; for the allowance of his age by the King's Bench in *Ireland* is the very grievance complained of in this writ of error here; and yet that nonage is inſiſted on, to hinder this court conſidering, whether that plea was juſtly allowed in *Ireland*. If a man is outlawed after judgment, and he brings a writ of error, as well to reverſe the outlawry as the judgment; a plea of that outlawry to the diſability of the perſon of the plaintiff in error will not be good, but the court will examine the errors, 7 *Hen.* 6. 44. *Bro. Error* 70. *Co. Litt.* 128. And if this plea ſhould be allowed to hinder the proceedings upon the writ of error, and the judges from looking into the judgment of the King's Bench in *Ireland*, let that judgment be ever ſo erroneous, it could not be looked into, till the defendant in error has had the full benefit of the judgment, for that judgment is only to ſtay, *&c.* till he comes to twenty-one. And that this court ſhould be hindred from examining the judgment, by pleading that matter, the allowance whereof is complained

T. Jones 181.
Raym. 461.

plained of to be the very error in the judgment below, would be very abſurd.

But in maintenance of the plea Mr. ſerjeant *Darnall* inſiſted, that if the defendant had joined in the aſſignment of errors, he would thereby have waved the benefit of his age; for this court could not take notice, whether he was under age or not, nor when he came of age; what his age was, when he pleaded in *Ireland*, would not be material; but whether he was now under age or not; for if he was now under age this court ought not to proceed to examine the errors, this writ of error being brought to reverſe the common recovery as well as the judgment of the King's Bench in *Ireland*.

And this *Michaelmas* term *Nov.* 17th Mr. *Williams* for the defendant in error farther argued, that the writ of error being to reverſe the common recovery, as well as the judgment in the King's Bench in *Ireland*, the defendant in error might have ſeveral things to plead ſince the judgment in *Ireland*, as a releaſe, *&c.* which the court will not put him to plead during his infancy, leſt he might be prejudiced by his miſtake; and therefore this plea was a good plea. He inſiſted alſo upon the antiquity of the common recovery, which was ſuffered 2 *Jac.* 2. the long enjoyment of the land under it ever ſince; and relied much upon the caſe of *Herbert verſ. Brown*, *Cro. Jac.* 392. where in error brought to reverſe a fine levied by the plaintiff's husband and herſelf, and error aſſigned, the defendant in error pleaded a deſcent to him of the lands, and that he was terretenant, and pleaded that he was within age, and prayed that the *parol* ſhould demur: the plaintiff counterpleaded the age, that ſhe was intitled to dower before the fine, and this fine only barred her, wherefore ſhe ſued this writ of error to be reſtored to her writ of dower; and upon demurrer to this counterplea it was adjudged, the *parol* ſhould demur: which ſhews the great care the law takes of infants. Although the perſon the infant had to contend with was one deemed a great favourite of the law, and that the writ of error in that caſe was only brought to reverſe the fine in order to reſtore her to her writ of dower, and nonage would be no plea in a writ of dower; yet the *parol* in that caſe was to demur, till the infant came of age. And he inſiſted, that that caſe was in a manner the ſame as this. He argued farther, that though the ſame plea was pleaded to the writ of error in the King's Bench in *Ireland*, yet it might be informally pleaded; and it would be hard the infant ſhould ſuffer for informal pleading, and therefore it was but reaſonable and juſt, to allow him to plead his infancy to this writ of error. Mr. *Fazakerley* was going to anſwer Mr. *Williams* for the plaintiff in error, but the judges being clear of opinion, they ſtopped him. And the chief juſtice, and *Reynolds* and *Probyn* juſtices (*Forteſcue* juſtice being abſent, it being his own cauſe) held it could not be ſufficient to hinder this court from conſidering of the judgment given by the King's Bench in *Ireland*. The firſt thing to be conſidered upon this writ of error is, whether the judgment that the *parol* ſhall demur for the nonage of the defendant in error is good; if it is, it will be affirmed, and the errors in the recovery cannot be looked into; yet if it is not, it ought not to be affirmed; if it is affirmed, the defendant will have the ſame advantage as if this plea had been allowed; but if it ought not to be affirmed, by reaſon it is not pleadable, it would be very ſtrange that it ſhould be allowed here, only to make the plea below good, when it is not. The conſequence of allowing ſuch plea will be, to let the party have the intire benefit of an erroneous judgment. For ſuppoſe in dower upon a plea of nonage the court ſhould give judgment the *parol* ſhould demur, yet if error is brought on that judgment, and the defendant ſhould plead the ſame plea here, and it muſt be allowed; the party would have the whole benefit of the erroneous judgment, becauſe till he comes of age, by the allowing the plea here, it could not be conſidered, whether the judgment below was right or wrong, and when he is come of age the defendant has had the whole benefit of the erroneous judgment below, which was only, that the *parol* ſhould demur till he came of age. This ſeems to fall directly within that rule of *non debet adduci exceptio ejus rei cujus petitur diſſolutio*, and the caſes cited which have been adjudged upon that principle. If the defendant had joined in the aſſignment of errors, he would not thereby have waived the benefit of his nonage, becauſe that is adjudged to him by the court of King's Bench in *Ireland*. The caſe cited by Mr. *Williams* does not come up to this, becauſe that was upon plea of nonage to the firſt writ of error, which was allowed, and well; but to bring it to this caſe, that ſhould have been of the ſame plea of nonage to a writ of error brought upon the judgment which allowed the nonage in the firſt writ of error. Judgment was given *Nov.* 17, that the defendant in error ſhould anſwer to the errors aſſigned.

Goodright *verſ.* Pullyn et al'.

Intr. *Hil.* 10 *Geo.* B. R. Rot. 534.

S C. 2 Stra. 729. Deviſe to *A.* for life, and after to his heirs male of his body and his heirs for ever, and for want of ſuch heir male, remainder over, is an eſtate tail in *A.*

THE plaintiff brought an ejectment for ſeveral meſuages and lands in *Iſlington* on the demiſe of *Edward Liſle*. On not guilty pleaded, the jury found the defendants not guilty as to part of the premiſſes; and as to the reſt they found a ſpecial verdict; that *Nicholas Liſle* was ſeiſed in fee of the premiſſes in queſtion, and being ſo ſeiſed 23 *April* 1694 duly made and publiſhed his laſt will; and thereby deviſed the premiſſes in queſtion to *Mary* his wife for life, and after her deceaſe then he deviſed the ſame to *Nicholas Liſle* ſon of *Kendrick Liſle* for his life, and after the deceaſe of the ſaid *Nicholas* he deviſed the ſame unto the heirs males of the body of the ſaid *Nicholas* lawfully to be begotten and his heirs for ever; but if the ſaid *Nicholas Liſle* ſhould happen to die without ſuch heir male, then he deviſed them to *Edward Liſle* of *Holt* for life, and after his death to and for the uſe of the heirs male of the body of the ſaid *Edward Liſle* lawfully iſſuing and his heirs for ever; and for default of ſuch heir male he deviſed them to *Charles Croke Liſle* in fee: then they find, that *Nicholas Liſle* the teſtator died ſeiſed, &c. 20 *May* 1694: that after his death *Mary* his wife entred and was ſeiſed for life, and died 1694. That after her death *Nicholas* the deviſee entred and was ſeiſed according to the ſaid will, *prout lex poſtulat:* that the 20th of *June* 1701 *Edward Liſle* of *Holt*, the deviſee in remainder, had iſſue *Edward* his eldeſt ſon and heir, the leſſor of the plaintiff: that *Edward* the father died in 1722: then they find that *Nicholas Liſle* the deviſee by indentures of leaſe and releaſe dated the 9th and 10th of *June* 1704 made a tenant to the *praecipe*, in order to ſuffer a common recovery, &c. of the tenements in queſtion; and they find the recovery ſuffered accordingly, in which the ſaid *Nicholas Liſle* was vouched, and vouched the common vouchee; which recovery was to the uſe of the ſaid *Nicholas Liſle* in fee: that he 1 *April* 1720 died without leaving any iſſue of his body, ſeiſed, &c.

The queſtion upon this ſpecial verdict, which was found before the late lord chief juſtice *Pratt*, was whether *Nicholas Liſle* the deviſee took an eſtate tail or an eſtate for life only by the will; if he took but an eſtate for life, the leſſor of the plaintiff had a good title; but if he took an eſtate tail, then *Nicholas* by the common recoverry barred the remainder deviſed by the will, under which the plaintiff claimed, and he had no title, but judgment ought to be given for the defendants.

Mr. *Bootle* for the plaintiff argued, that *Nicholas* took an eſtate for life only. The teſtator intended him only an eſtate for life, becauſe he has deviſed it in expreſs words to him for his life; and although the next deviſe is to the heirs male of his body, which generally ſpeaking are words of limitation, and not of purchaſe, yet by the tenor of this will the teſtator deſigned them words of purchaſe, to be a deſcription of a perſon, the ſame as if he had ſaid *ſon*, becauſe he goes on and deviſes the lands to his heirs for ever. Who is that? that is the perſon deſcribed under the words heirs male, which ſhews he intended but one perſon, ſince he uſes the word *his*. Then he goes on and ſays, that if *Nicholas* ſhould happen to die without ſuch heir male, again in the ſingular number, and manifeſts the deſign by the words heirs males to deſcribe a perſon who ſhould take by purchaſe; and therefore he ſaid this was *Archer*'s caſe, 1 *Co.* 66. *b.* deviſe to *Robert Archer* for life, and after to the next heir male of *Robert*, and to the heirs male of the body of ſuch next heir male: adjudged *Robert* took but an eſtate for life. Now here the words *his* and *without ſuch heir male* are as certain, and make as good a deſcription as next heir male. He cited alſo 1 *Roll. Ab.* 837. *pl.* 13. If *A.* deviſes to *B.* his eldeſt ſon for life, the remainder to the ſons of *B.* lawfully to be begotten, and if they alien, his daughters ſhall have the ſame eſtate, remainder to his right heirs; *B.* has but an eſtate for life, and not an eſtate tail, but his ſon ſhall have by purchaſe. He compared this caſe likewiſe to *Wild*'s caſe, 6 *Co.* 17. where 'tis held, if lands are deviſed to *A.* and his children, and *A.* has no children at the time of the deviſe, it is an eſtate tail in *A.* but if the deviſe is to *A.* and after his deceaſe to his children, there *A.* takes but an eſtate for life, and every child he has after may take by way of remainder. Therefore he concluded, *Nicholas* took an eſtate for life only.

Mr. *Fazakerley* for the defendant argued, that the intent of the party could not controul the ſettled rules of law. And therefore in the caſe of *King verſ. Melling*, 2 *Lev.* 59. 1 *Vent.* 214, 225. the deviſe was to *B.* for life, and after to the iſſue of his body by his ſecond wife, with power to make a jointure. There was the ſame inference made as to the intent of the deviſor, that *B.* ſhould take but an eſtate for life, and ſtronger, becauſe a power was added to make a jointure, which was unneceſſary, if he was intended to be tenant in tail; the deviſe over was to the iſſue, which is not ſo properly a word of limitation; and yet it was held to be an eſtate tail in *B.* No rule is more known, than where an eſtate is given to a man for life, and afterwards to his heirs males, that makes an eſtate tail. But 'tis objected, that the word *his*, and for default of *ſuch heir male*, qualify the words heirs males, and make them only a deſcription of a perſon, and the ſame if he ſaid next heir male, as in *Archer*'s caſe. But as to that he anſwered, then only one ſon of *Nicholas* could take, which can never be ſuppoſed to be the intent of the deviſor. In the next place the words heirs males muſt be rejected; but no words ought to be rejected, if they can all ſtand in a will, as they may in this caſe, if heirs males are conſtrued words of limitation; for *his heirs* may properly in grammar import the heirs of *Nicholas* the deviſee; and then for default of ſuch heir male will refer naturally to the heirs male mentioned before; ſo that all the words will ſtand. But by the other conſtruction the words heirs males muſt be rejected. In the caſe of *Backhouſe verſ. Wells*,

Backhouſe verſ. Wells. 2 Stra. 731, 800.

Eq Caſ. Abr. 184. *Wells*, which was adjudged *Hil.* 12 *Ann. B. R. Thomas Barker* deviſed to *John Barker* for life only, without impeachment of waſte, and after to his iſſue and the heirs males of the body of ſuch iſſue, and if he die without iſſue, *&c.* it was adjudged that *John Barker* took an eſtate only for life; but Mr. *Fazakerley* ſaid, that the earl of *Macclesfield*, who delivered the opinion of the court ſaid, if the deviſe had been inſtead of iſſue to the heirs males of the body of *John Barker*, *&c.* it would have been otherwiſe. He cited the caſe of *Atkins verſ. Atkins*, *Cro. Eliz.* 248. *Moor* 503. *pl.* 801. as an appoſite caſe; where the deviſe was to *S.* and the heirs of his body, and after the deceaſe of *S.* (not ſaying without heirs of his body) he wills the land ſhould remain to *B.* eldeſt ſon of *S.* and the heirs of his body, with remainder to three other ſons of *S.* in the ſame manner: that was adjudged an eſtate tail in *S.* notwithſtanding after his deceaſe the deviſe was to *B.* and the three other ſons, becauſe thoſe were not ſpecial nor particular enough to alter the deviſe before to *S.* and the heirs of his body. So here, the words *his* and *without ſuch heir male* cannot alter the former deviſe to *Nicholas* for life, and after his deceaſe to the heirs of his body, which made an eſtate tail as much as a deviſe to *Nicholas* and the heirs male of his body.

The judges were all unanimous of opinion, that this was an eſtate tail in *Nicholas Liſle* the deviſee. For if lands, *&c.* are deviſed to *A.* for life, though the words without impeachment of waſte are added, or with a power to make a jointure, and after his deceaſe to his heirs males, *A.* thereby takes an eſtate tail. And this is ſettled ſo firmly ſince the caſe of *King verſ. Melling*, 2 *Lev.* 59. that it is not to be diſputed; for the word heirs is properly a word of limitation, and not of purchaſe. But the words iſſue male or female are not properly words of limitation; and therefore if lands, *&c.* by deeds are conveyed to *A.* and his iſſue male, or iſſue female, he takes no eſtate in tail: but in a will, a deviſe to *A.* for life, and after his deceaſe to his iſſue, without more, will carry an eſtate tail to *A.* So that iſſue is ſometimes a word of purchaſe, ſometimes of limitation, according to the different penning of the will. Then they held, the ſubſequent words relied upon for the Vide Moore 124. plaintiff, as *his*, and *if he dies without ſuch heir male*, are not ſufficient to reſtrain and alter the operation of the words heirs males, and ſo qualify them, as to make them a deſcription of the perſon. *Forteſcue* juſtice thought *his* in grammatical conſtruction would properly refer to *Nicholas*, but as to that the other judges gave no opinion. But they all held, that the operation of plain and clear words, and a ſettled rule of law, ſhould not be defeated, or broke into, by uncertain or doubtful words, which they took the laſt at leaſt to be. But in effect the words heirs males muſt be rejected, to make this an eſtate for life only in *Nicholas*. And therefore judgment was given for the defendant, *Nov*. the 18th, 1726.

Crockatt *verſ.* Jones.

Intr. *Mich.* 13 *Geo.* B. R.

S. C. 2 Stra. 734.

IN caſe upon a promiſſory note payable to *B.* or order, ſigned by the defendant, and indorſed to the plaintiff; the defendant pleaded the ſtatute of limitations; the plaintiff replied, a *latitat* ſued out within the ſix years, and regularly continued, *&c.* to which there was a rejoinder, and a demurrer to the rejoinder. Which being held ill, ſerjeant *Chapple* objected for the defendant, that the plaintiff ought to have ſhewn a bill of *Middleſex* as a foundation of the *latitat*, the *latitat* referring to it. But adjudged, the replication of the *latitat*, without ſhewing a bill of *Middleſex* precedent, was ſufficient to avoid the ſtatute. And ſo it was adjudged, *Mich.* 9 *Geo.* *B. R. Holliſter verſ. Coulſton.* See *Stiles* 156. 1 *Sid.* 53, 60. Judgment for the plaintiff, *Nov.* 18, 1726.

Holliſter verſ. Coulſton.

Graddell and others *againſt* Tyſon.

Intr. *Paſch.* 12 *Geo.* B. R. Rot. 307.

S. C. 2 Stra. 716.
Jeofail.

ERROR upon a judgment given in the Common Pleas after verdict in debt upon a bond againſt *Tyſon*. The record returned was thus, *Ebor. ſſ. Anna Graddell vidua, Maximilianus Nelſon, et Galfridus Preſcott, executores teſtamenti et ultimae voluntatis Chriſtophori Graddell, qui quidem Chriſtophorus et quidam Jonannes Weſtby etiam defunctus fuerunt executores teſtamenti et ultimae voluntatis Dorotheae Weſtby defunctae, quem quidem Johannem praedictus Chriſtophorus ſupervixit, per Willielmum W. attornatum ſuum queruntur de Willielmo Tyſon, jun. Gen. uno attornatorum curiae domini Regis de Banco hic praeſenti in curia in propria perſona ſua, de eo quod non reddidit eiſdem* the plaintiffs 200*l.* and declare on a bond entred into by the defendant *Tyſon* to *Dorothy Weſtby*, *&c.* The defendant after *oyer* of the bond, and condition, which was to pay money, pleaded payment; and iſſue being joined thereon, verdict and judgment were given for the plaintiff. The errors aſſigned by *Tyſon* plaintiff in error were, that judgment was given for the plaintiff, where it ought to have been given for him, and that the declaration was inſufficient in law, *&c.*

Mr. *Strange* for the plaintiff in error inſiſted, that all actions in the Common Pleas muſt be either by original writ, or original bill, or attachment of privilege; but this action does not appear to have been by any of theſe ways, for which reaſon the proceedings are irregular. And in the like caſe for that reaſon judgment was given againſt the plaintiff in the Common Pleas by that court, *Dimock verſ. Wetheral*, 1 *Lutw.* 227, 228. And therefore he prayed, the judgment might be reverſed. *Sed non allocatur per curiam*; for this being before this court upon a writ of error, they cannot take notice, whether there was any original bill or not, the defendant being ſued as attorney, it not being aſſigned for error, that there was no original bill. But in order to have taken advantage of this, the plaintiff in error ſhould have aſſigned for error, that there was no bill, and took out a *certiorari*, and got it returned, that there was none. Judgment affirmed, *Nov.* 9, 1726.

William Dawkins *verſ.* John Burridge, Eſq;

Intr. *Trin.* 12 *Geor.* B. R.

S. C. 2 Stra. 734. Members of parliament may be ſued in *C. B.* by bill.

THE defendant *Burridge* brought a writ of error upon a judgment given againſt him in an action on a promiſſory note by *nil dicit*, and a writ of inquiry executed, and final judgment given for 379 *l.* 14 *s.* And the record of the Common Pleas was thus, *viz. Memorandum, quod 28 die Maii de termino ſanctae Trinitatis ultimo praeterito* [Note, the record in the Common Pleas was of *Michaelmas* term, 12 *Geo. rot.* 773.] *venit hic in curiam Willielmus Dawkins, Gen. per Johannem Elliſon attornatum ſuum, et exhibuit juſticiariis domini regis de banco quandam billam ſuam verſus Johannem Burridge armigerum, eodem Johanne Burridge habente privilegium parliamenti, cujus quidem billae tenor ſequitur in haec verba, ſcilicet, Willielmus Dawkins per J. E. attornatum ſuum queritur de Johanne Burridge nuper de Weſtmonaſterio in comitatu Middleſex armigero habente privilegium parliamenti, pro eo, viz. quod cum,* &c. And ſo the declaration goes on, and the reſt of the record of the Common Pleas is returned, and general errors are aſſigned. And Mr. *Reeve* for Mr. *Burridge* the plaintiff in error inſiſted, that the Common Pleas could not hold plea in this caſe againſt members of parliament by bill; which depends upon the words in the ſtatute of 12 & 13 *W.* 3. *cap.* 3. *ſect.* 2. which are theſe: “ And if any “ perſon or perſons, having cauſe of action againſt any of the “ knights, citizens or burgeſſes, or any other perſon intituled to “ privilege of parliament, after any diſſolution, prorogation, or ſuch “ adjournment as aforeſaid, or before any ſeſſions of parliament, "or meeting of both houſes as aforeſaid, ſuch perſon or perſons "ſhall and may proſecute ſuch knight, citizen or burgeſs, or other "perſon intituled to privilege of parliament, in his Majeſty's courts "of King's Bench, Common Pleas, or Exchequer, by ſummons "and diſtreſs infinite, or by original bill and ſummons, attachment "and diſtreſs infinite thereupon to be iſſued out of any of the ſaid "courts of record, which the ſaid reſpective courts are hereby impowered to iſſue againſt them or any of them, until he or they "ſhall enter a common appearance, or file common bail to the "plaintiff's action, according to the courſe of each reſpective court." And Mr. *Reeve* for the plaintiff in error argued, that this act did not intend to give a power to the Common Pleas to hold plea by bill, which could not do ſo before; but that the act was to be underſtood diſtributively, *i. e.* that ſuch court as could hold ſuit before by original, might hold plea by original to be ſued againſt a member of parliament; and ſuch as held plea by bill, might hold plea by bill againſt a member of parliament. And that this was the meaning of the act, appears by the end of the clauſe, where it is ſaid, according to the courſe of each reſpective court. The printed act he thought was miſprinted, by putting the *comma* after the word bill, and ſo joining the words, original bill, together; for in the parliament roll there are no ſtops nor *comma's*, and therefore it was the printer, that put the *comma* after original bill, whereas there ſhould be a *comma* between original and bill, the parliament intending thereby two ſeveral things, and not one, as now in the printed act, and that what has hardly been heard of, an original bill, an expreſſion not uſed in the law. *Sed non allocatur*; for *per curiam*, the intent of the parliament muſt be collected from the words, and the words are plain and expreſs, that a member of parliament may be ſued either in the King's Bench, Common Pleas or Exchequer, by ſummons and diſtreſs infinite (which refers to proceedings by original writ) or by original bill and ſummons, attachment and diſtreſs infinite, thereupon to be iſſued out of any of the ſaid courts, which the ſaid reſpective courts are impowered to iſſue againſt them. Then the words, according to the courſe of each reſpective court, refer only to entring the common appearance, or fillng common bail: then by the *proviſo* at the end of the act, whereby it is provided, that nothing in that act ſhould give any juriſdiction or power to any court to hold plea in any real or mixt action, in any other manner than ſuch court might have done before the making that act, they deſigned to give a juriſdiction to hold plea in perſonal actions, in another manner than they could have done before. Judgment was affirmed, *Thurſday*, *November* the 24, 1726.

Higgins *verſ.* Jennings.

S. C. 2 Stra. 726. Where full coſts though damages under 40 s.

IN treſpaſs for breaking and entring his cloſe, and treading his graſs, and erecting a wall upon the plaintiff's ground; the defendant as to all the treſpaſs, but entring the cloſe and treading down the graſs, pleaded not guilty; upon which iſſue was joined: and as to the entring the cloſe and treading down the graſs, the defendant juſtified under a right to a way, *&c.* The plaintiff replied, *extra viam*; and iſſue was joined thereon, and both iſſues were found for the plaintiff, but the jury gave damage under 40 *s.* And ſerjeant *Girdler* moved for the plaintiff, for direction to the maſter to tax full coſts. And firſt, he inſiſted, that the defendant being found guilty of erecting a wall on the plaintiff's ground, though the damage was under 40 *s.* that would intitle the plaintiff to full coſts, becauſe the title might come in queſtion upon it; and cited 1 *Salk.* 193. *Blackly verſ. Try*, where *Holt* chief juſtice is reported to have ſaid, if a treſpaſs is done *clamando titulum*, or the title may come in queſtion, there ſhall be full coſts. 2. As to the iſſue which is found for the plaintiff on the *extra viam*, he ſaid, the right to the way on the plaintiff's land muſt come in queſtion on that iſſue, *viz.* of what extent it is, *viz.* of ten or twenty feet breadth; and cited 2 *Lev.* 234. *Aſſer verſ. Finch*, as the very caſe in point.

Mr. *Willes* for the defendant urged, that by the expreſs words of 22 *&* 23 *Car.* 2. *cap.* 9. *ſect.* 136. in actions of treſpaſs, wherein the judge at the trial of the cauſe ſhall not certify, *&c.* that the freehold or title of the land in the plaintiff's declaration was chiefly in queſtion, the plaintiff ſhall recover no more coſts than damage, if the jury give damage under 40 *s.* Now in this caſe the judge has not certified. And it was adjudged, 2 *Ventr.* 48. that in treſpaſs for putting ſtakes upon the plaintiff's ground, and erecting a wall, is of the ſame nature, the plaintiff ſhould have no more coſts than damages, the damage being under 40 *s.*

Then he ſaid as to the other iſſue, the plaintiff by his replying *extra viam*, did admit the defendant had a right to a way over his ground, ſo that the right to the way could not come in queſtion on the iſſue *extra viam*; and then there was no more reaſon, that the plaintiff ſhould have full coſts, than if he had a verdict on not guilty. The court took time to conſider of it; and on another day the chief juſtice and Mr. juſtice *Reynolds* ſaid, they were of opinion, that as to the verdict on the not guilty, though the defendant was found guilty as to the erecting a wall, yet ſince the judge had not certified, that the right to the land came in queſtion, the plaintiff ought not to have more coſts than damages, the damages being under 40 *s.* For perhaps the defendant declined at the trial to inſiſt upon a right to build the wall, *&c.* But as to this Mr. juſtice *Forteſcue* and Mr. juſtice *Probyn* gave no opinion. But then all the judges agreed, the plaintiff ought to have full coſts as to the iſſue on the *extra viam*, upon the authority of that caſe in 2 *Lev.* 234. And full coſts were ordered to be taxed accordingly for the plaintiff.

The King *verſ.* Robert Reeks.

S. C. 2. Stra. 716. 1. Barn. 8.
How to authenticate an admiſſion that is not ſtampt at the time.

AN information in nature of a *quo warranto* was filed againſt the defendant, to ſhew by what authority he claimed and exerciſed the office of a burgeſs of the borough of *Chriſt-Church Twineham* in the county of *Southampton*, from 19 *Decemb.* 1721. to the time of exhibiting the information. The defendant in his plea ſet out the conſtitution of the borough (which was by preſcription) and that he was choſe a burgeſs the 19th of *December* 1721. according to the conſtitution he had ſet out, and that he was ſworn and admitted into the office. To this plea there was a replication, in which ſeveral iſſues were tendred and joined. The fourth iſſue was, that the defendant was not ſworn nor admitted into the office of burgeſs, as in his plea he had alleged. The cauſe was tried at the bar the 7th of *November*, by a *Hampſhire* jury. And all the iſſues being upon the defendant, he gave evidence to maintain the three firſt. But then in order to prove his being ſworn and admitted the 19th of *December* 1721, he produced an inſtrument in parchment, purporting the ſwearing and admitting on that day five burgeſſes, of which the defendant was one, but not named the firſt in the ſaid inſtrument, but the third, two others being named before him. It was proved to be ſigned by the burgeſſes then preſent; but it was ſtampt only with one ſtamp. Upon which Mr. Attorney General for the King objected, that this is no proof of the ſwearing and admitting of the defendant (both which it was incumbent upon him to prove) nor could be admitted to be read in evidence: for by the ſtatute of 9 & 10 *Will.* 3. *cap.* 25. an act for granting further duties upon ſtampt vellum, parchment and paper; *ſect.* 27. for every piece of vellum or parchment, and for every piece of paper, upon which any admiſſion into any corporation, *&c.* ſhall be written, 1 *s.* ſhall be paid. Then *ſect.* 59. the commiſſioners are required to ſtamp, *&c.* And afterwards by that clauſe 'tis enacted, if any inſtrument or writing by that act intended to be ſtampt, ſhall contrary to the intent thereof be written or ingroſſed by any perſon whatſoever (not being a known clerk or officer,

ficer, who in reſpect of any publick office or employment is or ſhall be intituled to the making, writing or ingroſſing the ſame) upon parchment or paper not ſtampt according to that act, then there ſhall be paid to his Majeſty, *&c.* over and above the duty aforeſaid, for every ſuch inſtrument or writing, ten pounds; and that no ſuch inſtrument or writing ſhall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or equity, until as well the ſaid duty as ten pounds ſhould be paid to the King, *&c.* and a receipt produced for the ſame, *&c.* Mr. Attorney General therefore inſiſted, that this inſtrument, being an admiſſion of five perſons to be burgeſſes, ought to have five ſtamps. That it could be good for none for the uncertainty, or at moſt it could be good but for one; but that could not be for the defendant, for if it was good for any, it muſt be for the firſt named; but the defendant was the third named, and therefore it could not be good for him. And of this opinion were *Raymond* chief juſtice, and *Forteſcue* and *Reynolds* juſtices, after having heard what the counſel for the defendant could ſay. But then they offered in evidence four other diſtinct pieces of parchment, dated the ſame 19th of *December* 1721. each of them being duly ſtampt, which imported the ſeveral admiſſions and ſwearings of the four burgeſſes laſt named in the other parchment, and one of them the particular ſwearing and admiſſion of the defendant. But then it was proved by the witneſs who produced theſe pieces of parchment, that the entries were not made upon them, nor were any of them ſtamped, till near two months after the 19th of *December* 1721. nor were any of them ſigned by the burgeſſes that elected and were to admit the defendant. But after having heard what was objected to this ſingle inſtrument, wherein *Reeks* alone was ſaid to be admitted and ſworn, by Mr. Attorney General and the other counſel for the King, and what was inſiſted upon to ſupport it by Mr. *Reeve* and the other counſel for the defendant, the ſame judges were clear of opinion, that this inſtrument was no evidence, nor could be admitted as ſuch, to prove the defendant was admitted and ſworn the 19th of *December* 1721. for it appears it was not entred upon, nor the parchment ſtampt, till two months after; and by the act the admiſſion is to be on paper or parchment ſtampt at the time, otherwiſe it is not to be given in evidence, till the penalty is paid, and certificate thereof produced. Upon which they directed the jury as to this iſſue, to find for the King. But the judges acquainted the counſel for the defendant, if they inſiſted upon having a verdict upon the other iſſues for the defendant, the trial muſt proceed, and the evidence muſt be heard on thoſe iſſues for the King, and then they muſt be left to the conſideration of the jury, whether they would find for the King or the defendant as to thoſes iſſues. But then they put them in mind, if a verdict on theſe three iſſues ſhould be found for the defendant, yet judgment of *ouſter* muſt be given againſt the defendant, according to the caſe of the King againſt *Pindar*, in an information in nature of a *quo warranto*, for exerciſing the office of mayor of *Penryn:* he pleaded the conſtitution of the corporation, and that he was elected and ſworn mayor, *&c.* and iſſue being taken in the replication, both as to his being elected and as to his ſwearing, upon the trial the jury found he was elected; but then they found upon the other iſſue, that he was not ſworn; and thereupon judgment of *ouſter* was given againſt him in this court, *Eaſter* term 1724. and on a writ of error brought on that judgment in the houſe of Lords, that judgment was affirmed, *March* 22, 1725. Upon conſideration whereof the counſel for the defendant agreed, that by their conſent the jury ſhould find all the iſſues againſt the defendant; and ſo they did. Note, Mr. juſtice *Probyn* had not took his place in court, when this trial came on.

The King againſt Pindar.

William Gordon, clerk, *verſ.* Robert Lowther, Eſq; late governor of Barbadoes.

AT a committee of the council at the *Cockpit*, *Decemb.* 14, 1726. for hearing plantation cauſes, the defendant *Lowther*'s petition for a diſmiſſion of the plaintiff's writ of error came on, upon this caſe. Mr. *Gordon* brought an action for a libel againſt Mr. *Lowther* in *Auguſt* 1722, in the court of Common Pleas in *Barbadoes*, to which Mr. *Lowther* put in a ſpecial juſtification, and upon a demurrer judgment was given in that court for the defendant Mr. *Lowther*, in *September* 1724. Upon which judgment Mr. *Gordon* brought a writ returnable before the governor in the court of errors, and the 12th of *June* 1725 the judgment was affirmed, and Mr. *Gordon* moved for an appeal, which was then granted, and received and filed; ſince which time Mr. *Gordon* never proceeded upon his appeal, nor procured the proceedings to be tranſmitted, but Mr. *Lowther* procured them all to be tranſmitted at his own expenſe, and applied to his Majeſty by petition, to diſmiſs the appeal. Which being referred to the committee, they being acquainted that the rule was, that the party appealing muſt procure the proceedings to be tranſmitted, and proceed, within a year after the appeal allowed in the plantations; and upon producing two precedents, wherein ſuch diſmiſſion had been ordered, without giving notice to the appellee; the lords and others of the committee agreed to report to his Majeſty their opinion, that the appeal of Mr. *Gordon* ought to be diſmiſſed with 5*l.* coſts (following the precedents produced as to the coſts) without any notice given to Mr. *Gordon*, or any agent of his. Note, among other lords the lord privy ſeal, lord *Trevor*, and chief juſtice *Raymond*, the maſter of the rolls, and the lord chief juſtice *Eyre*, were preſent, and agreed to the order.

Magoons and Premanee *verſ.* Dumareſque, *et e contra.*

December 14, 1726.

AT the ſame committee of council there came on the petition of *Magoons* and *Premanee*, owners of the ſhip *L'eſprit*, and a petition of Mr. *Dumareſque*, officer of the cuſtoms in *Jerſey*, and a letter from the *greffier* of *Jerſey* to the clerks of the privy council; all which, by order of his Majeſty in council, were referred to this committee. And they aroſe upon this caſe. Mr. *Dumareſque* made a ſeiſure of the ſhip and goods, as forfeited, for having imported into *Jerſey East-India* goods, contrary to the act of parliament; and thereupon commenced a ſuit in the royal court there, for a condemnation of the ſhip. *Magoons* and *Premanee*, owners of the ſhip and goods, inſiſted there, that the ſhip was drove in by ſtreſs of weather. The court looking on it as a caſe of difficulty, without making any determination, ordered their *greffier* to ſend a letter to the clerk of the council, taking notice of the difficulty, and deſiring his Majeſty would determine the matter here; which he did write, and tranſmitted all the proceedings hither. Upon which *Magoons* and *Premanee* petitioned for an order for the delivery of the ſhip and goods; and Mr. *Dumareſque* petitioned for an order, for the royal court of *Jerſey* to proceed, and determine the ſeiſure. And the lords and others of the committee being all of opinion, that the court of *Jerſey* could not tranſmit the cauſe to his Majeſty for difficulty, but ought to have determined the right of the ſeiſure one way or other, agreed to report their opinions to his Majeſty, that an order ſhould be made by his Majeſty in council, taking notice that the tranſmiſſion was irregular, and commanding the royal court of *Jerſey* to proceed to give judgment.

Dyke and others *verſ.* Blakſton.

Intr. *Mich.* 13 *Geo.* B. R. Rot.

ERROR on a judgment in the Common Pleas in an *indebitatus aſſumpſit* by *nil dicit*, and a writ of inquiry executed, and final judgment given for the defendant *Blakſton*, who was plaintiff in the Common Pleas. Mr. *Parker* for the plaintiff took exception. The record is, that the defendants below *veniunt et nil dicunt in barram, &c.* but it is not ſaid, they appeared by attorney, as it ought to be; and the law is ſo ſtrict as to that, that the omiſſion of the *Chriſtian* name of the attorney is error, 1 *Roll. Rep.* 336. *Hewſon*'s caſe; nor is it ſaid, the defendants appeared *in propriis perſonis. Sed non allocatur*; for when it is ſaid, *veniunt*, that imports in proper perſon, if it is not ſaid it was by attorney. The ſecond error aſſigned was, that the writ of inquiry was returnable *quindena Paſchae*, and the inquiſition was returned to be taken the 25th of *April*, which was *quindena Paſchae*, and therefore ill; becauſe the law making no fractions of the day, the inquiſition could not be took on the day of the return of the writ. *Sed non allocatur*; for the court will take it, that the inquiſition was took on that day before the writ was returned, which is well enough, for it may be executed on that day, and might have been executed before the writ was returned, otherwiſe the inquiſition could not have been returned. Judgment was affirmed *November* 12, 1726.

Walter White *verſ.* William Clever.

Intr. *Trin.* 12 *Geo.* B. R.

S. C. 1 Stra. 681. S. C. *Ante*, 1416.

IN debt on a bond dated 27th of *June*, 10 *Geo.* of the penalty of 100 *l.* the defendant prayed *oyer* of the bond, and the condition, which condition, reciting that the defendant and plaintiff were lately choſe collectors for the overſeers of the poor of *St. Andrew Holbourn* for the year enſuing, according to the cuſtom of the pariſh, and that the ſaid *Walter White* could not conveniently attend and ſerve the ſaid office by reaſon of buſineſs, was, that if the ſaid *William Clever* ſhould collect all ſuch monies as ſhould be to be collected by virtue of the ſaid office, and ſhould carefully execute the ſaid office ſingly, without trouble to or aſſiſtance from the ſaid *Walter White*, and do other things mentioned in the condition, not material to the preſent caſe to be mentioned, the obligation was to be void, elſe to be in full force. Then the defendant pleaded, that he did diligently exerciſe the ſaid office ſingly, without trouble to or aſſiſtance from the ſaid *Walter White*, and then pleads performance of the reſt of the condition. The plaintiff replies, that the defendant *non executus fuit dictum officium ſingulus Anglice* ſingly, *ſine auxilio de dicto Waltero White, prout praedictus Willielmus ſuperius placitando allegavit; et hoc petit quod inquiratur per patriam.* The defendant rejoins, *proteſtando* that the plaintiff kept the defendant's books out of his cuſtody without his conſent from the 22d of *April* 1725. to the 24th of *June* next following, *et libros illos ſemper abinde detinuit, cuſtodivit, et illos eidem Willielmo deliberare denegavit, per quod* the defendant after the detaining of thoſe books out of his cuſtody, the money, &c. ſingly could not collect; for plea ſaith, *quod verum eſt* that the plaintiff *in propria perſona ſua exercuit officium praedictum a praedicto 22 die Aprilis anno ſupradicto uſque praedictum 24 diem Junii, ſed quod praedictus* the plaintiff *voluntarie ſuſcepit et officium praedictum a toto tempore praedicto exercuit ſine requiſitione vel aſſenſu praedicti* the defendant, *qui per totum tempus praedictum ſemper paratus fuit et obtulit* to the plaintiff *apud Londinum praedictum in parochia et warda praedictis dictum officium ad exercendum ſingulus, Anglice* ſingly, *ſine auxilio praedicti* the plaintiff; *et hoc idem* the defendant *paratus eſt verificare*; &c. The plaintiff demurred ſpecially, and ſhewed for cauſe that the rejoinder was a departure from the bar; the defendant joined in demurrer. And after hearing what Mr. ſerjeant *Girdler* could ſay in behalf of the defendant, the court was clear of opinion, that the rejoinder was naught; for if the fact there diſcloſed amounted to ſhew, that the defendant had executed the office ſingly, the defendant ought to have joined iſſue with the plaintiff upon the iſſue offered by him in his replication, and given this matter in evidence: but if the fact ſet out in the rejoinder was only an excuſe for the defendant's not having exerciſed the office, as the court took it to be; then it was a departure from the bar; and the defendant ought not to have pleaded, that he did execute the office ſingly, and rejoin this matter; but ought to have pleaded this matter at firſt. Judgment for the plaintiff, *November* 3, 1726.

Robert Spark *verſ.* Thomas Jobber.

Intr. *Trin.* 12 *Geo.* B. R. Rot. 91.

Indebitatus aſſumpſit for *diverſis rebus* ſeems to be ill.

IN an *indebitatus aſſumpſit* for 100 *l.* *pro diverſis bonis mercimoniis merchandizis et rebus* by the plaintiff at the requeſt of the defendant ſold to the defendant, &c. and a *quantum meruit* laid in the ſame manner, the defendant demurred to the declaration, and the plaintiff joined in demurrer. The cauſe coming on in the paper the 9th of *November*, no counſel appeared for the defendant. Whereupon the counſel for the plaintiff prayed judgment, alleging it was only a demurrer for delay. But the court objected, that the word *rebus* was a very uncertain word, for it might be for rent, or money due on a bond, *&c.* for which an *indebitatus aſſumpſit* would not lie. But the counſel for the plaintiff informing the court, that the defendant declared he would not defend it, judgment was given for the plaintiff. Note, this was only an interlocutory judgment on the demurrer.

Lancaſter *verſ.* Fielder.

A priſoner on a judgment ſhall not be diſcharged though an *elegit* has been ſued out and returned he has no lands.

IN an action brought by the plaintiff *L.* againſt the defendant, the defendant put in bail, and afterwards was ſurrendred in diſcharge of his bail, and committed to the *Marſhalſea*; the plaintiff proceeded in the action, and got judgment, and ſued execution thereon by *elegit*, upon which the ſheriff took an inquiſition, and levied ſome of the goods of the defendant in part of the debt, but returned, the defendant had no lands. Mr. ſerjeant *Whitaker* moved, that the defendant might be diſcharged out of cuſtody: for ſince the defendant has choſe an *elegit*, he can have no other execution, becauſe he has made election, to take the *elegit* according to the ſtatute of *Weſtm.* 2. *c.* 18. 2 *Inſt.* 395. *Coke* ſays, after ſuing out an *elegit*, the plaintiff upon a judgment in debt cannot have a *capias*. Upon which the court made a rule, for the plaintiff to ſhew cauſe, *&c.* And at another day the judges were all of opinion, that it being returned, that the defendant had no lands, the *elegit* was to be conſidered only as a *fieri facias*, though goods were levied; and that if the defendant had been at large, the plaintiff might have had a *capias ad ſatisfaciendum*. So is *Hobart*'s opinion, *Hob.* 58. *Foſter verſ. Jackſon.* 1 *Lev.* 92. *Glaſcock verſ. Morgan.* But if any land had been extended on the *elegit*, the plaintiff had been bound down to that execution. The former rule was diſcharged *November* 25, 1726.

The King *verſ.* Fawle.

November 23, 1726.

Indictment for a felony removed from a corporation.

MR. *Fazakerley* moved for a *certiorari*, to remove an indictment found againſt the defendant, for a felony in ſtealing ſome hay, from the quarter-ſeſſions of the peace held for the town and corporation of *Chippington-Norton*, upon *affidavits* that the defendant could not have a fair trial there. And he cited a caſe between the King and *Powell*, where a *certiorari* was granted, to remove an indictment from the quarter-ſeſſions of the peace for *Salop*, for the like reaſon. And a rule was made, for the proſecutor to ſhew cauſe; which was afterwards made abſolute.

Parry *verſ.* Berry.

November 13, 1726.

S. C. 2 Stra. 717. Practice.

MR. *Theed* moved to ſtay proceedings upon a *ſcire facias* againſt the bail, becauſe the defendant in the original action died after judgment recovered againſt him, and after a *capias ad ſatisfaciendum* thereupon ſued out and returned, but before the return of the ſecond *ſcire facias* againſt the bail, till which time the bail had time by the courſe of the court to ſurrender the principal, and was prevented doing it by the act of God, *viz.* his death. And a rule was made to ſhew cauſe. But afterwards upon Mr. *Parker*'s ſhewing cauſe, the rule was diſcharged, becauſe it was the bail's omiſſion, that they did not ſurrender him, he living till after the return of the *capias ad ſatisfaciendum.* And a motion made in behalf of the bail, *Mich.* 1 *Geo.* 2. *B. R.* between *Glyn* and *Yates*, in the like caſe, was for the ſame reaſon denied.

Barber and Philpot *verſ.* Wharton.

A maſter of a ſhip ſued for his wages, and laid the contract to be made *infra fluxum and refluxum maris*, prohibition denied after a ſentence.

A Rule was made laſt term, to ſhew cauſe why a prohibition ſhould not be granted to the court of admiralty, to ſtay a ſuit by the defendant as maſter of the ſhip *Victory* for his wages, upon ſuggeſtion that the contract was made upon land, *&c.* according to the caſe of *Clay verſ. Snellgrave*, *Trin.* 12 *Will.* 3. *B. R.* 1700. [See before, 576.] ſhortly reported in *Salk.* 33. where it was held, a maſter of a ſhip could not ſue in the admiralty for his wages, where the contract was made upon land, though mariners were permitted ſo to do, by indulgence rather than of ſtrict right. And Mr. *Reeve* for the defendant ſhewed for cauſe why the rule for the prohibition ſhould not be made abſolute, that the application to this court was too late, for it was after ſentence; and then it was inſiſted upon, no prohibition ſhould go, unleſs it appeared upon the face of the libel, that the admiralty had no juriſdiction, which it did not in this caſe. Upon which the cauſe was put off this term; and now the 27th of *October* Mr. *Fazakerley* for the prohibition inſiſted, that though it was after ſentence, yet if it did not appear upon the face of the libel, that the admiralty had a juriſdiction, a prohibition ought to go. It cannot be within their juriſdiction, unleſs the contract was laid to be *ſuper altum mare*, which is not done in this caſe, for it is only laid to be *infra fluxum et refluxum maris, infra juriſdictionem curiae admiralitatis*. In *Hob*. 212. it is held, that it is not enough to give the admiralty juriſdiction, that a fact was done *infra juriſdictionem maritimam* therefore the laying the contract to be made *infra juriſdictionem admiralitatis* is not ſufficient: then laying it to be *infra fluxum et refluxum maris* is not enough, becauſe at low-water that is within the juriſdiction of the common law. And it cannot be made good by intendment, for in 1 *Ventr*. 308. the taking not being expreſly laid to be *ſuper altum mare*, though the book ſays, there was much to imply it; yet the court held it not ſufficient, for the alleging it was abſolutely neceſſary. *Sed non allocatur*; for the court was of opinion, that the contract being laid, to be made *infra fluxum et refluxum maris*, it might be upon the high ſea; and was ſo; if the water was at high-water mark; as it might be on land, if the water was at low water-mark; for in that caſe there is *diviſum imperium* between the common law and admiralty juriſdiction, according as the water was high or low. Then when it is ſaid to be *infra juriſdictionem admiralitatis*, it is ſufficient; and amounts to the ſame, as if it had been ſaid to be *ſuper altum mare*. But if it had appeared upon the libel, that the contract was made upon the land, the adding *infra juriſdictionem admiralitatis*, or *infra juriſdictionem maritimam*, could not have been enough, to intitle the admiralty to a juriſdiction. And therefore the rule for the prohibition was diſcharged. See 1 *Roll. Abr*. 532. *pl*. 12. where it is held to be ſufficient, to allege that the contract was made *infra juriſdictionem admiralitatis*, without ſaying it was made *ſuper altum mare*; for if it was not made on the high ſea, it ought to be ſuggeſted on the other ſide, to have a prohibition.

The King *verſ.* Benoier.

Shaw's Par. Law, cap. 44. ſ. 4.

The King verſ. Mundy.

MR. *Verney* moved, to quaſh an order made at the quarter-ſeſſions at *Hereford*, whereby the father in law was ordered to maintain his daughter in law; becauſe he was not by law obliged to maintain her. And he cited the King *verſ. Mundy*, *Trin.* 5 *Geo.* an order made by the juſtices upon a ſon in law, to maintain his mother in law, was quaſhed. And a rule was made to ſhew cauſe, why it ſhould not be quaſhed; which rule was made abſolute, no perſon ſhewing cauſe to the contrary, *Hil.* 13 *Geo. B. R. January* 31, 1726.

Hilary Term

13 Georgii regis, B. R. 1726.

William Gregſon *verſ.* John Heather.

Intr. *Mich.* 13 *Geo.* B. R.

THE plaintiff brought an action of debt upon a bail-bond for 130*l.* as aſſignee of *William Nicholls*, Eſq; late ſheriff of the county of *Surrey*, and laid it in *London*, and ſet out, that the defendant 7th *January* 1724. at *Stretham* in *Surrey*, was arreſted by the ſaid ſheriff upon an attachment of privilege at the ſuit of the plaintiff, *&c.* and that the ſheriff took bail for his appearance, and the defendant then and there became bound to the ſheriff in this bond, *&c.* with condition, that he ſhould appear, *&c.* but he did not appear, *&c.* whereby the bond became forfeited; and that the ſaid *William Nicholls* afterwards, *viz.* 22d *December* 1725. at *London*, *viz.* in the pariſh of *St. Mary le Bow* in the ward of *Cheape*, at the requeſt of the plaintiff aſſigned to the plaintiff the ſaid bond, according to the ſtatute, *&c.* The defendant demurred generally, and the plaintiff joined in demurrer. And the exception Mr. *Fazakerley* took to the declaration in behalf of the defendant was, that the ſheriff could arreſt only within his county, and take the bail-bond only there, which was in *Surrey*; and therefore the aſſignment being tranſitory matter, and not local, ought to have been laid at *Stretham* in *Surrey*, where the bond was taken, and not in *London*. But the court was unanimous of opinion, the plaintiff might lay the aſſignment in *London*, if he pleaſed. And therefore gave judgment for the plaintiff, *January* 27, 1726.

S. C. 2 Stra. 727. In debt on a bail-bond brought by the aſſignee of the ſheriff, the arreſt was made, and the bond took, in *Surrey*, and the aſſignment was laid, and the action brought, in *London*, and good. *Trin.* 13 *Geo.* the ſame point ruled ſo again on the authority of the caſe, *Norcroſt v. Matthews.*

David

David Cheſman and Elizabeth his wife *verſ.* Margery Nainby.

Intr. *Mich.* 13 *Geo.* B. R. Rot. and intr. *Eaſter* term, 11 *Geo.* C. B. Rot. 396.

S. C. 2 Stra. 739. What bond in reſtraint of trade is good.

ERROR upon a judgment given in debt againſt the plaintiffs in error upon bond for the defendant in error and plaintiff below; wherein *Nainby* the plaintiff below declared upon a bond entred into by *Elizabeth* the wife of the plaintiff in error, *dum ſola*, by the name of *Elizabeth Vicars*, dated the 5th of *October* 8 *Geo.* to the ſaid *Nainby* in 100 *l.* The defendants in the Common Pleas, *Cheſman* and his wife, prayed *oyer* of the bond, and of the condition, which was thus: Whereas the abovenamed *Margery Nainby*, at the ſpecial requeſt of the abovebound *Elizabeth Vicars*, is to take her the ſaid *Elizabeth Vicars* for her hired ſervant, to attend in her ſhop, and to inſpect her cuſtomers there, and to ſhew her goods, and further to ſtand by and aſſiſt her the ſaid *Margery* in her ſaid trade and buſineſs of a linen-draper, whereby it is preſumed the ſaid *Elizabeth*, if ſhe continues any length of time in the ſaid ſervice of the ſaid *Margery*, may become a perfect and knowing perſon in the ſaid trade; and whereas the ſaid *M. N.* conſents to hire and take her the ſaid *E. V.* upon and in conſideration only upon the expreſs promiſe and agreement of the ſaid *Eliz.* that ſhe ſhall not nor will at any time after ſhe ſhall have left the ſervice of the ſaid *Margery* ſet up or exerciſe the ſaid trade of a linen-draper, either by herſelf or any other perſon in truſt for her directly or indirectly, in any ſhop, room or place within the ſpace of half a mile of the now dwelling-houſe of the ſaid *M. N.* in *Drury-lane*, or in any other houſe that ſhe the ſaid *M. N.* her executors or adminiſtrators, ſhall think proper to remove to, in order to carry on the ſaid trade of a linen-draper, nor ſhall the ſaid *Eliz.* within the ſame ſpace of half a mile directly or indirectly be concerned in or aſſiſt or inſtruct any other perſon in the managing and carrying on the ſaid trade, under colour or pretence of being a ſervant to ſuch perſon, or under any other colour or pretence whatſoever; which ſaid promiſe and agreement, joined with the good character and opinion ſhe the ſaid *M. N.* hath of the integrity and honeſty of her the ſaid *Eliz.* is the ſole conſideration that hath obliged the ſaid *M. N.* to take the ſaid *Eliz.* into her ſervice for three years: now the condition of the above obligation is ſuch, that if the ſaid *Eliz. Vicars* ſhall act contrary to and in breach of the above recited promiſe and agreement, according to the true intent and meaning thereof, or of any part thereof, that then and in ſuch caſe the ſaid *Eliz. Vicars*, her executors and adminiſtrators, ſhall thereupon pay or cauſe to be paid to the ſaid *M. N.* her executors, adminiſtrators and aſſigns, the ſum of 100 *l.* the ſaid 100 *l.* being the conſideration money the ſaid *M. N.* might reaſonably expect with an apprentice to the ſaid trade; that then this obligation to be void, otherwiſe to remain in full force. After *oyer* of which ſaid bond and condition the defendants pleaded in bar, that the ſaid *Eliz.* from the making of the ſaid bond did continue and remain in the ſervice aforeſaid until the 28th day of *April* 1724. and then left that ſervice, and that the ſaid *Margery* continued to inhabit and reſide and exerciſe her ſaid trade in her ſaid manſion-houſe in the ſaid ſtreet *vocato Drury-lane* from the time of making the ſaid bond till the time of ſuing out her original writ; and that the ſaid *Eliz.* within half a mile of the ſaid manſion-houſe of the ſaid *Margery* at any time after the departure of the ſaid *Eliz.* out of the ſervice of the ſaid *Margery* directly or indirectly was not concerned in or had inſtructed or aſſiſted any other perſon in managing or exerciſing the ſaid trade, under colour or pretenſe of being ſervant to ſuch perſon, or under any other colour or pretenſe whatſoever; and the defendants further plead, that the ſaid *Eliz.* at any time after the departure of the ſaid *Eliz.* out of the ſaid ſervice of the ſaid *Margery* did not uſe or exerciſe the ſaid trade either by herſelf or by any other perſon in truſt for her directly or indirectly in any ſhop, room or place within half a mile from the ſaid manſion-houſe of the ſaid *M. N. &c.* The plaintiff below replied, that the ſaid *Eliz.* from the time of making the ſaid bond did continue and remain in the ſaid ſervice, and out of the ſaid ſervice did depart, as the defendants above alleged; and that the ſaid *Margery* continued to inhabit, reſide and exerciſe her trade, as the defendants above alleged; but the ſaid *Margery* further ſaid, that the ſaid *Eliz.* within the ſpace of half a mile from the ſaid manſion-houſe of the ſaid *Margery* above mentioned, and within nine months next after the departure of the ſaid *Eliz.* out of the ſaid ſervice, did aſſiſt and inſtruct a certain perſon, *viz.* the ſaid *David Cheſman in adviſando et exercendo miſterium praedictum* in the condition above mentioned, contrary to the tenor of the ſaid condition, *viz.* in the ſaid ſtreet called *Drury-lane*, *&c. et hoc petit quod inquiratur per patriam*; upon which iſſue was joined. And upon a trial at *niſi prius* in *Middleſex*, before lord chief juſtice *King*, a verdict was found for the plaintiff, and judgment given for her by the court of Common Pleas. Upon which judgment this writ of error was brought.

Mr. *Strange* for the plaintiffs in error agreed, that a bond given for a valuable conſideration, to reſtrain the exerciſe of a trade in a particular place, would be good; and therefore he ſaid he would not diſpute the reſolutions in the caſes of *Mitchell verſ. Reynolds*, adjudged *Hil.* 11 *Ann. B. R.* and of *Bowers* and *Wrench*, adjudged the ſame term. But he inſiſted, here did not appear in the condition of this bond to be any conſideration; becauſe it does not appear by the condition, that *M. N.* was compellable to take *E. V.* into her ſervice. *Margery Nainby*'s taking *Eliz. Vicars* is the meritorious conſideration of the bond; but that was executory, at the time when the bond was made; and therefore if there was no power in *E. V.* to compel *M. N.* to take her, as there does not any appear, that cannot be called a conſideration, ſince *M. N.* might refuſe it; and for this he cited *Yelv.* 49. *Allen verſ. Randall*, that where the condition was executory, the plaintiff to intitle himſelf to an action upon the promiſe againſt the defendant, ought to ſhew, he had performed, or was under legal obligation to perform it. And although by the plea the defendants plead, that the ſaid *Eliz.* from the making of the ſaid bond, which was the 5th of *October* 1722. did continue in the ſaid ſervice till the 28th of *April* 1724. and then left that ſervice; yet the court ought not to regard that allegation, but the judgment of the court, whether the bond was good, ought to be founded upon what appears in the bond itſelf. *Sed non allocatur.* For *per curiam*, it appears plainly, that *Margery Nainby* had agreed to take *E. V.* into her ſervice; for in the condition of the bond it is ſaid, *M. N.* is to take *E. V.* into her ſervice, *&c.* which imports an agreement by *M. N.* ſo to do: and it is further ſaid in the condition, *M. N.* conſents to take the ſaid *E. V.* and in another place it is recited in the condition, that the ſaid *E. V.*'s promiſe and agreement, *&c.* is the ſole conſideration that hath obliged *M. N.* to take the ſaid *E. V.* into her ſervice, *&c.* all which expreſſions import an agreement between *M. N.* and *E. V.* that *M. N.* ſhould take *E. V.* into her ſervice, in conſideration that *E. V.* had agreed not to trade, *&c.* And this being in the condition of the bond ſealed by the ſaid *E. V.* appears to have been ſo under her hand. Beſides, the plea confeſſes *M. N.* did take her into her ſervice, and that *E. V.* departed from it; and therefore all the court held the bond, notwithſtanding this objection, was a good bond. And if *M. N.* had refuſed to take *E. V.* into her ſervice, *&c. E. V.* ought to have pleaded it; inſtead of which the defendants have ſhewed by their plea, that *E. V.* was admitted into *M. N.*'s ſervice, *&c.* Then Mr. *Strange* inſiſted further, this bond was void, becauſe the reſtraint of trade was not confined to a particular place, but was in effect general; becauſe the condition is not only that *E. V.* ſhould not exerciſe the trade,

&c. within half a mile of the then dwelling-houſe of *M. N.* in *Drury-lane*, but it is alſo of any other houſe that *M. N.* her executors or adminiſtrators, ſhall think fit to remove to, to carry on the ſaid trade; which may be extended all *England* over; for if *E. V.* ſets up in the remoteſt part of the kingdom, if *M. N.* her executors or adminiſtrators, removes within half a mile of that place, *E. V.* muſt not exerciſe her trade, *&c.* there; and ſo *toties quoties:* ſo that by that means the bond will be a general reſtraint every where: whereas theſe ſorts of bonds are not good, unleſs the exerciſe of the trade is only reſtrained in a particular place. But to this ſerjeant *Whitaker* anſwered for the defendant in error, that if a bond is given, with condition to do ſeveral things, and ſome are agreeable to law, and ſome againſt the common law; the bond ſhall be good as to the doing the things agreeable to law, and only void as to thoſe that are againſt the law. But if a bond is given, with condition to do a thing againſt an act of parliament, and alſo to pay a juſt debt; the whole bond will be void: becauſe the letter of the ſtatute makes it void, and is a ſtrict law. So is *Hob.* 14. *Norton verſ. Sims.* 14 *H.* 8. 15. 3 *Co.* 88. 1 *Ventr.* 237. Now the breach is aſſigned upon part of the condition, which is good in law; and therefore if the other part, to which Mr. *Strange* takes the exception, ſhould be againſt law, yet that will not hinder the plaintiff's recovery upon this part of the condition, which is legal. And of that opinion was the whole court. And judgment was affirmed, *Friday February* 3, 1726. After this, error was brought in parliament, and *February* 22, 1727. by the unanimous opinion of all the then twelve judges this judgment was affirmed with 40*l.* coſts.

Gabriel Johnſon *verſ.* James Laſerre.

Intr. *Hil.* 13 *Geo.* B. R. and *Trin.* 12 *Geo.* C. B. Rot. 1326.

S. C. 2 Stra. 745. Although an executor is not obliged to give bail on error, yet the court may take it.

ERROR upon a judgment in a *ſcire facias* ſued in the Common Pleas by *Laſerre* upon a recogniſance for 440*l.* entred into by *Johnſon* to *Laſerre*, in which judgment was given for *Laſerre*. *Johnſon* the defendant in the Common Pleas prayed there *oyer* of the recogniſance, and the condition, which condition recited, that *Hugh Howard* and *Thomaſine* his wife, executors of *John Langſton*, Eſq; had ſued a writ of error returnable in the King's Bench, upon a judgment recovered in the Common Pleas by *Laſerre* againſt *Howard* and his wife; if therefore the ſaid *Howard* and his wife proſecuted the writ of error with effect, *&c.*

and paid the ſum recovered, and alſo the damages and coſts that ſhould be awarded if the judgment ſhould be affirmed, *&c.* that then, *&c.* after which *oyer* had, the ſaid *Johnſon* pleaded in bar of the *ſcire facias* the act of 16 *&* 17 *Car.* 2. *c.* 8. to prevent arreſts of judgment and ſuperſeding executions, and the *proviſo* therein, that that act ſhould not extend to any writ of error to be brought by an executor, *&c. per quod* the ſaid recogniſance taken contrary to the ſaid ſtatute *vacua in lege exiſtit.* And upon demurrer judgment was for the plaintiff *Laſerre* in the Common Pleas. And Mr. *Strange* for the plaintiff in error inſiſted, that executors by the act of *Car.* 2. were not obliged to enter into recogniſances upon writs of error brought by them upon judgments obtained againſt them, and that this appearing to be ſuch a recogniſance, was void. But *per totam curiam*, if a man will voluntarily enter into ſuch a recogniſance, 'tis good at common law. And judgment was affirmed. *Thurſday February* the 9th, 1726.

Watts and his wife *verſ.* Goodman.

Intr. *Trin.* 12 *Geo.* B. R. Rot. 467.

IN debt upon bond dated the 30th of *December* 1707 for 100*l.* entred into by the defendant to *Samuel Rutter* former husband of the plaintiff's now wife, to whom ſhe was adminiſtratrix; the defendant prayed *oyer* of the bond, which being entred *in haec verba*, it was; *Noverint univerſi per praeſentes*, that the defendant and *Benjamin Fawkner* were bound to the ſaid *Samuel Rutter* in 100*l.* to be paid to the ſaid *Samuel Rutter*, *ad quam quidem ſolutionem bene et fideliter faciendam obligamus nos et utrumque noſtrum per ſe pro toto et in ſolido haeredes executores et adminiſtratores noſtros, &c. quo lecto et audito*, the defendant *petit judicium de narratione praedicta*, becauſe ſhe ſays, that the ſaid *Benjamin Fawkner ſigillavit et deliberavit* the ſaid bond as his act and deed to the ſaid *Samuel Rutter*, and became jointly bound with the defendant to the ſaid *Samuel Rutter*, and is yet alive, *viz.* at, *&c. unde, &c. petit judicium de narratione praedicta et quod narratio illa caſſetur, &c.* To which the plaintiff demurred, and the defendant joined in demurrer. This cauſe coming on in the paper the 26th of *January*, it was objected for the defendant, that the bond was a joint bond, there being no words in it, to make it ſeveral; and therefore the plaintiffs had brought their action wrong, in ſuing the defendant alone. But Mr. *Robinſon* for the plaintiff argued, that the bond was joint and ſeveral, and cited *Dier* 310. *pl.* 8. where an obligation was made by three, and the words were, *obligamus nos et utrumque noſtrum per ſe pro toto et in ſolido*, and only two were ſued, and they pleaded a ſpecial *non eſt factum*, after *oyer* of the condition of the bond; but there was no *oyer* of the bond itſelf, and the iſſue was found againſt the defendants; and it was moved in arreſt of judgment, but the plaintiff had judgment. 2 *Bulſt*. 70. *Cro. Jac*. 322. *Hankinſon verſ. Sandilaus.* Two bound themſelves, or any of them, their heirs, executors, or either of their heirs *&c.* this bond was held joint and ſeveral. And 1 *Lutw*. 697. *Sayer verſ. Chayter*, in debt on a bond, on *oyer* it appeared, that the defendant *Chayter* and two others were bound, *ad quam quidem ſolutionem bene et fideliter faciendam obligo me, haeredes, executores et adminiſtratores meos*, and *Powell* juſtice was of opinion, the bond was joint and ſeveral, by reaſon of the words *obligo me haeredes, &c. meos*, which is the ſame as if it had been ſaid by the three obligors ſeverally; and that the heirs were not obliged, before the words, *ad quam quidem ſolutionem:* and certainly it was the intent of the parties, the heirs ſhould be obliged; yet if by thoſe words the bond is not ſeveral, the heirs are not obliged. The ſame intent may be collected in this caſe. The cauſe was ordered to ſtand in the paper, to conſider of the caſes. And the judges all ſeemed ſtrong in opinion, this could not be a ſeveral bond. But they gave judgment for the plaintiff, becauſe this matter was pleaded in bar; whereas it is only a plea in abatement; for a plea which begins with a *petit judicium de narratione*, and concludes, *quod narratio caſſetur*, is a plea in bar in the King's Bench, and has been ſo often adjudged. Judgment for the plaintiffs, *February* 9, 1726.

Matter pleaded in bar, which ought to have been in abatement.

The King *verſ.* John Ward, Eſq;

The Attorney General, by order of the houſe of lords, filed the following information againſt the defendant.

Trin. 11 Geo. regis.

S. C. 2 Stra. 747. Of what papers a forgery may be committed at common law.

Middleſex, ſſ. MEmorandum, *quod Philippus Yorke miles attornatus domini regis generalis, qui pro eodem domino rege in hac parte ſequitur, in propria perſona ſua venit hic in curia dicti domini regis coram ipſo rege apud Weſtmonaſterium die Mercurii proxime poſt tres ſeptimanas ſanctae Trinitatis iſto eodem termino, et pro eodem domino rege dat curiae hic intelligi et informari, quod Johannes Ward de Hackney in comitatu Middleſexiae armiger exiſtens onerabilis ad deliberandum trecenta et quindecim dolia, Anglice* tons, *et quarter' unius dolii aluminis valoris quinque mille librarum praenobili Edmundo duci de comitatu Buckingham et de Normanby ad certum diem jam praeteritum, ipſe idem Johannes Ward nequiter*

machinans et intendens praedictum ducem de praedicto alumine decipere et defraudere, et cum iniqua et fraudulenta intentione ad evitandum deliberationem ejuſdem aluminis, primo die Februarii anno regni domini Georgii Dei gratia Magnae Britanniae Franciae et Hiberniae regis, fidei defenſoris, &c. undecimo, apud Weſtmonaſterium in comitatu Middleſexiae vi et armis, &c. in dorſo cujuſdam certificationis in ſcriptis, manu cujuſdam Ambroſii Newton ſignatae, falſo fabricavit et contrafecit et fabricari et contrafieri cauſavit quoddam ſcriptum in verbis et figuris ſequentibus, videlicet,

Schedule

Tons	*C.*
660 :	5
315 :	5
975 :	10

Mr. *John Ward*, I do hereby order you to charge the quantity of ſix hundred and ſixty tons and 1 quarter of allum to my account, part of the quantity here mentioned in this certificate, and out of the money ariſing by the ſale of allum in your hand pay to Mr. *W. Ward* and yourſelf ten pounds for every ton according to agreement; and for your ſo doing this ſhall be your diſcharge. *Buckingham. April* 30, 1706.

in malum exemplum omnium aliorum in hujuſmodi caſu delinquentium, ad grave damnum praefati ducis, ac contra pacem dicti domini regis nunc, coronam et dignitatem ſuas, &c. Et idem attornatus domini regis generalis pro eodem domino rege ulterius dat curiae hic intelligi et informari, quod praedictus Johannes Ward exiſtens onerabilis ad deliberandum trecenta et quindecim dolia, Anglice tons, *et quarter' unius dolii aluminis valoris quinque mille librarum praefato duci ad certum diem jam praeteritum, ipſe idem Johannes Ward, nequiter machinans et intendens praefatum ducem de praedicto alumine decipere et defraudare, et cum iniqua et fraudulenta intentione ad evitandum deliberationem ejuſdem aluminis, poſtea, ſcilicet dicto primo die Februarii anno regni dicti domini regis nunc undecimo ſupradicto, apud Weſtmonaſterium in comitatu Middleſexiae, vi et armis, &c. quoddam ſcriptum falſo fabricatum et contrafactum in dorſo cujuſdam certificationis in ſcriptis, manu cujuſdam Ambroſii Newton ſignatae, nequiter, illicite et fraudulenter publicavit et publicari cauſavit, quod quidem ſcriptum falſo fabricatum et contrafactum ſequitur in his verbis et figuris ſequentibus, videlicet,* [and then it is ſet out again] *dicto Johanne Ward adtunc et ibidem bene ſciente dictum ſcriptum, per ipſum Johannem Ward ut praefertur publicatum, falſum et contrafactum fuiſſe; ad grave damnum praefacti ducis, &c.* To this information the defendant pleaded not guilty, and upon *May* 3, 1725, upon a trial at bar by a ſpecial jury of gentlemen of the county of *Middleſex*, the defendant was found guilty; after which the defendant, as it was ſaid, went beyond ſea, or at leaſt abſconded, ſo that proceedings were againſt him for outlawry, but he ſurrendered himſelf

the laſt day in laſt term in court, which day the *exigent* was returnable, and was committed to the cuſtody of the marſhal, and *Saturday* the 4th of *February* he was brought by rule into court, to receive judgment. At which time Mr. *Hungerford*, Mr. *Ketelbey*, Mr. *Bootle*, Mr. *Filmer*, and Mr. *Strange*, the defendant's counſel, moved in arreſt of judgment. Whoſe arguments taking up that day, the counſel for the King, Mr. Attorney General *Yorke*, Mr. *Lee* one of his Majeſty's counſel, Mr. *Marſh*, Mr. *Fazakerley*, and Mr. *Verney*, anſwered the objections of the defendant's counſel upon *Monday February* 6; and upon the preſſing inſtances of the defendant's counſel, they had time given them for their reply till next day.

The firſt objection that was made to the information by the counſel for the defendant was, that the offenſe laid was falſly making and forging a writing upon the back of a certificate in writing, ſigned by one *Ambroſe Newton*, and this was no forgery at common law, and that the information being grounded upon the common law, and not upon the 5 *Eliz. c.* 14. the information was not maintainable.

They inſiſted, that forgery at common law muſt be of a record, or ſomething of a publick nature, as a privy ſeal, a licence from the barons of the Exchequer to compound a debt, or a deed under ſeal, *Britt.* 16. *Fleta, cap.* 22. but that counterfeiting other writings of a private nature between party and party is no forgery at common law, 1 *Hawk.* 184. and therefore to ſay *A.* has forged a writing, is not actionable. 1 *Sider.* 16. In the caſe of *Caſſubilly verſ. Brit.* So 1 *Roll. R.* 431. 1 *Roll. Ab.* 66. *pl.* 8. *Aier verſ. Froſt:* Thou haſt made forged writings, and thou ſhouldſt have loſt thy ears for it, held not actionable, becauſe it is uncertain what writings, and they might be ſuch, the forging of which might not deſerve the loſs of ears. So *Cro. Eliz.* 166. *Hil.* 32 *Eliz. B. R. Vennor verſ. Wootton.* You have forged your father's hand, and thereby falſly have procured your father's tenants to pay their rents to you due to your ſiſter: adjudged not actionable, becauſe it is not ſhewn what things he forged for which he is by any law puniſhable: for it might be a letter, for which he is not puniſhable, and for that a caſe between *Brook and Doughty*, 28 *Eliz.* was cited; you have forged my lord of *Leiceſter*'s hand to ſuch a letter, adjudged not actionable; and what *Croke* is reported to have ſaid in *Wilſhire*'s caſe, *Yelv.* 146. *viz.* that to ſay *J. S.* had forged his father's hand, whereby he procured the tenants to pay him the rent due to his father, is not actionable, as (ſays that book) it was adjudged 3 *Eliz.* becauſe it relates but to a private matter, for the ſon by no law is puniſhable for it. And this being before the ſtatute

machinans et intendens praedictum ducem de praedicto alumine decipere et defraudere, et cum iniqua et fraudulenta intentione ad evitandum deliberationem ejuſdem aluminis, primo die Februarii anno regni domini Georgii Dei gratia Magnae Britanniae Franciae et Hiberniae regis, fidei defenſoris, &c. undecimo, apud Weſtmonaſterium in comitatu Middleſexiae vi et armis, &c. in dorſo cujuſdam certificationis in ſcriptis, manu cujuſdam Ambroſii Newton ſignatae, falſo fabricavit et contrafecit et fabricari et contrafieri cauſavit quoddam ſcriptum in verbis et figuris ſequentibus, videlicet,

Schedule

Tons	*C.*
660 :	5
315 :	5
975 :	10

Mr. *John Ward*, I do hereby order you to charge the quantity of ſix hundred and ſixty tons and 1 quarter of allum to my account, part of the quantity here mentioned in this certificate, and out of the money ariſing by the ſale of allum in your hand pay to Mr. *W. Ward* and yourſelf ten pounds for every ton according to agreement; and for your ſo doing this ſhall be your diſcharge. *Buckingham. April* 30, 1706.

in malum exemplum omnium aliorum in hujuſmodi caſu delinquentium, ad grave damnum praefati ducis, ac contra pacem dicti domini regis nunc, coronam et dignitatem ſuas, &c. Et idem attornatus domini regis generalis pro eodem domino rege ulterius dat curiae hic intelligi et informari, quod praedictus Johannes Ward exiſtens onerabilis ad deliberandum trecenta et quindecim dolia, Anglice tons, *et quarter' unius dolii aluminis valoris quinque mille librarum praefato duci ad certum diem jam praeteritum, ipſe idem Johannes Ward, nequiter machinans et intendens praefatum ducem de praedicto alumine decipere et defraudare, et cum iniqua et fraudulenta intentione ad evitandum deliberationem ejuſdem aluminis, poſtea, ſcilicet dicto primo die Februarii anno regni dicti domini regis nunc undecimo ſupradicto, apud Weſtmonaſterium in comitatu Middleſexiae, vi et armis, &c. quoddam ſcriptum falſo fabricatum et contrafactum in dorſo cujuſdam certificationis in ſcriptis, manu cujuſdam Ambroſii Newton ſignatae, nequiter, illicite et fraudulenter publicavit et publicari cauſavit, quod quidem ſcriptum falſo fabricatum et contrafactum ſequitur in his verbis et figuris ſequentibus, videlicet,* [and then it is ſet out again] *dicto Johanne Ward adtunc et ibidem bene ſciente dictum ſcriptum, per ipſum Johannem Ward ut praefertur publicatum, falſum et contrafactum fuiſſe; ad grave damnum praefacti ducis, &c.* To this information the defendant pleaded not guilty, and upon *May* 3, 1725, upon a trial at bar by a ſpecial jury of gentlemen of the county of *Middleſex*, the defendant was found guilty; after which the defendant, as it was ſaid, went beyond ſea, or at leaſt abſconded, ſo that proceedings were againſt him for outlawry, but he ſurrendered himſelf

the laſt day in laſt term in court, which day the *exigent* was returnable, and was committed to the cuſtody of the marſhal, and *Saturday* the 4th of *February* he was brought by rule into court, to receive judgment. At which time Mr. *Hungerford*, Mr. *Ketelbey*, Mr. *Bootle*, Mr. *Filmer*, and Mr. *Strange*, the defendant's counſel, moved in arreſt of judgment. Whoſe arguments taking up that day, the counſel for the King, Mr. Attorney General *Yorke*, Mr. *Lee* one of his Majeſty's counſel, Mr. *Marſh*, Mr. *Fazakerley*, and Mr. *Verney*, anſwered the objections of the defendant's counſel upon *Monday February* 6; and upon the preſſing inſtances of the defendant's counſel, they had time given them for their reply till next day.

The firſt objection that was made to the information by the counſel for the defendant was, that the offenſe laid was falſly making and forging a writing upon the back of a certificate in writing, ſigned by one *Ambroſe Newton*, and this was no forgery at common law, and that the information being grounded upon the common law, and not upon the 5 *Eliz. c.* 14. the information was not maintainable.

They inſiſted, that forgery at common law muſt be of a record, or ſomething of a publick nature, as a privy ſeal, a licence from the barons of the Exchequer to compound a debt, or a deed under ſeal, *Britt.* 16. *Fleta*, *cap.* 22. but that counterfeiting other writings of a private nature between party and party is no forgery at common law, 1 *Hawk.* 184. and therefore to ſay *A.* has forged a writing, is not actionable. 1 *Sider.* 16. In the caſe of *Caſſubilly verſ. Brit.* So 1 *Roll. R.* 431. 1 *Roll. Ab.* 66. *pl.* 8. *Aier verſ. Froſt:* Thou haſt made forged writings, and thou ſhouldſt have loſt thy ears for it, held not actionable, becauſe it is uncertain what writings, and they might be ſuch, the forging of which might not deſerve the loſs of ears. So *Cro. Eliz.* 166. *Hil.* 32 *Eliz. B. R. Vennor verſ. Wootton.* You have forged your father's hand, and thereby falſly have procured your father's tenants to pay their rents to you due to your ſiſter: adjudged not actionable, becauſe it is not ſhewn what things he forged for which he is by any law puniſhable: for it might be a letter, for which he is not puniſhable, and for that a caſe between *Brook and Doughty*, 28 *Eliz.* was cited; you have forged my lord of *Leiceſter*'s hand to ſuch a letter, adjudged not actionable; and what *Croke* is reported to have ſaid in *Wilſhire*'s caſe, *Yelv.* 146. *viz.* that to ſay *J. S.* had forged his father's hand, whereby he procured the tenants to pay him the rent due to his father, is not actionable, as (ſays that book) it was adjudged 3 *Eliz.* becauſe it relates but to a private matter, for the ſon by no law is puniſhable for it. And this being before the ſtatute of 5 *Eliz.* it was urged was an authority in point, that ſuch ſort of forgery as this was not puniſhable at common law, *viz.* of an indorſement upon a certificate, a thing merely of a private nature, and in effect nothing more than a letter. And this they ſay appeared by the *Stat.* of 33 *H.* 8. *c.* 1. which inflicts puniſhments on perſons who get the money or goods of others into their hands under colour of a falſe token or counterfeit letter, for if ſuch counterfeit letters had been at common law puniſhable as forgery, the making that ſtatute was unneceſſary and uſeleſs.

It was farther argued for the defendant, that a forgery is not puniſhable, unleſs it is to the prejudice of ſome perſon; therefore where *B.* was obliged in a bond of 100 *l.* for the honeſty of his ſon apprentice to *A. A.* raſes out *libris* in the bond, and puts in *marcis*; and adjudged this was not a forgery puniſhable, becauſe it was not a prejudice to any body but to *A.* the bond being avoided by *A.* and the ſum made leſs. *Noy* 99. *Black verſ. Allen.* So *Moore* 655. *pl.* 897. *Salway verſ. Wale.* Antedating of a deed to defeat a mean aſſurance. But antedating is no forgery, unleſs there is a mean intereſt in a third perſon to be prejudiced thereby. Now in the preſent caſe it does not appear, that the duke of *Buckinghamſhire* was prejudiced by this, for it is not alledged in the information, that the 315 tons of allum was prevented from being delivered thereby. If it had, they admitted an action would have laid againſt the defendant for a deceit, or he might have been indicted for a cheat, but not for forgery at common law.

F. N. B. 96, 99, 100.

On the other ſide it was argued by the counſel for the King, that notwithſtanding theſe objections, the offenſe charged in this information was a forgery at common law, for which the defendant might have been indicted; and that the information was maintainable againſt the defendant for it. And of that opinion was the court unanimouſly. For the judges ſaid, that although ſome of the forgeries at common law mentioned in the *Mirror*, *cap.* 4 & 5. *Britt.* 16. & *Fleta*, *l.* 1. *c.* 22. which are cited in 3 *Inſt.* 169. were capital, and as the law then ſtood puniſhed with death; and others of them puniſhed with leſſer though infamous puniſhments: yet none of theſe books ſay, that the forgeries there particularly ſpecified were the only forgeries puniſhable by the common law. It is not to be diſputed, but that forging a deed was a forgery puniſhable by the common law; now forging a writing not ſealed may be equally miſchievous with forging a deed, and therefore as to the nature of the offenſe it falls under the ſame reaſon: and *ubi eadem eſt ratio eadem eſt lex.* A forgery of a deed, though the prejudice ariſing therefrom may not be 40 *s.* is puniſhable as a forgery at common law. But the forging of a goldſmith's note, bills of exchange,

change, *&c.* may be of vaſtly more miſchievous conſequence; and therefore it is reaſonable, the offender ſhould ſuffer the ſame puniſhment at leaſt. It farther appears by the preamble of the ſtatute 5 *Eliz. cap.* 14. that forging of writings was puniſhable at common law; for the ſtatute recites, that whereas the wicked, pernicious and dangerous practice of making, forging and publiſhing falſe and untrue charters, evidences, deeds and writings, hath of late been more practiſed, *&c.* which ſeemeth to have grown, chiefly by reaſon that the pains and puniſhments limited for ſuch great and notable offenſes by the laws and ſtatutes of this realm before this time have been, and yet are ſo ſmall, mild and eaſy, *&c.* ſo that ſtatute takes notice, that forging of writings was puniſhable by law before that ſtatute, that is, by the common law; for it ſays, by the laws and ſtatutes of the realm. And they farther ſaid, that this was not a new point, and that they relied on the caſes which had been cited by the counſel for the King. 5 *Mod. Rep.* 137. 1 *Salk.* 342. The defendant was indicted for forging or cauſing to be forged a bill of lading; and this was at common law, as appears in 5 *Mod.* 137. The King *verſ. Stocker*, the court held the indictment ill for incertainty, but not becauſe the offenſe was no forgery at common law, and not puniſhable. 1 *Sid.* 278. The King *verſ. Ferrers.* The defendent was indicted and convicted for forging an acquittance, the record of which is in *Tremaine's Intr.* 129. where it appears to have been an indictment at common law, and the defendant was fined, and bound to his good behaviour, *Raym.* 81. *Farr*'s caſe. Indictment at common law, for forging a warrant of attorney, and judgment of fine, and pillory, and impriſonment. 2 *Sid.* 71. *Dudley*'s caſe, for forging the entry of a marriage in a regiſter. *Rex verſ. Penny, &c. Intr. H.* 20 *Car.* 2. *B. R. Crown off. Roll.* 21. indictment for forging a general releaſe at common law. *Hil.* 34 *Car.* 2. *Rot.* 35. The King *verſ. Sheldon.* Indictment for forging a bill of exchange at common law, and judgment againſt the defendant. And lately a caſe of the ſame nature between the King and *Ward*, and conviction at the *Old Baily.* [That was the preſent defendant's brother.] The defendant eſcaped, and has not been took ſince. *Stiles* 12. *Savage*'s caſe, for forging of letters of credit, and alſo for a cheat. 1 *Sider.* 142. The King *verſ. Dekins*, for forging a protection of Sir *A. A. C.* 1 *Salk.* 400. The King *verſ. Yarrington.* And *Forteſcue* juſtice cited the Queen *verſ. Traverſe*, which was an indictment at common law, for forging the indorſement on an army debenture; for it was indorſed to *Bridgett Gradon*, and the defendant altered the name, and made *George Gradon*, and judgment was given againſt the defendant.

As to the objection made from the caſes for words, the reaſon for thoſe caſes was, becauſe it did not appear, what the writing was that was forged, and it might be a writing of no conſequence, or that could prejudice no body, and the rule was at that time to take words *in mitiori ſenſu*. But the chief juſtice ſaid, he apprehended, if the caſe of *Vennor verſ. Wootton*, *Cr. Eliz.* 166. was to be adjudged now, it would be adjudged otherwiſe than it was; for it appears by the words, a forging of writing was meant, whereby the forger had prejudiced his ſiſter, for he received the rents by reaſon of that forgery, which were due to his ſiſter, which imported a complete forgery; and whether the writing was a letter or other writing, the ſcandal was the ſame: and the caſe relied on, as cited by *Croke*, as adjudged 3 *Eliz.* before 5 *Eliz.* in *Yelv.* 146. was of the ſame caſe as *Cro. Eliz.* 166. which was in 32 *Eliz.* long after the ſtatute of 5 *Eliz.* As to the objection raiſed from the ſtatute of 33 *Hen.* 8. *c.* 1. that if ſuch ſort of forgeries as theſe were puniſhable at common law, that ſtatute was unneceſſary: the court ſaid, that that ſtatute did not create new offenſes, for the crimes therein mentioned were crimes at common law, but it increaſed the penalty. 2. Upon that ſtatute no fact was puniſhable, but where the offender had carried his fraud into execution, and got the money or goods into his poſſeſſion, whereby the party defrauded was actually prejudiced. But a man is puniſhable for a forgery, if it may be prejudicial, though the miſchief is prevented be the diſcovery of the forgery. And that therefore is an anſwer to another objection made by the defendant's counſel, that it does not appear, the duke of *B.* was actually prejudiced; it not being averred, that the delivery of the allum was avoided in fact by this forged indorſement; for if he might be prejudiced by it, that makes the forgery an offenſe, for which an indictment would lie at common law: as if *A.* forges a bond in *B.*'s name, though *B.* is never obliged to pay the money, an indictment without all queſtion will lie at common law. And for theſe reaſons the court were clear of opinion, that this offenſe, of forging an indorſement on the back of the certificate, whereby the duke of *B.* might be defrauded of the allum, was a forgery, for which this information will lie at common law.

The next objection the defendant's counſel made was, that if the offenſe was a forgery puniſhable at common law, yet the fact was not ſet out in this information ſufficiently, for the court to found a judgment upon: for unleſs the defendant was chargeable to deliver the allum at the time when he made this forged indorſement, there was no poſſibility the duke of *B.* could be prejudiced by it, nor can it be ſaid to be done to avoid the delivery of the allum. As it ſtands upon the information it is, *Memorandum*, That the Attorney General, *Wedneſday proxime poſt tres Trin.* 11 *Geo.* [which was in *Trin.* term 1715.] comes and informs the court, that the defendant *onerabilis exiſtens ad deliberandum* 315 tons of allum to the duke of *B. ad certum diem jam praeteritum*, he the ſaid defendant, contriving and intending the ſaid duke of the ſaid allum to defraud, *et ea intentione* to avoid the delivery of the ſaid allum, 1 *Feb.* 11 *Geo.* [which was in *Feb.* 1724.] forged the indorſement, *&c.* So that the *onerabilis exiſtens* muſt refer to the exhibiting the information, which was long after the forgery; and if ſo, then the defendant does not appear to be chargeable to deliver the allum when the forgery was committed; or if it does refer to *ad diem jam praeteritum*, it is liable to the ſame exception; though theſe words ſeem to make it worſe, as making it more uncertain. But they inſiſted, it could not refer to 1 *Feb.* 11 *Geo.* by any grammatical conſtruction, and the rather becauſe before the time of the forgery is laid, a new ſentence is begun by the *ipſe idem Johannes Ward machinans et intendens, &c.* But the information ſhould have gone on, *et ſic onerabilis exiſtens* the 1 *Feb.* 11 *Geo.* did forge, *&c.* And for this *Cr. Jac.* 214. Sir *Nicholas Point*'s caſe was cited, as a caſe in point, where in an indictment for a forcible entry it was laid, that ſuch a day and year the defendant entred into ſuch lands, *exiſtens liberum tenementum* of *J. B.* and with force expelled him; and judgment was reverſed, for not ſaying *adtunc exiſtens*, for it might be the freehold of *J. B.* at the time of the indictment, and not at the time of the entry. *Cro. Jac.* 639. *Bridge*'s caſe, *Palm.* 426. *Turner*'s caſe, and 2 *Roll. Rep.* 65. *Ailing*'s caſe, agree with *Point*'s caſe. *Dier* 164. *b.* They relied alſo much upon the caſe of the King *verſ. Knight, H.* 11 *W.* 3. *B. R.* 1 *Salk.* 375. where an information was againſt the defendant, for that he *exiſtens nuper receptor generalis* of the cuſtoms, falſly ſuch a day indorſed exchequer bills, *quaſi receptas pro cuſtumis, &c.* and the fact with which he was charged being no offenſe if it had been well laid, unleſs he was receiver general, *&c.* at the time when he indorſed the exchequer bills, *&c.* the whole court held the information ill, becauſe it was *nuper receptor*, and held it could not be made good by inference or intendment, but that a criminal charge ought to be expreſs, and not to be made out by argument; and after a verdict in that caſe the judgment was arreſted. And therefore the defendant's counſel inſiſted, the information was naught, and no judgment could be given againſt the defendant upon it.

But to this it was anſwered by the counſel for the King, and held by the whole court, that it did ſufficiently appear, that the defendant was chargeable to deliver the allum at the time when he made this forged indorſement. For the forgery being laid to be done 1 *Feb.* 11 *Geo.* and the forgery being laid to be, *ea intentione* to avoid the delivery of the allum, it is the ſame as if it had been laid, *ſic onerabilis exiſtens* he had the 1 *Feb.* 11 *Geo.* forged the indorſement;

dorſement; which the counſel for the defendant agree, would have been good. And the *exiſtens onerabilis* referring to the perſon, ſhall not refer to the time of exhibiting the information, but the committing the offenſe. So is *Cro. Jac.* 609. *Johnſon*'s caſe, and 2 *Lev.* 179. the King *verſ. Moore*, in an information on the ſtatute 4 & 5 *Phil. & Mar. c.* 8. for taking a woman out of the cuſtody of the guardian, it was ſet out, that the defendants *exiſtentes* above the age of fourteen years, took *A.* then being a virgin unmarried, and poſſeſſed of goods, and ſeiſed of land, of a great value, out of the cuſtody of her mother, *contra formam ſtatuti:* after verdict for the crown it was moved in arreſt of judgment, that 'tis not ſaid, that the defendants at the time of the taking were above the age of fourteen years, for the *exiſtentes* refers to the time of the information exhibited, and not of the taking, as in the caſes of forcible entry, *exiſtens liberum tenementum* refers to the time of the indictment, and not of the entry. *Sed non allocatur:* in thoſe caſes the *exiſtens* follows the verb, *viz. ipſum diſſeiſivit* of ſuch land, *exiſtens liberum tenementum*, and therefore might be only the freehold after the diſſeiſin; but in the caſe of *Moor* the *exiſtens* preceeds the verb *ceperunt*, and ſo refers and is tied up to the time of the taking.

1 Salk. 377. The Queen verſ. Smith.

Another exception was taken to the information, that it was not ſhewn, how the defendant was chargeable to deliver the allum, whether it was by obligation, deed, &c. for it ought to appear to the court, that they might judge, whether he was chargeable or not. But to this it was anſwered, that the forgery was the *git* of the information, and that this was but an inducement to it; and that there was no manner of neceſſity, to ſhew how the defendant was chargeable to deliver the allum. And of that opinion was the whole court.

Another exception was taken to the information, that the word tons in the written certificate, relating to allum, imported a meaſure by weight, but in the information it was laid ſo many *dolia*, *Anglice* tons; whereas the word *dolium* properly ſignified a liquid meaſure, as a hogſhead, but not a meaſure by weight; and ſince there was a proper *Latin* word for tons by weight, the *Anglice* would not help it. But it was over-ruled, becauſe *dolium* in *Littleton*'s dictionary ſignifies a ton; and ſo in *Townſend prepar.* &c. 145. for a ton by weight both *tonna* and *dolium* are put. Another objection was taken, that the information uſed the word *contrafecit*, whereas it ought to be *controfecit*. But it was held good; and ſo is *Co. Intr.* 360. for counterfeiting the coin, *contrafecerunt*.

Mr. *Filmer* for the defendant took a farther exception to the firſt information, that the inſtrument was not laid to be publiſhed as well as forged. For the making and not publiſhing any ſuch writing, is not puniſhable at all. *Sheph. epitome* 610. and the precedents are to lay a publication. *Weſt's precedents* 108. 6 *preced.* in *Tremaine's entries,* all at common law. And though the ſecond information lays a publiſhing, yet it does not refer to the inſtrument in the firſt information, for it is not ſaid he did publiſh *idem ſcriptum,* but *quoddam ſcriptum*; nor is it ſaid, he publiſhed *ut verum ſcriptum,* as that of the King *verſ. Teners* is laid. *Tremaine's entries* 129. The caſe is ſhortly mentioned 1 *Sid.* 278. But as to this, the court held it not neceſſary, to lay a publication in the firſt information, for the forgery was puniſhable, though the party was not actually prejudiced, if he might be prejudiced by it, and therefore they held it good, though the information did not ſhew the duke was actually defrauded of the allum; and for the ſame reaſon, there was no neceſſity to lay, that the writing was publiſhed. Dier 202.

As for the ſecond information, the court being of opinion, that the firſt was good, it was not much for the defendant's ſervice, if there was a fault in the ſecond, becauſe judgment would be given againſt him on the firſt. However, Mr. Attorney General anſwered as to that, that this being an information for a forgery at common law, it was not neceſſary to ſay, he publiſhed it *ut verum ſcriptum,* that being only requiſite in proſecutions upon the ſtatute of 5 *Eliz. c.* 14.

Mr. *Strange* for the defendant took another exception, that there was no entry on the record, that proclamation was made, if any body would inform the King's juſtices, *&c.* But that was preſently over-ruled by the court, that ſuch proclamation was only for the benefit of the King, and the defendant was not prejudiced by the omiſſion; and *Coke Intr.* 353. *b.* hath no entry of ſuch proclamation. And judgment was given for the King; and the defendant *Ward* was ordered to ſtand in the pillory before *Weſtminſter* hall gate, and fined 500 *l.* and committed to the King's Bench priſon, there to lie, till he paid his fine.

Bindover *verſ.* Sindercombe.

Intr. *Hil.* 12 *Geo.* C. B. rot. 1105.

In ejectment the certainty of the thing ought to be ſuch, that the ſheriff may know how to give poſſeſſion thereof.

IN error upon a judgment for the plaintiff in the Common Pleas, after verdict and damages intire, the errors inſiſted upon were the uncertain deſcription of the things in the declaration, for which the ejectment was brought. And ſerjeant *Chapple* for the plaintiff in error laid it down as a ſettled rule, that the certainty of the thing ought to appear to be ſuch, that the ſheriff might know, of what to deliver poſſeſſion: now here the ejectment is for *illas partes meſuagii in Nether-Stowey et Over-Stowey in comitatu Somerſet praedicto, ſcilicet, unum locum vocatum* a paſſage room, *ex boreali parte ejuſdem meſſuagii*; but *locum* is altogether an uncertain deſcription of the thing, and cannot be helped by the *vocatum* a paſſage-room. The next error inſiſted on was, that the ejectment was for *illam parcellam areae antrorſum que jacet et boreali occidentali parte ſemitae ducentis a porticu antrorſum ad coquinam praedictam* [a *coquina* being mentioned before] and for *parcellam areae muratae pone praedictum meſuagium quae jacet ex boreali parte ſemitae ducentis a praedicto meſuagio ad pomarium*, and alſo for *illam parcellam pomarii quae jacet ex boreali parte bundae fore erect' a ſepe magni gardini verſus oriental. in directa linea trans pomarium et ex tranſverſo piſcinae, vocatae* a mote, *uſque ad pratum ad diſtantiam quadraginta et ſex pedum verſus auſtral. a foſſa quae ducit a magno gardino ad latrinam*; and alſo for *illam partem piſcinae, vocatae* a mote *taliter ſeparatam per bundam praedictam quae jacet verſus boreal.* and for *unum clauſum paſturae vocatum* five acres, *continens per aeſtimationem quinquaginta acras, &c.* And ſerjeant *Chapple* for the plaintiff in error argued, that *locum* is as uncertain as *clauſum*, and not ſuch a proper deſcription of a thing, as the law took notice of, and therefore fell within the reaſon of *Savel*'s caſe, 11 *Co.* 55. that *parcellam areae, parcellas pomarii, partem piſcinae*, were liable to the ſame objection, and were the ſame as *peciae terrae*. But it was adjudged, *Moore* 702. *pl.* 976. *Palmer verſ. Humphry*, that an ejectment could not be maintained for *peciae terrae*, and the judgment given for the plaintiff in that caſe was reverſed. Nor would an ejectment lie for *clauſum vocatum* dovecote-cloſe, containing three acres, but that the ejectment ought to be of ſo many acres of land or meadow, *&c.* 11 *Co.* 55. *Savel*'s caſe: which was agreed by *Holt* chief juſtice to be law, 1 *Salk.* 254. in the caſe of *Knight* againſt *Syms*; and there the ejectment was for five cloſes of arable and paſture, containing twenty acres, and there judgment was arreſted. And Mr. *Fazakerley* for the plaintiff in error cited a caſe

Shower 254.

between *Holdfaſt* and *Wright*, where in ejectment brought for a cloſe of meadow called *Partridge Lees*, containing acres more or leſs, judgment was arreſted laſt *Michaelmas* term by the Common Pleas, becauſe the certainty of the acres ought to appear in the declaration: but the more or leſs made this declaration uncertain.

Holdfaſt verſ. Wright.

But as to the exception to the declaration, that the ejectment did not lie for the *locum vocatum* a paſſage-room, the court held the declaration was good; for a part of a houſe called *locus*, with a name, as here the paſſage-room, and further aſcertained in which part of the houſe it lies, is ſufficiently aſcertained, to enable the ſheriff to deliver poſſeſſion. And ſo it is adjudged in point in the exchequer-chamber, *Hutchinſon verſ. Puller*, *Hil.* 34 *Car.* 2. *C. B.* where the ejectment was brought for a place called the *veſtry*, and judgment given for the plaintiff in the King's Bench was affirmed.

As to the exceptions of *parcella areae*, *parcella pomarii*, *partem piſcinae*, *&c.* the court held, they were certain enough, becauſe they were deſcribed by the abuttals ſufficiently, *viz. parcella areae antrorſum quae jacet*, *&c.* as in the declaration. But as to one of the abuttals, *viz. illa parcella pomarii quae jacet ex boreali parte bundae fore erect' a ſepe magni gardini verſus oriental. in directa linea trans pomarium, et ex tranſverſo piſcinae vocatae* a mote, *uſque ad pratum ad diſtantiam quadraginta et ſex pedum verſus auſtral. a foſſa quae ducit a magno gardino ad latrinam*, it was objected by the counſel for the plaintiff in error, that that abuttal could not aſcertain, what parcel or part of the orchard was intended to be deſcribed by the declaration, becauſe it referred to a boundary to be erected, *bunda fore erecta*, which no body could gueſs what it was to be. But as to this the court were of opinion, that this was certain enough; for though the boundary was ſaid to be erected, yet this being after a verdict, they could not intend, but that evidence was given upon the trial, to ſupport this deſcription, and that though the boundary was not perfectly erected and compleated, there were ſome marks, where it was deſigned to be erected: however, that the laying it from the bound to be erected from the hedge of the great garden *verſus oriental.* in a direct line *trans pomarium*, *&c. uſque ad pratum*, *&c.* ſufficiently aſcertained the parcel of the orchard, for which the ejectment was brought, and that the ſheriff might be thereby well directed to deliver poſſeſſion. To this deſcription another exception was likewiſe took by the counſel for the plaintiff in error, that it was laid to be *ex tranſverſo piſcinae vocatae* a mote, whereas that is not a proper word for a mote, for *piſcina* only ſignifies a place to keep fiſh in; but it ſhould be *foſſa*, which more properly ſignifies a mote; and this goes to another part of the declaration, *viz. partem piſcinae vocatae* a mote. But to this it was anſwered, that though *piſcina* might ſignify a place to keep fiſh in, yet this might be ſo, and yet have the name of or be called a mote; and therefore it was well enough.

The laſt exception was, that the ejectment was for *clauſum paſturae vocatum* five acres, containing by eſtimation five acres. And for this they relied upon *Savel*'s caſe as in point, which *Holt* affirmed was law. But to this it was anſwered, that *Savel*'s caſe did not come up to this, for in *Savel*'s caſe there was no mention of what ſort of land it was, whether arable, meadow or paſture, which ſeems to be the beſt reaſon for that judgment; but here it is ſaid paſture: and therefore after *Savel*'s caſe, *Cro. Jac.* 435. *Wikes verſ. Sparrow*, an ejectment for two cloſes, called *higher Gulwell* and *lower Gulwell*, containing three acres of land, without ſhewing what every cloſe contained, it was adjudged for the plaintiff: and as to the judgment in *Savel*'s caſe, in 2 *Ro. Rep.* 167. it is ſaid, that judgment was given on a ſudden. And as to the caſe cited out of *Salkeld* 254. *Knight verſ. Syms*, the reaſon of that judgment appears by the book to be, becauſe it was not ſhewn, how many acres there were of arable, and how many of paſture. So is *Cro. Car.* 573. *Martin verſ. Nichols*. And judgment was affirmed by the unanimous opinion of the court, *Jan.* 31, 1726. As to the caſe cited of *Holdfaſt verſ. Wright*, *quaere* if it was ſo adjudged, for I ſhould have taken it to be well enough?

The King *verſ.* Seawood.

S. C. 2 Stra. 739. Information was amended after a plea in abatement.

AN information was filed againſt the defendant by the addition of *generoſus*, for a challenge. The defendant pleaded, that he was a ſurgeon, *&c.* And upon a motion for leave to amend the information, a rule was made, to ſhew cauſe, *&c.* and upon hearing counſel of both ſides the rule was made abſolute, for amendment of the information upon payment of coſts, this being a ſuit not carried on by the crown. The defendant ſhall have coſts for not going to trial, where the proſecution is not by the King. The King *verſ. Johnſon*, cited by my brother *Forteſcue*. In the caſe of the King *verſ. Tutchin*, there was a plea of *miſnomer* in abatement, and the Attorney General had leave to amend, and gave the defendant an imparlance. *Friday*, *Febr.* 3, 1726.

The

The inhabitants of Woodend in the pariſh of Blakeſley in the county of Northampton *verſ.* the inhabitants of Paulſpury in that county.

S. C. 2 Stra. 746.

A child may gain a new ſettlement with the mother after the father's death.

TWO juſtices of the peace of the county of *Northampton* by their order dated the 19th of *March*, 12 *Geo.* 1725, removed *Eliz. Buncher* a poor perſon from the pariſh of *Paulſpury* to the endſhip of *Woodend*, as the place of her laſt legal ſettlement. Which order was delivered into the general quarter-ſeſſions held for the county of *Northampton*, 19th of *April* 1726. by the two juſtices: at which ſeſſions the inhabitants of *Woodend* appealed againſt the ſaid order: after hearing which appeal the ſeſſions ſtated the fact ſpecially, *viz.* that it appeared to that court, that *John Buncher* rented an houſe and ſome cloſes at *Woodend* about 30 *l. per annum*, and inhabited the ſaid houſe for ſeveral years, and died inſolvent, and left a widow and one daughter, whoſe name is *Eliz. Buncher*; the widow ſoon after removed into *Paulſpury*, into a meſuage or tenement about 40 *s. per annum* value, and ſome lands about 10 *l. per annum*, that was her own eſtate for life, both houſe and land being copyhold, and took her ſaid daughter with her, then about the age of fourteen years; and the daughter lived with her mother at *Paulſpury* above two years in the ſaid meſuage or tenement; but the mother let the ſaid land to a tenant; whereupon this court is of opinion, that the ſaid *Eliz. Buncher* is ſettled at *Woodend*, the place of her father's ſettlement, and not at *Paulſpury*, where ſhe lived with her ſaid mother as aforeſaid, and therefore do confirm the order above recited for ſending her to *Woodend*. And theſe orders being removed into the King's Bench by *certiorari*, Mr. *Reeve* moved laſt term to quaſh them, becauſe it appeared by the fact ſtated, the laſt legal ſettlement of *Eliz. Buncher* was at *Paulſpury*, becauſe the mother being a widow, having gained a new ſettlement after her huſband's death, the daughter gained a ſettlement alſo, as part of her family. And there is no difference between a father's gaining a ſettlement and a mother's in ſuch a caſe as this, for the mother is obliged to provide for her children after her huſband's death, as the father was when living; and ſhe could not leave this daughter behind her, neither could ſhe be removed from her. But if after the huſband's death ſhe had married a man ſettled in another pariſh, though her children by her former huſband muſt have gone with her for nurture, yet they would have been no part of her ſecond huſband's family, and therefore would have gained no ſettlement thereby in the pariſh where the father in law was ſettled. And for this he cited the caſe of the inhabitants of *St. Catherine*'s near the *Tower*, and the inhabitants of *St. George's Southwark*, as a caſe expreſly in point; and ſuch orders as theſe were quaſhed, *Mich* 1 *Geo.* 1714. for the reaſons by him before alleged.

But Mr. *Chauncy* for the inhabitants of *Paulſpury* ſaid, the difference was, between a ſettlement gained by the father, and a ſettlement gained by the mother. In the firſt caſe it had been adjudged, the ſettlement of the father gained his children a ſettlement; though *Holt* at firſt doubted of that, 2 *Salk.* 528. between the inhabitants of *Cumner* and *Milton.* But there was not the ſame reaſon as to the mother's ſettlement, becauſe the mother was not obliged to take care of the children.

The court ordered the copy of the orders in this caſe, and of the caſe of *St. Catherine*'s and *St. George*'s that was cited, to be delivered to them, and that it ſhould be ſtirred again this term. And upon reading the orders relating to *St. Catherine*'s and *St. George*'s, cited by Mr. *Reeve*, they were thus. Two juſtices of the peace of *Surrey* by their order dated the 25th of *January* 1713, removed *Lydia*, *Elizabeth*, *Anne*, *Catherine*, *James* and *Samuel Cloyd*, from the pariſh of *St. George Southwark* in *Surrey* to the pariſh of *St. Catherine* near the *Tower* in *Middleſex*, as the place of their laſt legal ſettlement; and upon an appeal to the quarter-ſeſſions of *Surrey*, held at *Ryegate* 6 *April* 1714, they made a ſpecial order, *viz.* reciting the order of the two juſtices: now upon examination of witneſſes upon oath it appears to this court, that the ſaid *Lydia Cloyd*, aged ſixteen years, *Elizabeth Cloyd*, aged fourteen years, *Anne Cloyd*, aged ten years, *Catharine Cloyd*, aged eight years, *James Cloyd*, aged four years, and *Samuel Cloyd*, aged three years, were the ſons and daughters of *John Cloyd* and *Lydia Cloyd*, which ſaid *John Cloyd* the father at the time of his death was legally ſettled in the ſaid pariſh of *St. Catharine*, and there died, and that none of the ſaid children have by any act of their own gained any ſettlement diſtinct from the ſettlement of their father; but that after his death *Lydia* the widow and the ſaid ſix children went to dwell at the ſaid pariſh of *St. George Southwark*, where ſhe took a houſe of 12 *l. per annum*, and lived in the ſame above four months, and paid the Queen's tax, but never paid any rent to her landlord: now upon hearing, *&c.* this court is of opinion, that the ſaid ſix children, not having gained any ſettlement themſelves, are ſettled at the ſaid pariſh of *St. Catharine*, where their father *John Cloyd* now deceaſed had his laſt legal ſettlement; and gained no ſettlement by living in the ſaid houſe with their mother, and diſmiſſed the appeal, and confirmed the order of the two juſtices. And theſe orders being removed into the King's Bench by *certiorari*, were quaſhed, *Mich.* 1 *Geo.* for the reaſons alleged by Mr. *Reeve.* And therefore *February* the 13th, 1726. upon the authority of that precedent the court quaſhed the orders in the preſent caſe, adjudging the place of *Elizabeth Buncher*'s laſt legal ſettlement to be at *Paulſpury*.

Eaſter Term

13 Georgii regis, B. R. 1727.

Shipman *againſt* Lethieullier.

S. C. Barnard. 14.

SHipman brought a writ of error upon a judgment in an *indebitatus aſſumpſit* brought againſt him by *Lethieullier* in the Common Pleas, by *nihil dicit,* and writ of inquiry executed, and final judgment given againſt him for 1295*l.* *&c.* and aſſigned the general errors, and alſo that there was no writ of inquiry of damages between the ſaid parties to the ſaid plea, or inquiſition thereupon taken, filed or remaining upon record in the Common Pleas, returnable *in praedicto craſtino aſcenſionis anno regni domini regis duodecimo, in termino Paſchae anno, &c. duodecimo:* whereupon he prayed a *certiorari,* directed to the *cuſtos brevium* of the Common Pleas, to certify, *&c.* To which the *cuſtos brevium* of the Common Pleas returned, *quod non habetur aliquod breve de inquirendo de damnis et inquiſitio ſuperinde capta inter partes praedictas de placito praedicto in cuſtodia ſua vicecomiti London directum* returnable *in craſtino aſcenſionis Domini praedicti termini paſchae de recordo affilatum, &c.* Upon which the defendant in error *Lethieullier* ſuggeſts, that there is a writ of inquiry of damages between the parties in the ſaid plea in the cuſtody of the *cuſtos brevium* of the Common Pleas *de termino paſchae praedicto de recordo affilatum,* and prays another *certiorari, &c.* To which the *cuſtos brevium* of the Common Pleas returned, *quod ſcrutatis brevibus de inquirendo de damnis ipſius domini regis vicecomiti London directis in cuſtodia ſua de recordo affilatis de termino paſchae anno regni ſui duodecimo, et retornabilibus in craſtino aſcenſionis Domini in dicto termino, habetur quoddam breve de inquirendo de damnis vicecomiti London directum inter partes infranominatas de placito infraſcripto in cuſtodia ſua praedicti termini et retornatum de recordo affilatum cum inquiſitione ſuperinde*; and then ſets out the writ of inquiry, and the inquiſition, *&c.* which warranted and agreed with the record. And thereupon the defendant in error pleaded, *in nullo eſt erratum.* And ſerjeant *Richard Comyns* for the plaintiff in error inſiſted, that the judgment ought to be reverſed, becauſe the *cuſtos brevium* could not return upon the ſecond *certiorari* a fact in every particular contrary to his return upon the firſt *certiorari*, as here he has done. And the court cannot tell to which return to give credit, there being the ſame reaſon to give credit to the return of the firſt, as of the ſecond *certiorari*. And therefore it does not appear certainly to the court, that there was any writ of inquiry and inquiſition, to induce them to affirm the judgment; and he cited 1 *Leon.* 22. *Darrell verſ. Thin*, and 176. *Sed non allocatur*; for here being a poſitive return of a writ of inquiry, which warrants the record, they will take that to be true. And judgment was affirmed *May* the 22d, 1727. See *Cro. Jac.* 130, 131. *Markham verſ. Beſſum*, *Cro. Jac.* 597. *Johns verſ. Bowens*, 1 *Salk.* 266. Note, *Forteſcue* juſtice ſaid, the caſe of *Overton verſ. Broker*, *M.* 12 *Geo. B. R.* was the ſame caſe, except that that was in the caſe of an original writ; but I did not remember that caſe.

Overton verſ. Broker.

Monk *verſ.* Cooper.

R*Oger Monk* aſſignee of *Philip Gulton* and *Elizabeth* his wife, ſurviving executrix of *Margaret Saunders*, brought an action of covenant for non-payment of rent for a houſe upon *London Bridge*, and declared, that *Margaret Saunders*, 30 *Auguſt* 1714. being poſſeſſed of the demiſed premiſſes for a term of ſixty years, which commenced in 1695. leaſed the ſame by indenture to the defendant from *Lady day* 1716 for twenty-one years, rendring yearly during the ſaid term of twenty-one years from and after the commencement thereof 25 *l. per annum*, payable quarterly; that the defendant covenanted by the ſaid indenture, that he, *&c.* would pay the ſaid rent to the ſaid *Margaret*, her executors, adminiſtrators and aſſigns, during the ſaid term, after the commencement thereof; that the defendant entred, and held the premiſſes till the 30th of *September* 1726. that *Margaret Saunders* being poſſeſſed of the reverſion made her will, and the ſaid *Elizabeth*, and another ſince deceaſed, her executors, and died 17th *Nov.* 1714. then they ſet out, that the will was proved, *&c.* and *Philip Gulton* and *Elizabeth* his wife *December* 21, 1725. bargained and ſold and aſſigned all their intereſt in the reverſion to the plaintiff, of which the defendant had notice, *&c.* then the breach is aſſigned in the defendant's not paying the rent at the ſeveral quarter-days, *Chriſtmas* 1725, *Lady day*, *Midſummer*, and *Michaelmas* 1726. The defendant prayed *oyer* of the leaſe, which being ſet out, among the other covenants there was a covenant from the defendant, that he would keep the demiſed premiſſes during the ſaid term, except the

S. C. 2 Stra. 763. Where there is a covenant to pay rent, an action lies though the leſſee has no enjoyment by the default of the leſſor.

ſame ſhould happen to be demoliſhed or damaged by fire, and would ſo deliver them up at the end of the term, except as before excepted. Then the defendant pleads, that before *Michaelmas* 1725, and during the defendant's occupation of the premiſſes, *viz.* 20th *Sept.* 1725, the demiſed premiſſes againſt the defendant's will *igne conſumpta fuerunt*, and were not rebuilt by the ſaid *Philip*, *Elizabeth* and *Roger*, or any of them, for a whole year next following *Mich.* 1725. *neque habuit aut habere potuit idem Thomas aliquem uſum, beneficium, aut occupationem inde durante toto tempore praedicto*, and therefore prays judgment, if he ought to be charged with the rent for thoſe four quarters. The plaintiff demurred, and the defendant joined in demurrer. Mr. *Strange* argued for the defendant, that the rent was payable only for the enjoyment of the demiſed premiſſes, and therefore ſince he was hindred enjoying them, by their being burnt down, for which he was not to anſwer, nor obliged to repair by his expreſs covenants, but it belonged to the plaintiff to rebuild them; it would be extremely hard to make him pay the rent for the time he could have no enjoyment, nor uſe, nor benefit of them. *Sed tota curia contra*, that the defendant was bound by his expreſs covenant, to pay the rent during the term. And judgment was given for the plaintiff *May* 12, 1737.

The King *againſt* Philip Wyatt.

Conviction for killing game.

THE defendant was convicted by lord *Barrimore* a juſtice of peace for the county of *Cheſter*, for that he not being qualified according to the ſtatute, the 2d of *Jan.* 13 *Geo.* at the *ville* of *Mottram Andrews* in the ſaid county, two greyhounds for killing and deſtroying game *illicite in cuſtodia ſua habuit et adtunc et ibidem uſus fuit* to deſtroy the game, contrary to the ſtatute; for which he was adjudged to forfeit five pounds. This conviction being removed by *certiorari* into the King's Bench, Mr. *Fazakerley* for the defendant took an exception to it, that by the ſtatute of 5 *Ann. cap.* 14. an act for the better preſervation of the game, upon which ſtatute this conviction is grounded, by *par.* 4. one half of the 5 *l.* forfeited is to be paid to the informer, and one half to the poor of the pariſh where the offenſe is committed. But in this caſe it does not appear, that the offenſe was committed in any pariſh, for both the information and the oath of the witneſs allege the offenſe to have been *apud villam de Mottram Andrews in comitatu Ceſtriae*, and the judgment of the juſtice is, *quod mihi praefato juſticiario conſtat, quod praedictus P. W. eſt culpabilis de praemiſſis praedictis in informatione praedicta ſpecificatis et ei impoſitis modo et forma prout in et per informationem praedictam et* *ſuperius allegatur*. But there does not appear to be any ſuch pariſh as *Mottram Andrews*, and conſequently the poor of the pariſh will be deprived of their moiety of the 5 *l.* forfeited. *Sed non allocatur*; for *per curiam*, if there was ſuch a pariſh as *Mottram Andrews*, it ſhall be *prima facie* intended to be co-extenſive with the *ville*. But if the offenſe was committed in a *ville*, which was extra-parochial (which may be) then the informer will have the whole penalty. And the conviction was affirmed, *May* 13, 1727. *per totam curiam*.

The King *againſt* the commiſſioners of ſewers for the levels of Tendring, Lexden and Winſtree, in the county of Eſſex.

S. C. 2 Stra. 763. *Tardè*, a good return to a *mandamus*.

A *Mandamus* bearing *teſte* the 10th of *February*, 12 *Geo.* returnable *Wedneſday proxime poſt quindenam Paſchae* was directed to the defendants, commanding them to make a rate upon the occupiers of lands within the hundreds of *Lexden* and *Winſtree*, to reimburſe *Daniel Bayley* expenditor of thoſe hundreds 349 *l.* 5 *s.* 8 *d.* which he had diſburſed, and had been allowed him by the commiſſioners on his account. To which the defendants returned, that 25 *Nov.* 1721. they made a rate upon the occupiers of lands within the levels of the hundreds of *Lexden* and *Winſtree*, within the limits of their commiſſion, for 799 *l.* 17 *s.* 4 *d.* *&c.* which when collected will be ſufficient and applicable to repay the ſaid *Daniel Bayley* the ſaid 349 *l.* 5 *s.* 8 *d.* which rate they cauſed to be delivered to the collector, *&c.* with the privity and conſent of the ſaid *Daniel Bailey*, to collect and levy, *&c.* for the uſes aforeſaid, which rate is ſtill in force: then they further return, that the King the 17th of *Jan.* the ſecond of his reign, by his letters patent appointed them commiſſioners, *&c.* which commiſſion, not being ſuperſeded, by virtue of the ſtatute expired and determined 17th of *Feb.* 12 *Geo.* and that the *mandamus* was delivered to them 12 *Feb.* 12 *Geo. et non antea*; *quodque propter temporis brevitatem ante expirationem et determinationem commiſſionis noſtrae praedictae executionem brevis ſive praecepti illius facere non potuimus, prout interius nobis praecipitur*. And the court were of opinion, that this return was good, becauſe the time was too ſhort for the commiſſioners to make a new rate. And if a peremptory *mandamus* ſhould be granted, the commiſſioners could not now make a rate, the commiſſion being expired.

Stanton *verſ.* Smith.

S. C. 2 Stra. 762. Words actionable.

IN an action upon the caſe for words, the plaintiff declared, that he was a perſon of good name and condition, and now is, and at the time of ſpeaking the words aftermentioned, and for ſeven years before, was a brewer, and in that trade got his livelihood and great gains, and always paid his debts to the full without any compounding; the defendant maliciouſly intending to bring the plaintiff into diſcredit, and to bring him into diſgrace with all the King's ſubjects to whom he was known, the defendant the 4th of *Octob.* 13 *Geo.* at, *&c.* ſpoke ſeveral falſe and ſcandalous words (mentioning them particularly in the declaration, and laying them ſeveral ways) of the plaintiff, *ad damnum* 200 *l.* The defendant as to all the words in the declaration, except theſe, *viz.* "He is a ſorry pitiful fellow, and a rogue, he compounded his debts at five ſhillings "in the pound," pleaded not guilty, whereupon iſſue was joined; and as to thoſe words the defendant demurred, and the plaintiff joined in demurrer. Mr. *Theed* for the defendant argued, that theſe words were not actionable, for there is no *colloquium* laid of his trade. He cited *Noy* 77. *Marſhall verſ. Allen.* He is a baſe broken raſcal, and hath broken twice, and I will make him break a third time. The court ſeemed to be of opinion, that the words were not actionable, and a rule was made for judgment for the defendant, unleſs cauſe, *&c.* [See the ſame caſe *Latch* 114. by the name of *Hill*'s caſe, where it is ſaid, the plaintiff had not alleged he was a tradeſman, but that he was an honeſt ſubject, and got his livelihood by buying and ſelling only, and for that all the judges agreed that judgment ſhould be arreſted; but otherwiſe it had been if he had been a tradeſman.] He cited alſo 2 *Salk.* 694. You are a cheat, and have been a cheat divers years, ſpoke of a tradeſman, and judgment was arreſted. *Savage againſt Robery.* But we were all of opinion, that ſuch words ſpoke of a tradeſman muſt greatly leſſen the credit of a tradeſman, and be very prejudicial to him, and therefore that they were actionable. Judgment was given for the plaintiff, *May* 9.

Angus Mackleod *verſ.* John Snee, Francis Pargiter, William Beckin.

Intr. *Paſch.* 12 *Geo.* B. R. Rot. 137.

Intr. *Hil.* 11 *Geo.* C. B. Rot. 1763 et 1769.

S. C. Stra. 762.

What is a bill of exchange.

ERROR on a judgment given againſt *Mackleod* in the Common Pleas, in an action on the caſe brought upon ſeveral promiſes againſt him by *Snee*, *Pargiter*, and *Beckin*; wherein they declared, that they, and one *John Dundas* and *Charles Savers* were merchants, *&c.* and that the ſaid *John Dundas* 25 *May* 1724, at *London*, *&c.* drew his bill of exchange according to the cuſtom of merchants, dated at *Edinburgh*, and the ſame day directed it to the defendant by the name of captain *Mackleod* of the late brigadier *Douglas*'s regiment of foot, *et per billam illam requiſivit* the defendant *unum menſem poſt datum ejuſdem billae ſolvere praefato Carolo Savers vel ordini novem libras et decem ſolidos ſterling, ut ejus quarter. dimid. ſtipend.* (*Anglice* quarter half pay) *a* 24 *die Junii A. D.* 1724. *uſque* 25 *diem Septembris ſequentem per advanceament. Anglice per* advance, *prout per adviſamentum a praedicto Johanne Dundas*; that *Charles Savers* indorſed the bill payable to the plaintiff's *Snee &c.* for value received, of which *poſtea*, *viz.* 5 *June* 1724, the defendant *Mackleod* had notice, and afterwards the ſame day and year accepted it, *&c.* then they laid ſeveral other counts in the declaration, *&c.* The defendant pleaded *non aſſumpſit*. And on trial before lord chief juſtice *Eyre* the jury found a verdict for the plaintiff, and 9 *l.* 10 *s.* damages beſides coſts; and found as to all the other counts for the defendant. And judgment being given for the plaintiffs, *Mackleod* brought this writ of error. And ſerjeants *Chapple* and *Whitaker* argued for the plaintiff in error, that judgment ought to be reverſed, becauſe this was not a bill of exchange, but was an appointment, or an authority, or order for the defendant to pay the 9 *l.* 10 *s.* As if one deſire the caſhier of the Bank to pay money which would grow due for a dividend before hand, ſo this is only an appointment by an half-pay officer to the defendant, to pay by way of advance. In this caſe the drawer never intended to make himſelf chargeable by this bill, for it is not ſaid to be for value received; ſo that (they inſiſted) this could not be a bill of exchange as to the drawer; and if not, it cannot be ſuch as to the acceptor: for it muſt be a bill of exchange, if at all, both to drawer and acceptor. And they compared it to the caſe of *Joceline verſ. Laſerre*, "Pray pay out of my growing ſubſiſtence,"

&c. no bill of exchange; [See before, 1362.] and to the caſe *Jenny verſ. Herle*, *P.* 10 *Geo. B.R.* 1724. "Pay to Mr. *Jo. Herle* 1945 *l.* upon demand, out of the money in your hands belonging to the proprietors of the *Devonſhire* mines, being part of the conſideration money for the purchaſe of the manor of *Weſt Buckland*," [*Ante*, 1361.] On the other hand it was urged by Mr. *Reeve* and Mr. *Fazakerley* for the defendants in error, that this was a good bill of exchange. And of that opinion was the whole court, for this bill was not payable upon a contingency, nor out of a particular fund, and is made payable at all events, and payable to order, and is drawn upon the general credit of the drawer, not out of the half-pay, for it is payable as ſoon as the quarter begins for the half-pay mentioned in the bill, which was not to be due till three months after. And judgment was affirmed by my brothers *Forteſcue*, *Reynolds* and *Probyn* juſtices, and myſelf, *May* 2, 1727.

William Aſlett *verſ.* William Vincent.

Intr. *Hil.* 13 *Geo.* B. R. Rot.

The defendant demurs after iſſue joined upon *de injuria ſua propria*, it is a diſcontinuance and ill.

IN treſpaſs for breaking the plaintiff's houſe, and taking away a great quantity of the plaintiff's goods then and there found, to the value of 100 *l.* and converting them to his own uſe, and diſpoſing of them, and diſturbing the plaintiff in poſſeſſion of his houſe, and keeping poſſeſſion for three weeks, *&c.* As to the force and arms, and diſturbing the plaintiff in the poſſeſſion of his houſe, and keeping him out of poſſeſſion, the defendant pleaded not guilty, and iſſue was joined upon that; and as to the reſt of the treſpaſs the defendant juſtified, that he was ſeiſed in fee of the houſe, and being ſo ſeiſed by indenture demiſed the ſaid houſe to *Thomas Sanſon* for fifteen years, rendring 34 *l. per annum*, *&c.* and for a year's rent due *Lady day* before the time when, *&c.* he entred, and diſtrained the goods, and gave notice, *&c.* for what he had diſtrained the goods, and after five days from thence with the conſtable of the ſaid pariſh, *&c.* cauſed the ſaid goods diſtrained there to be appraiſed by two appraiſers, by the ſaid conſtable ſworn, *&c.* and after ſuch appraiſement, for default of payment of the ſaid rent, and replevying the diſtreſs, he ſold the goods for 15 *l.* 13 *s.* 6 *d.* being the beſt price that could be got for the ſame, towards ſatisfaction of the rent for which they were diſtrained, *&c. prout ei bene licuit*; which is all the reſidue of the treſpaſs, *&c.*

The plaintiff replied, that the defendant *de injuria ſua propria abſque tali cauſa* in his plea alleged, *praedicto tempore quo, &c. vi et armis domum praedictam fregit et intravit, et bona et catalla* of the plaintiff, *&c. cepit, aſportavit, et in uſum proprium convertit et diſpoſuit, modo et forma* the plaintiff *ſuperius verſus eum queritur*; *et hoc petit quod inquiratur per patriam, et praedictus Willielmus Vincent inde ſimiliter, &c.* and then the defendant *dicit quod placitum praedictum* of the plaintiff *minus ſufficiens in lege exiſtit*, and ſo demurs generally; and the plaintiff joined in demurrer. Serjeant *Glyde* for the defendant argued, that the replication was ill, becauſe the defendant by his plea had ſhewed, that he entred into the houſe by authority of law, to take a diſtreſs for the rent; and as to the goods he made a title under that diſtreſs, and therefore according to 8 *Co.* 67. *Crogate*'s caſe, where the defendant claims an intereſt, or acts under an authority given by law, the plaintiff cannot reply generally, *de injuria ſua propria abſque tali cauſa*, but they ought to be anſwered. In 1 *Lev.* 307. *White againſt Stubbs*, in treſpaſs for entring his cloſe, and taking his goods, the defendant juſtified the taking *damage feaſant:* the plaintiff replied, *de injuria ſua propria abſque tali cauſa*, the defendant demurred; and it was reſolved, that the replication was ill, the plea in bar containing a title; which he relied on as a ſtrong caſe.

Mr. *Reeve* for the plaintiff inſiſted, the replication was good; for the plea contained nothing but matter of fact; that the defendant did not make title to the goods, but only intituled himſelf to diſtrain them, and diſpoſe of the diſtreſs, as the ſtatute had directed; but that by the diſtreſs no property veſted in the defendant. And as to *Crogate*'s caſe, 8 *Co.* 67. where it is ſaid, a particular anſwer ought to be given, where the party juſtifies under an authority given by law; he ſaid, *Holt* chief juſtice, in the caſe of *Chance verſ. Weedon*, which is now printed in 2 *Salk.* 628. denied that part of *Crogate*'s caſe, and held, that where the defendant juſtifies by authority by common law, or of a general act of parliament, *de injuria ſua propria abſque tali cauſa*, is a good replication. However he ſaid, here the defendant's demurrer came after iſſue was joined upon the *de injuria ſua propria abſque tali cauſa*, and therefore was ill. And upon that the court held, they could give no judgment. *May* 12.

Ante, 700.

Trin.

Trin. Term

Anno regni 13 Geo. 1. et primo Geo. 2. B. R. 1727.

Sarah Smith *verſ.* William Jarves and James Baily.

8 Mod. 307. *Ante*, 1376.

IN caſe brought by the plaintiff as indorſee of a promiſſory note againſt the defendants, the plaintiff declared, that the 28th of *Feb.* 1725. and long before, *et continue poſtea hucuſque*, the defendants were partners *in via merchandizandi et conjunctim negotiatorum* for their common advantage, and that the ſaid 28th of *Feb.* 1725, at, *&c.* the ſaid defendant *William*, for himſelf and the ſaid *James* his partner, made his promiſſory note in writing with his own hand ſubſcribed according to the ſtatute, *&c.* bearing date the ſaid day and year, and delivered it then and there to one *Peter Rich*, by which note the ſaid *William*, for himſelf and the ſaid *James Baily*, promiſed to pay to the ſaid *Peter* or order ſeven months after date of the ſaid note 36 *l.* 5 *s.* for value received, *&c.* To this count (there being ſeveral other counts in the declaration, to which the defendants pleaded *non aſſumpſerunt*) the defendants demurred generally. And ſerjeant *Glyde* for the defendants inſiſted, that this note was not a negotiable note, nor indorſeable to the plaintiff, within the act of 3 & 4 *Annae, cap.* 9. becauſe the plaintiff had not charged in the declaration, that the defendant *William* had ſigned the note for him and the other defendant *Baily* his partner. But *per curiam*, it is very good, for the plaintiff has ſaid, the defendant *William* made it for himſelf and his partner, and ſubſcribed it with his own hand, whereby he promiſed for himſelf and partner to pay, which ſhews ſufficiently he ſigned it for himſelf and partner. And judgment was given for the plaintiff, *June* the 8th, 1727.

Monday, *June* 12, Mr. *Oneby* being brought to the bar from *Newgate*, to hear the reſolution of the court, the chief juſtice delivered the opinion of the judges, in the following manner.

The King *verſ.* John Oneby.

S. C. 2 Stra. 766. Foſter 297.

AT the general ſeſſions of the peace held at *Hickes hall* for the county of *Middleſex* 28th of *February* in the 12th year of his Majeſty's reign, *John Oneby* of *St. Martins in the fields*, Gent. was indicted, for that he the 2d of *February* 12 *Geo.* at the ſaid pariſh, feloniouſly, voluntarily, and of his malice forethought, made an aſſault upon one *William Gower*, Eſq; and that he the ſaid *John Oneby*, with a ſword which he then and there held drawn in his right hand, the ſaid *William Gower* in and upon the left part of his belly near the navel feloniouſly, voluntarily, and of his malice forethought, did ſtrike and thruſt, giving the ſaid *William Gower* then and there with the ſaid drawn ſword in and upon his ſaid left part of his belly near the navel a mortal wound, of which mortal wound the ſaid *William Gower* lived in a languiſhing condition from the ſaid 2d of *February* to the 3d day of the ſaid *February*, on which 3d day of *February* the ſaid *William Gower* at the pariſh aforeſaid of the ſaid mortal wound did die; and ſo the jurors find, that the ſaid *Oneby* the ſaid *William Gower* feloniouſly, voluntarily, and of his malice forethought, did kill, and murder. Which indictment being delivered to the juſtices of gaol-delivery for *Newgate*, the ſaid *John Oneby* was arraigned thereupon, and pleaded not guilty. And upon the trial, which was had before Mr. baron *Hale* and Sir *William Thompſon* recorder of *London*, the jury found the ſpecial verdict following, *viz.* that the ſaid *John Oneby* and the ſaid *William Gower*, together with *John Rich*, *Thomas Hawkins* and *Michael Blunt*, were in company together in a room in the *Caſtle tavern* in the pariſh of *St. Martin's in the fields*, in a friendly manner; that after the ſaid *John Oneby*, *William Gower*, *John Rich*, *Thomas Hawkins* and *Michael Blunt*, had continued together in the ſaid room for the ſpace of two hours, a box and dice were called for, whereupon the drawer ſaid, that he had dice but no box; and that thereupon the ſaid *John Oneby* commanded the drawer to bring a pepper-box, and accordingly a pepper-box and dice were brought; that immediately after the ſaid *John Oneby*, *William Gower*, *John Rich*, *Thomas Hawkins* and *Michael Blunt*, began to play at hazard; and after they had played half an hour, the ſaid *John Rich* asked if any of the company would ſet him three pieces of money called half-crowns, that thereupon the ſaid *William Gower* in a jocular manner ſet three pieces of money called halfpence, and then ſaid to the ſaid *John Rich*, that he had ſet him three pieces; that the ſaid *John Oneby* at the ſame time ſet the ſaid *John Rich* three half-crowns, which the ſaid *John Rich* won; and immediately the ſaid *John Oneby* in an angry manner turned to the ſaid *William Gower*, and ſaid to him, that it was an impertinent thing to ſet half-pence; and further ſaid to the ſaid *William Gower*, that he the ſaid *William Gower* was an impertinent puppy in ſo doing; to which the ſaid *William Gower* then and there anſwered, that whoſoever called him ſo was a raſcal; and thereupon the ſaid *John Oneby* took up a glaſs bottle, and with great force threw it at the ſaid *William Gower*, but the glaſs bottle did not ſtrike the ſaid *William Gower*, but paſſing by near his head bruſhed his peruke, which he then had upon his head, and beat out ſome of the powder out of his peruke; that thereupon the ſaid *William Gower* immediately after toſt a glaſs or candleſtick *at* the ſaid *John Oneby*, but the glaſs or candleſtick did not hit the ſaid *John Oneby*; upon which both the ſaid *John Oneby* and *William Gower* preſently roſe from their ſeats, to fetch their ſwords, which then hung up in the room; and the ſaid *William Gower* then drew his ſword out of the ſcabbard, but the ſaid *John Oneby* was hindred by others of the company from drawing his ſword out of the ſcabbard, whereupon the ſaid *William Gower* threw away his ſword, and by the interpoſition of the ſaid *John Rich*, *Thomas Hawkins* and *Michael Blunt*, the ſaid *William Gower* and *John Oneby* ſat down again, and being ſo ſet down continued for the ſpace of an hour in company with the ſaid *John Rich*, *Thomas Hawkins* and *Michael Blunt*; that after the expiration of that hour the ſaid *William Gower* ſaid to the ſaid *John Oneby*, we have had hot words, but you was the aggreſſor, but I think we may paſs it over; and at the ſame time the ſaid *William Gower* offered his hand to the ſaid *John Oneby*; to which the ſaid *John Oneby* then anſwered the ſaid *William Gower*, no damn you, I will have your blood; that afterwards the reckoning was paid by the ſaid *John Oneby*, *William Gower*, *John Rich*, *Thomas Hawkins* and *Michael Blunt*; and that the ſaid *William Gower*, *John Rich*, *Thomas Hawkins* and *Michael Blunt* went out of the ſaid room, with an intent to go home, leaving the ſaid *John Oneby* in the room; that the ſaid *John Oneby* ſo as aforeſaid remaining in the room, called to the ſaid *William Gower*, young man come back, I have ſomething to ſay to you; that thereupon the ſaid *William Gower* returned into the ſaid room, and the door of the room was immediately flung to, and ſhut, by reaſon of which ſhutting of the door, all of the ſaid company beſides the ſaid *William Gower* and *John Oneby* were ſhut out of the room; and that then after ſhutting of the door a claſhing of ſwords was heard; then the jury find, that the ſaid *John Oneby* gave the ſaid *William Gower* with his ſword the mortal wound in the indictment

[*Erga*] without an *Anglice*.

dictment mentioned, of which he died; but they further find, that at the breaking up of the company the ſaid *John Oneby* had his great coat thrown over his ſhoulders, and that the ſaid *John Oneby* received three ſmall wounds in the fighting with the ſaid *William Gower*; and that the ſaid *William Gower*, being asked upon his death-bed, whether he the ſaid *William Gower* had received his wounds in a manner among ſwords-men called fair, anſwered, I think I did; and they further find, that from the time the ſaid *Oneby* threw the glaſs bottle at the ſaid *William Gower*, there was no reconciliation between the ſaid *John Oneby* and *William Gower*: and whether this is murder or manſlaughter, the jury pray the advice of the court: and if, *&c.*

So that the queſtion upon the ſpecial verdict is, whether *John Oneby* the priſoner at the bar is guilty of murder or manſlaughter.

A great deal of time was ſpent in drawing up this ſpecial verdict; for although the trial at the *Old Baily* was in the beginning of laſt *March* was twelve months, yet the record was not removed into this court till *Hilary* term laſt; towards the end of which term it was argued by counſel on both ſides, and another argument being deſired by counſel for the priſoner, we thought it proper, to deſire the opinion of all the reſt of the judges; and for that purpoſe it was argued before all the judges at *Serjeants inn hall* in *Chancery-lane* upon the 6th day of *May* laſt; which was as ſoon as all the judges could meet by reaſon of the intervention of the circuits. And after mature conſideration had, upon a meeting of them, they *ſeriatim* gave their opinions, and came to this reſolution unanimouſly, not one of them diſſenting, and which I have authority from them to declare, *viz.* that *John Oneby* the priſoner at the bar, upon the facts found upon this ſpecial verdict, is guilty of murder.

Without entring into a nice examination of the ſeveral definitions or deſcriptions of murder, as they are found in the old law-books, as *Bracton*, *Briton* and *Fleta*, where the wickedneſs of the act is aggravated by the circumſtances of ſecrecy or treachery; murder has been long ſince ſettled to be, the voluntary killing a perſon of malice prepenſe, and that whether it was done ſecretly, or publickly. *Staundf. pl. cor.* 18. *b.* 3 *Inſt.* 54.

But then it muſt be conſidered, what the word malice in ſuch caſe imports. In common acceptation malice is took to be a ſettled anger (which requires ſome length of time) in one perſon againſt another, and a deſire of revenge. But in the legal acceptation, it imports wickedneſs, which includes a circumſtance attending an act, that cuts off all excuſe. By the 25 *H.* 8. *c.* 33. for taking away clergy, it is enacted, that every perſon, who ſhall be indicted of the crimes therein mentioned, and thereupon arraigned, and ſtand mute of malice or of frowardneſs of mind, ſhall loſe the benefit of his clergy. Now in that place malice can never be underſtood in the vulgar ſenſe, for the party cannot be thought to ſtand mute out of a ſettled anger, or deſire of revenge, but only to ſave himſelf; and therefore ſuch ſtanding mute, and refuſing to ſubmit to the courſe of juſtice, is ſaid to be done wickedly, *i. e* without any manner of excuſe, or out of frowardneſs of mind.

This malice, an eſſential ingredient to make the killing a perſon murder (to uſe the expreſſions of lord chief juſtice *Coke* and lord chief juſtice *Hale*, whoſe authority hath eſtabliſhed them) muſt be either implied or expreſs; and ſays *Hale* in his *Pleas o the Crown* 44. this implied malice is collected, either from th manner of doing, or from the perſon ſlain, or the perſon killing As to the two laſt, there is no occaſion at preſent, to take them into conſideration.

1. As to the firſt, *viz.* from the manner of doing, as *Hale* expreſſes it, or as *Holt* chief juſtice, *Kelynge* 126. ſays, from th nature of the action. 1. Wilfully poiſoning any man implie malice. 2. If a man doth an act, that apparently muſt do harm with an intent to do harm, and death enſues; it will be murder As if *A.* runs with a horſe uſed to ſtrike, among a multitude o people, and the horſe kills a man; it will be murder, for the la implies malice from the nature of the act. 3. Killing a ma without a provocation is murder; as if *A.* meets *B.* in the ſtreet and immediately runs him through with a ſword, or knocks ou his brains with a hammer, or bottle. And if angry words ha paſſed in that caſe between *A.* and *B.* yet it would have bee murder in *A.* becauſe words are not ſuch a provocation, as wi prevent ſuch a homicide from being murder; lord *Morley*'s caſ *Kelynge* 56. 4. The law will imply malice from the nature o the original action, or firſt aſſault, though blows paſs between th parties, before the ſtroke is given, which occaſions the death. A if upon angry words, or abuſive language, between *A.* and *B.* o a ſudden, *A.* without any provocation (for angry words or abuſiv language in ſuch a caſe is looked on as none) draws his ſwor immediately, and makes a paſs at *B.* or ſtrikes at him with an dangerous weapon, as a piſtol, hammer, large ſtone, *&c.* whic in probability might kill *B.* or do him ſome great bodily hurt, an then *B.* draws his ſword, and mutual paſſes are made, and *A.* kill *B.* this will be murder; for the act was voluntary, and it appear from the nature of it, that it was done with an intent to do mi

chief; and therefore ſince in all probability it might have occaſioned *B.*'s death, or done him ſome great bodily harm, the law implies malice prepenſe; and the reſiſtance or paſſes that were made by *B.* were but in the defence of his perſon, which was violently and cruelly attacked. And this was the reſolution of *Kelynge* chief juſtice, *Twiſden*, *Windham* and *Morton* juſtices, in *Hopkin Hugget*'s caſe, *Kelynge* 62. And though in the principal caſe the eight other judges differed in opinion from the four judges in the King's Bench, yet to this opinion of the four the eight judges did agree, as *Kelynge* took it. And this was the true reaſon of *Mawgridge*'s caſe, *Kel.* 119. the judgment in which caſe is a great authority in this caſe, that not being ſo ſtrong a caſe as the preſent caſe. It was indeed objected by the counſel for the priſoner at the bar in their arguments in the preſent caſe, 1. That *Mawgridge*'s caſe was a ſingle caſe, that the judgment in that caſe had carried murder further than it had ever been carried before. 2. That it was not determined with the unanimous opinion of all the then judges, for one very great judge of the then twelve, *viz.* lord *Trevor*, differed from the other judges, and held it was only manſlaughter. But upon our meeting to conſider of this preſent caſe, all the judges unanimouſly agreed, that *Mawgridge*'s caſe was undoubted law, and that that judgment was a right and juſt judgment; ſo groundleſs was that inſinuation which had been made (for ſuch an inſinuation there was) in *Weſtminſter-hall*, that ſome of the preſent judges were of opinion, that the judgment in *Mawgridge*'s caſe was not a legal judgment.

And this is as much as is neceſſary, rather more than is neceſſary, to be ſaid as to implied malice, ſince there will be no occaſion in this caſe to look out for malice implied.

2. Malice expreſs, is a deſign formed of taking away another man's life, or of doing ſome miſchief to another, in the execution of which deſign death enſues. And this holds, where ſuch deſign is not formed againſt any particular perſon; as if *A.* having no particular malice againſt any particular perſon, comes with a general reſolution againſt all oppoſers; if the act be unlawful, and death enſue, it is murder. As if it be to commit a riot, to enter into a park, lord *Dacre*'s caſe, *H. P. C.* 47. *Moore* 86. *Sav.* 67. So if *A.* goes with a reſolution to kill the firſt man he meets, and meeting *B.* kills him, it is murder with expreſs malice; yet *A.* had not declared any malice againſt *B.* nor againſt any particular perſon. Much more will it be expreſs malice, when the miſchievous deſign is formed againſt any particular perſon, which may be made evident as well by circumſtances as by the expreſs declarations of the perſon killing. As that he would be revenged

of *B.* or that he would have his life, or have his blood, and ſometime after he kills *B.* And that ſuch declarations ſpoken ſeriouſly, or deliberately, or after time for reflection, manifeſt an expreſt malice, no body can doubt.

Having thus briefly mentioned that known and ſettled rule, that there muſt be either malice expreſs or implied, to make murder, and alſo ſome inſtances of what is one and what the other of them; I come to the preſent caſe before us.

All the twelve judges were unanimous in opinion, that as the facts are found in this ſpecial verdict, it appears, that the priſoner at the bar had expreſs malice againſt Mr. *Gower*, when he gave him the mortal wound, of which he died: 1. Mr. *Gower* did nothing that could reaſonably raiſe a paſſion in Mr. *Oneby*. He gave him no provocation whatſoever, for when M. *Gower* ſet the three half-pence, he ſet them againſt Mr. *Rich*, and that in a jocular manner, therefore that was no affront to Mr. *Oneby*. 2. Upon that Mr. *Oneby* turned to Mr. *Gower* in an angry manner, and gave him abuſive language, and called him impertinent puppy; the anſwer of *Gower* was not improper, nor more than what might be expected, that whoſoever called him ſo was a raſcal. 3. That as *Oneby* had before began with *Gower*, by giving him abuſive language, ſo he then took up the glaſs bottle, *et magna cum vi* threw it at *Gower*, and beat the powder out of his peruke; if it had killed *G.* it had been certainly murder; upon which *Gower* toſſed a glaſs or candleſtick at *Oneby*. And the difference of the finding in the ſpecial verdict is obſervable, *Oneby* threw the bottle at *G. magna cum vi*; *Gower* only toſſed the glaſs or candleſtick at *Oneby*. 4. When they fetched their ſwords, *Gower* did it only to defend himſelf; for the verdict finds, that though *G.* drew his ſword firſt, yet the priſoner at the bar being hindred by the company from drawing his ſword, *Gower* thereupon threw his ſword away. 5. By the interpoſition of the company the priſoner at the bar and Mr. *Gower* ſat down again, and continued in company for an hour, after which Mr. *Gower* ſaid, we have had hot words, but you was the aggreſſor, but I think we may paſs it over, and offered his hand to the priſoner; that the priſoner at the bar was the aggreſſor is true, and that in a violent manner; this was ſufficient, to have appeaſed Mr. *Oneby*, but what is his anſwer? no, damn you, I will have your blood. There is an expreſs declaration of malice, an expreſs declaration of a deſign of taking away Mr. *Gower*'s life. Theſe words are incapable of any other conſtruction. Theſe words ſhew his malicious intent, even in throwing the bottle at firſt; they are ſpoken an hour after the firſt action, and are ſpoken with deliberation.

The next fact the jury find is, that afterwards (not particularly finding what interval of time paſſed between the ſpeaking theſe words, and what is found next) that Mr. *Gower*, *Rich*, *Hawkins* and *Blunt* went out of the room, with an intent to go home, leaving the priſoner at the bar in the room; that the priſoner remaining in the room, called to the ſaid *William Gower*, ſaying, young man came back, I have ſome thing to ſay to you. Theſe words alſo ſhew a plain deliberation, and being attended with the circumſtances found before, and what follows immediately, import contempt, young man, are inſolent and imperious, come back, and import a reſentment he had conceived againſt Mr. *Gower*, about which he had ſomething to ſay to him. For what purpoſe did the priſoner ſtay, after all the company had left the room, to go home? it was to ſay ſomething to Mr. *Gower*. What is that? Why as ſoon as Mr. *Gower* is returned into the room, the door was immediately flung to, and ſhut; and the reſt of the company ſhut out; and then after ſhutting the door, a claſhing of ſwords was heard, and the priſoner gave Mr. *Gower* the mortal wound, of which he died.

Theſe immediate ſubſequent facts ſhew, what it was the priſoner had to ſay to Mr. *Gower*; it was to carry the malicious deſign, he had before declared he had againſt Mr. *Gower*, into execution, *viz.* to have his blood; and he had it, for he gave him the wound of which he died.

To go farther; if the priſoner had malice againſt Mr. *Gower*, though they fought after the door was ſhut, the interchange of blows will make no difference; for if *A.* has malice againſt *B.* and meets *B.* and ſtrikes him, *B.* draws, *A.* flies to the wall, *A.* kills *B.* it is murder. *H. P. C.* 42. *Kelynge* 58.

Nay, if the caſe had been, that there had been mutual malice between the priſoner and Mr. *Gower* (which does not appear to have been on the part of the deceaſed) and they had met and fought upon that malice; the killing Mr. *G.* by the priſoner had been murder. *H. P. C.* 47. 1 *Bulſtr.* 86, 87. *Hob.* 121. *Crompt.* 21.

The judges were all of opinion upon the facts found in this verdict, there appeared to be expreſs malice in *Oneby* againſt Mr. *Gower*, and then *Oneby* killing *Gower*, having ſuch expreſs malice againſt him, they were all unanimous and clear of opinion, that this was plainly murder.

Having thus mentioned the reaſons, upon which we ground this preſent reſolution; I ſhall next conſider, if any of the objections made by the counſel for the priſoner are an anſwer to theſe reaſons, or take of the force of them.

The counſel for the priſoner Mr. *Oneby* inſiſted, that upon the whole verdict the caſe was no more, than that from a ſlight occaſion paſſionate words aroſe, mutual reproaches paſſed, the quarrel was ſudden, mutual aſſaults were made, and on a ſudden fighting in heat of paſſion the priſoner killed the deceaſed; which can be no more than manſlaughter.

That ſuch fact could amount to no more than manſlaughter, they cited the known caſe, that if *A.* and *B.* fall out upon a ſudden, and they preſently agree to fight, and each fetches his weapon, and go into the field, and fight, and one of them kills the other; this is but manſlaughter, *H. P. C.* 48. 3 *Inſt.* 57. becauſe the paſſion was never cooled.

In this caſe (ſaid they) it is plain, the quarrel aroſe on a ſudden; Mr. *Oneby*'s paſſion was raiſed, and that is not found by the jury to have ever been cooled, and therefore the words Mr. *Oneby* ſpoke, no, damn you, I will have your blood, *&c.* were only words of heat ſpoke under the continuance of the firſt paſſion. And they further inſiſted, that the law had fixed no time, in which the paſſion muſt be took to be cooled; but that depends upon circumſtances, of which the jury are the proper judges. In this caſe the whole time that paſſed between the quarrel and giving the mortal wound, was but little more than an hour; and it has been adjudged, that the paſſion ſhall not be took to be cooled in very near that time in 12 *Co.* 87. *Cro. Jac.* 296. *H. P. C.* 48. *Rowley*'s caſe, where the child of *A.* beat the child of *B.* *B.*'s child all bloody ran home to his father; *B.* the father ran three quarters of a mile, and beat the child of *A.* by means whereof he died; this was adjudged to be only manſlaughter; yet there muſt have been a conſiderable time after *B.* was provoked by the uſage of his child, before he killed *A.*'s child, becauſe he ran three quarters of a mile; yet it being one continued paſſion raiſed in *B.* upon the beating of his child, it was held this was only manſlaughter. And in this preſent caſe, to ſhew the paſſion of Mr. *Oneby*, which was ſuddenly raiſed, was not cooled; the counſel for Mr. *Oneby* obſerved, that the jury had expreſly found, that there was no reconciliation between *Oneby* the priſoner and Mr. *Gower* the deceaſed, from the time Mr. *Oneby* firſt threw the bottle.

This I take to be the chief objection, upon which the counſel for the priſoner principally relied.

In anſwer to this objection I muſt firſt take notice, that where a man is killed, the law will not preſume, that it was upon a ſudden quarrel, unleſs it is proved ſo to be; and therefore in *Legg*'s caſe, *Kelyn.* 27. it was agreed upon evidence, that if *A.* kills *B.* and no ſudden quarrel appears, it is murder; for it lies upon the party indicted, to prove the ſudden quarrel.

In the next place, from what I have ſaid before it appears, that though a quarrel was ſudden, and mutual fighting before the mortal wound given; it is by no means to be took as a general rule, that the killing a man will be only manſlaughter. It is true, if reproachful language paſſes between *A.* and *B.* and *A* bids *B.* draw, and they both draw (it is not material which of them draws firſt) and they both fight, and mutual paſſes are made; death enſuing from thence will be only manſlaughter, becauſe it was of a ſudden, and each ran the hazard of his life. But there is a wide difference between that caſe, and where upon words *A.* draws his ſword, and makes a paſs at *B.* or with ſome dangerous weapon attacks him, and then *B.* draws, and they fight, and *A.* kills *B.* there though there was a quarrel upon abuſive language, and there was afterwards a mutual fighting, yet ſince *A.* attacked *B.* with a weapon or inſtrument, which might have taken away *B.*'s life, though they fought afterwards, that will be murder. And this was agreed by all the judges in the preſent caſe.

But for argument's ſake, and it is only for argument's ſake, and to give the objection made by the counſel for the priſoner its full force; If it ſhould be looked on here, that what is found in the former part of the verdict was upon a ſudden quarrel, and only the effect of paſſion; yet if it appears upon the ſpecial verdict, that there was ſufficient time for this paſſion to cool, and for reaſon to get the better of the tranſport of paſſion, and the ſubſequent acts were deliberate, before the mortal wound given; the killing of the deceaſed will be murder.

And all the judges were of opinion, that upon conſideration of the facts found, it appeared, there had been ſufficient time for Mr. *Oneby*'s tranſport of paſſion to cool, and that he had deliberated, and that the killing of Mr. *Gower* was a deliberate act, and the reſult of malice Mr. *Oneby* had conceived againſt the deceaſed.

But before I mention their reaſons, I muſt lay down this propoſition, which they all agreed, *viz.* that the court are judges of the malice, and not the jury; and that the court are alſo judges upon the facts found by the jury, whether, if the quarrel was ſudden,

den, there was time for the paſſion to cool, or whether the act was deliberate or not?

Upon the trial of the indictment the judge directs the jury thus, If you believe ſuch and ſuch witneſſes, who have ſworn ſuch and ſuch facts, the killing the deceaſed was with malice prepenſe expreſs, or it was with malice implied, and then you ought to find the priſoner guilty of murder; but if you do not believe thoſe witneſſes, then you ought to find him guilty of manſlaughter only: and ſo according to the nature of the caſe, if you believe ſuch and ſuch facts, the act was deliberate, or not deliberate; and then you ought to find ſo and ſo. And the jury may, if they think proper, give a general verdict, either that the priſoner is guilty of murder, or of manſlaughter. But if they decline giving a general verdict, and will find the facts ſpecially, the court is to form their judgment from the facts found, whether there was malice or not, or whether the fact was done on a ſudden tranſport of paſſion, or was an act of deliberation or not,

Although there are many ſpecial verdicts in indictments for murder, there never was one, where the jury find in expreſs terms, that the act was done with malice, or was not done with malice prepenſe, or that it was done upon a ſudden quarrel and in tranſport of paſſion, or that the paſſion was cooled, or not cooled, or that the act was deliberate, or not deliberate; but the collection of thoſe things from the facts found is left to the judgment of the court. *Holloway*'s caſe, *Palm.* 545. *Cro. Car.* 131. *W. Jones* 198. So in the caſe cited by the counſel for the priſoner, *Cro. Jac.* 296. *Rowley*'s caſe, the jury find the fact, but don't find in expreſs terms, that the father, whoſe child was beat, killed the other child in a ſudden heat of paſſion; but that was left to the judgment of the court, upon the particular facts found.

But then it is objected, that the law has fixed no time, in which the paſſion muſt be ſuppoſed to be cooled. 'Tis very true, it has not, nor could it, becauſe paſſions in ſome perſons are ſtronger and their judgments weaker than in others; and by conſequence it will require a longer time in ſome, for reaſon to get the better of their paſſions, than in others; but that muſt depend upon the facts, which ſhew whether the perſon has deliberated or not; for acts of deliberation will make it appear, whether that violent tranſport of paſſion was cooled or no.

But thus far the reſolutions of the judges have already gone, and it has been adjudged, that if two fall out upon a ſudden, and they appoint to fight next day, that the paſſion by that time muſt be looked on to be cooled; and in ſuch caſe, if they meet next day, and fight, and the one kills the other at that meeting, it has been often held to be murder. *Hale P. C.* 48.

To go a little further: If two men fall out in the morning, and meet and fight in the afternoon, and one of them is ſlain; this is murder; for there was time to allay the heat, and their meeting is of malice. So is *Legg*'s caſe, *Kelyng* 27.

At the meeting of all the judges before lord *Morley*'s trial by the peers for the murder of one *Haſtings*, they all agreed, that if upon words two men grow to anger, and afterwards they ſuppreſs that anger, and then fall into other diſcourſe, or have other diverſions, for ſuch a reaſonable ſpace of time as in reaſonable intendment their heat might be cooled, and ſome time after they draw upon one another, and fight, and one of them is killed; this is murder, becauſe being attended with ſuch circumſtances, it is reaſonably ſuppoſed to be a deliberate act, and a premeditated revenge upon the firſt quarrel. But the circumſtances of ſuch an act being matter of fact, the jury are judges of them, *Kelyng* 56. The meaning of which laſt words is, that the jury are judges of the facts, from which thoſe circumſtances are collected. But as I ſaid before, when thoſe facts are found, the court is to judge from them, whether they do not ſhew the act was deliberate or not.

Lord *Morley* upon his trial by the peers was acquitted; and after that in *Eaſter* term 18 *Car.* 2. *Broomwich*, who was indicted as a principal, in being preſent, aiding and abetting lord *Morley* in the murder of *Haſtings*, was tried at the King's Bench bar. The quarrel was at a tavern; but it was proved, when the quarrel was at the tavern, that lord *Morley* ſaid, if we fight at this time, I ſhall have a diſadvantage, by reaſon of the height of my ſhoes; and preſently after they went into the fields and fought, lord *Morley* killed *Haſtings*; but while they were fighting, *Broomwich* made a thruſt at *Haſtings*, and lord *Morley* cloſed in with *Haſtings*, and killed him; and (ſays the book) this was held as clear evidence of their intention to fight, when they went out of the tavern; and the quarrel being only about words, and fighting in a little time after, it was held murder by all the court. And there need not be a night's time between the quarrel and the fighting, to make it murder, but ſuch time only as it may appear not to be done on the firſt paſſion; for lord *Morley* conſidered the diſadvantage of his ſhoes: and the court directed the jury, that it was murder in *Broomwich*, being preſent and aiding; but the jury acqitted him. 1 *Sid.* 277. reports the ſame caſe, and ſays, that the court in the direction to the jury laid it down, that after the provocation in the houſe, they ſay, this is no convenient place (and ſo have reaſon, to judge of conveniency) and appoint another place, though the fight is to be preſently; this is murder, for the circumſtances ſhew their temper.

In *H. P. C.* 48. if *A.* and *B.* fall out, *A.* ſays he will not ſtrike, but will give *B.* a pot of ale to touch him, *B.* ſtrikes, *A.* kills him; murder.

Two quarrel; the one ſays, if you'll go into the field, I will break your head, and there one kills the other; murder. *Crompt.* 25. *p.* 49.

Two fall out on a ſudden in the town, and they by agreement go into the field preſently, and one kills the other; murder. *Cromp.* 23. *fol.* 31.

From theſe caſes it appears, that though the law of *England* is ſo far peculiarly favourable (I uſe the word peculiarly, becauſe I know no other law that makes ſuch a diſtinction between murder and manſlaughter) as to permit the exceſs of anger and paſſion (which a man ought to keep under and govern) in ſome inſtances to extenuate the greateſt of private injuries, as the taking away a man's life is; yet in thoſe caſes it muſt be ſuch a paſſion, as for the time deprives him of his reaſoning faculties; for if it appears, reaſon has reſumed its office; if it appears he reflects, deliberates, and conſiders before he gives the fatal ſtroke, which cannot be, as long as the fury of paſſion continues; the law will no longer under that pretext of paſſion exempt him from the puniſhment, which from the greatneſs of the injury and heinouſneſs of the crime he juſtly deſerves, ſo as to leſſen it from murder to manſlaughter. Let us ſee therefore, whether upon this ſpecial verdict it appears, that the fighting and killing Mr. *Gower* was only done in heat of paſſion, or was a deliberate act. By what I obſerved before, it plainly appears, it was a deliberate act. But to recapitulate in ſhort: after the words had paſſed, and the bottle was thrown by the priſoner, and ſwords drawn; by the interpoſition of friends they ſat down, and continued in company for an hour (a reaſonable time under thoſe circumſtances for the paſſion to cool, and after that hour expired, the deceaſed ſays, we have had hot words, but you was the aggreſſor, but I think we may paſs it over, and at the ſame time offered his hand to the priſoner, which was enough to have appeaſed the priſoner; to this Mr. *Oneby* anſwered, no, damn you, I'll have your blood, words expreſſing malice, not paſſion: then when the company went out of the room, the priſoner ſtaid, and called the deceaſed back; Young man, come back, I have ſomething to ſay to you; the door immediately was ſhut, claſhing of ſwords was heard, and the deceaſed received the mortal wound from the priſoner at the bar. The priſoner's words ſhew, what was his intention, *viz.* to take away Mr. *Gower*'s life; and the killing him may properly be ſaid to have been done upon deliberation and conſideration.

The counſel for the priſoner in their arguments inſiſted, that there were ſeveral circumſtances found in the ſpecial verdict in favour of the priſoner, which were a foundation for the court, to conſtrue the other expreſſions to be only words of heat, and that what he did was in the heat of his firſt paſſion, which was never cooled, and not out of malice. As, 1. It is found, that at the breaking up of the company Mr. *Oneby* had his great coat thrown over his ſhoulders, from whence it would be a ſtrain to think he then intended to fight with Mr. *Gower*. 2. It might be Mr. *Gower* who ſhut the door, who came back after he was out of the room, the jury not having found who ſhut the door. 3. That it was found, there was no reconciliation between them, from the throwing the bottle at Mr. *Gower*. But as to the firſt of theſe objections, conſidering the words the priſoner uſed after this, and after the deceaſed was out of the room, and what followed; ſince the jury have found this fact, without ſaying any more about it, the natural conſtruction is, that this was only uſed by the priſoner as a blind to the company, to conceal from them his real intention, till they were gone out of the room. As to the ſecond, it ſtands uncertain upon the verdict, but it is an uncertainty which can have no influence upon the preſent determination; for if Mr. *Gower* had ſhut the door, that would not alone have materially altered the caſe. As to the third, ſince expreſs malice before appeared to be in the priſoner, the finding that fact does not import, that the firſt heat of paſſion continued only, but that the malice continued.

The counſel for Mr. *Oneby* farther objected, that it appeared, there was mutual fighting after the door was ſhut; for it is found, that he received three ſlight wounds; then it is not found, who drew firſt, or made the firſt aſſault, after the door was ſhut; and it was poſſible, a new ſudden quarrel might then ariſe, in which Mr. *Gower* might be the aggreſſor; and therefore the ſpecial verdict was uncertain in a material point. The anſwer to which is, what is ſaid in *Legg*'s caſe, *Kelyn.* 27. cited before; that if *A.* kills *B.* and no ſudden quarrel appears, it is murder; for it lies on the party indicted, to prove the ſudden quarrel; and therefore the jury not having found any ſuch thing for the priſoner's benefit, it is to be took, there was no ſuch. This is ſaid, ſuppoſing the latter part of the verdict could be conſidered, without regarding the former part of it; and that when the company went out of the room, the priſoner and Mr. *Gower* were reconciled. But however that might have done, here it appears there was no reconciliation, and therefore there can be no imagination of a new original quarrel in the room, after the door was ſhut. And as to the ſlight wounds the priſoner received, that is immaterial, for he having malice againſt Mr. *Gower*, though there was mutual fighting, and the priſoner was wounded, yet when he killed Mr. *Gower* it will be murder.

The laſt fact in the ſpecial verdict, which they relied on was, when Mr. *Gower* was asked upon his death-bed, whether he had received his wounds in a manner among ſwordſmen called fair, he anſwered I think I did; whereby the deceaſed ſhewed, he was ſatisfied the act was fair. The anſwer to which is plain, that if *A.* have malice againſt *B.* and they meet and fight, though the fight is never ſo fair according to the laws of arms, yet if *A.* kills *B.* it will be murder.

The caſes the counſel for the priſoner principally relied on to make this fact only manſlaughter, were *Rowley*'s caſe, 12 *Co.* 87. and *Turner*'s caſe, *Comberbatch* 407, 8.

As to 12 *Co.* 87. the caſe was, that two boys fighting together, the one of them was ſcratched in the face, and he bled a great deal at the noſe, and ſo he ran three quarters of a mile to his father, who ſeeing him very bloody, took in his hand a cudgel, and went three quarters of a mile to the other boy, and ſtruck him upon the head, upon which he died; and it was held but manſlaughter, for the paſſion of the father continued. And there is no time, that the law can determine, that is was ſo ſettled, that it ſhould be adjudged malice prepenſe.

Note, Theſe are the words of 12 Co. 87.

To which the anſwer is plain for the reaſon given in *Cro. Jac.* 296. which is the ſame caſe, that the father having no anger, before, but being provoked upon the complaint and ſight of his ſon's blood, and in that anger beating him, of which he died; the law adjudged it to be upon that ſudden paſſion. But that is, conſidering what has been ſaid before, clearly diſtinguiſhable from the preſent caſe; beſides it may be added, it was but a little cudgel he ſtruck with, from which no ſuch fatal event could be reaſonably expected.

Turner's caſe was this; his wife complained, the boy had not cleaned her clogs, upon which Mr. *Turner* took up a clog and ſtruck him on the head, and killed him; and though there was no other provocation it was held only manſlaughter. But the reaſon of that was, becauſe the clog was ſo ſmall, there could be no deſign to do any great harm to the boy, much leſs to kill him; and a maſter may correct a ſervant in a reaſonable manner for a fault. And lord chief juſtice *Holt*, in *Comberbatch* 408. ſays, that in that caſe it was an unlikely thing, meaning that the clog ſhould kill the boy. The counſel for the priſoner being apprehenſive of the authority of *Mawgridge*'s caſe, *Kelyng.* 119. beſides the obſervations they had made, mentioned before, to induce the court to look upon that judgment as not warranted by law; endeavoured to diſtinguiſh the preſent caſe from it, ſuppoſing it to be law. And 1ſt, they ſaid, that in *Mawgridge*'s caſe the bottle hit Mr. *Cope* and ſtunned him; but here the bottle did not hit Mr. *Gower*, but only bruſhed ſome powder out of his peruke. 2dly, In *Mawgridge*'s caſe the bottle was full of wine; here it is not found to have been ſo, and therefore muſt be took to have been empty; and the ſize of the bottle does not appear, it might be very ſmall. 3dly, *Mawgridge* drew his ſword immediately after throwing the bottle without intermiſſion; here Mr. *Gower*'s ſword was firſt drawn. 4thly, Mr. *Cope* never drew; here Mr. *Gower* not only drew the firſt, but claſhing of ſwords were heard, ſo there muſt have been fighting.

It is very true (ſo far as theſe facts will make a difference) this preſent caſe is diſtinguiſhable from *Mawgridge*'s caſe; for that caſe was determined only upon an implied malice (but as I ſaid before, was very rightly and juſtly determined, as we all agreed); for ſtrictly and properly ſpeaking, although the word expreſs malice is mentioned in the reaſons given for that reſolution, yet it was but malice implied. But ſtill this way of diſtinguiſhing the preſent caſe from *Mawgridge*'s will be of no ſervice to the priſoner; becauſe though all the judges held, this caſe was diſtinguiſhable from *Mawgridge*'s caſe; it was in reſpect that this was a much ſtronger caſe as to the murder, the jury having found facts which ſhew Mr. *Oneby* had an expreſs malice againſt Mr. *Gower*. Upon the whole matter this court, with the concurrent opinion of all the other judges, is of opinion, that the priſoner at the bar *John Oneby*, by this ſpecial verdict is found guilty of murder.

The priſoner being, after this reſolution pronounced, intituled by the courſe of the court to have four days to move in arreſt of judgment, he was ſent back to *Newgate*, and a rule for bringing him up to receive judgment the end of the week was made; before which time an account came of the death of his late Majeſty at *Oſnabrug* the 11th of *June*. And afterwards at the time appointed by the rule he was brought to the bar, and judgment was pronounced againſt him, and execution awarded. After which a pretty ſtrong application was made to his Majeſty King *George* the ſecond for a reprieve; but he was pleaſed to declare, that the judges having adjudged the priſoner guilty of murder, the law ſhould take its courſe. In which attempt the priſoner not ſucceeding, he killed himſelf in *Newgate* in the night before the day appointed for his execution, by cutting through the great artery in his arm with a razor, by which he bled to death.

Memorandum, As ſoon as I had delivered this reſolution, I deſired my brothers *Forteſcue*, *Reynolds* and *Probyn*, that if they diſapproved any thing I had laid down, they would expreſs their diſapprobation; but they publickly declared, they concurred *in omnibus*.

Thomas Warren *verſ.* Matthew Conſett.

S. C. 2 Stra. 778.

Intr. *Hil.* 7 *Geo.* C. B. Rot. 1556. and *Hil.* 8 *Geo.* B. R. Rot. 47.

Nil debet where pleadable to a ſpecialty.

ERROR on a judgment given in the Common Pleas in an action of debt for 2800 *l.* brought by *Conſett* againſt *Warren*, upon a covenant to pay that ſum in caſe the plaintiff and defendant did not perform the covenants in an indenture for the transfer of and payment for ſhares in the *Welſh Copper* company; in which the plaintiff below *Matthew Conſett* declared, that the 19th of *Aug.* 1720, by a certain indenture made between the plaintiff and defendant (one part of which ſealed by the ſaid *Warren* the plaintiff *Conſett* produced in court) the ſaid *Conſett* for the conſiderations in the ſaid indenture mentioned for himſelf, &c. covenanted and agreed with the ſaid *Warren*, &c. that upon payment to him, &c. of 1400 *l.* he, &c. would transfer to the ſaid *Warren* twenty five ſhares in the ſtock of the governor and company of the copper miners in *Wales*, when and as ſoon as the transfer book of the ſaid governor and company ſhould be open, &c. and that the ſaid *Warren* covenanted with the ſaid *Conſett* by the ſaid indenture, that he, &c. would not only accept the ſaid twenty five ſhares, but would upon transfer thereof pay to the ſaid *Conſett*, &c. the ſaid ſum of 1400 *l.* in full for the purchaſe of the premiſſes; and for the performance of the covenants, payment and agreements aforeſaid, on the part and behalf of the ſaid reſpective parties, &c. each obliged himſelf, his heirs, &c. to the other of them, &c. in the penal ſum of 2800 *l.* By the ſaid indenture; and the plaintiff below *Matthew Conſett* in fact ſays, that after making the ſaid indenture, *viz.* 23d of *Auguſt* 1720, the ſaid transfer book of the ſaid governor and company firſt opened after the making the ſaid indenture, and that he the ſaid *Matthew Conſett* did in due form of law transfer the ſaid twenty five ſhares to the ſaid *Thomas Warren*, of which he had notice; but the ſaid defendant *Thomas Warren* refuſed to accept the ſaid transfer, and has not paid the ſaid 1400 *l.* to the ſaid *Conſett*; *per quod actio accrevit* to the ſaid *Conſett* to demand and have of the ſaid *Thomas Warren* the ſaid 2800. To which the defendant *Warren* pleaded, *quod ipſe non debet praedicto Mattheo Conſett praedictas* 2800 *l. nec aliquem inde denarium, &c. et de hoc ponit ſe ſuper patriam.* To this *Conſett* the plaintiff below demurred, and ſhewed for cauſe, *quod praedictus* the defendant *Warren reſpondit materiae pro infractione conventionis aſſignatae, ſed placitavit generale placitum in hujuſmodi caſu non admiſſibile, &c.* The defendant joined in demurrer and in the Common Pleas judgment was given for the plaintiff *Conſett*. Upon which judgment *Warren* brought this writ of error. And it was argued for the plaintiff in error by Mr. *Reeve*, and by Mr. ſerjeant *Darnall* for the defendant in error, in *Mich. Term.* 11 *Geo.* 1724. And it was argued in this *Trin.* term by Mr. *Fazakerley* for the plaintiff in error, and by Mr. ſerjeant *Chapple* for the defendant in error. And the ſingle queſtion that was made was, whether *nil debet* is a good plea to debt brought for the penalty upon theſe articles? And it was inſiſted upon by Mr. *Reeve* and Mr *Fazakerley*, that it was a good plea, and that therefore judgment ought to have been given for the defendant by the court of Common Pleas.

The counſel for the plaintiff in error agreed, that where debt is brought upon a judgment, or upon a ſingle bill, the defendant cannot plead *nil debet*; becauſe by the judgment or ſingle bond the defendant does appear to be indebted, and the diſcharge muſt be by matter of as high a nature. So in debt upon a bond with condition for payment, *nil debet* is no plea; for the plaintiff declares only upon the bond, and the defendant muſt pray *oyer* of the bond and condition, or if the bond is defeaſanced by a diſtinct deed he muſt plead that defeaſance, and ſhew he has performed the condition of the bond, or the agreement in the defeaſance. But here it was not enough for the plaintiff to ſet out the articles, but it was abſolutely neceſſary for him to aver the facts, to intitle him to the action, as that he had transferred, and that the defendant had not accepted the twenty five ſhares and paid the 1400 *l.* ſo that this action is not barely founded on the articles, but on the defendant's not performing the facts in the articles; and in ſuch caſe the defendant is not eſtopped, to ſay he owes nothing, becauſe the cauſe of action ariſes from fact, and not barely from the deed. And therefore in debt for rent upon a leaſe by indenture, the defendant may plead payment, or levied by diſtreſs, *et ſic nil debet*. Every day's experience ſhews, that a general *nil debet* is a good plea to debt 9 Ed. 4. 53. Pl. 17.

debt for rent upon a leaſe by indenture. Where matter of fact is mingled with record, it is triable *per pais*. *Hob.* 244. *Peter verſus Stafford.* And in ſuch caſe *nil debet* is a good plea, as in debt for taking ſcavage *contra formam ſtatuti*. 21 *H.* 7. 14. *Br. Iſſue join* 23. So in any action of debt upon a ſtatute, becauſe the action is grounded on the fact as well as on the ſtatute. In debt for an eſcape of a perſon took in execution upon a judgment by *capias ad ſatisfaciendum*, *nil debet* is a good plea. 1 *Saund.* 38. *Jones verſus Pope*; yet ſuch action of debt is not barred by the ſtatute of limitations. So in debt for tithes, yet thoſe actions are grounded upon ſtatutes *Cro. Car.* 513. *Tallery verſ. Jackſon.* So in debt upon a judgment recovered againſt an adminiſtrator upon ſuggeſting a *devaſtavit*, the defendant may plead *nil debet*, and ſo Mr. *Reeve* ſaid it was held by lord chief juſtice *Holt* in the caſe of *Berwick verſ. Andrews*, *Mich.* 2 *Ann.* And yet to debt upon a judgment *nil debet* is no plea. Therefore they concluded, that in this caſe the action of debt not being barely founded upon the articles, but upon the fact alſo (in not accepting the ſhares, and in not paying the 1400*l.*) *nil debet* was a good plea; and the judgment given in the Common Pleas for the plaintiff there was erroneous, and ought to be reverſed.

1 Salk. 314.

On the other ſide it was argued by Mr. ſerjeant *Darnall* and Mr. ſerjeant *Chapple*, that the plea was an ill plea, and that judgment ought to be affirmed, They admitted, that in debt for rent (though reſerved by indenture) or for an eſcape, or upon a ſtatute, *nil debet* would be a good plea; becauſe the foundation of the action is a meer fact, as the arrears of rent, the eſcape, or the doing the act prohibited by the ſtatute. So on the other hand, where the action is grounded upon a record, or ſpecialty, *nil debet* is no plea. 3 *Lev.* 170. *Tyndal verſ. Hutchinſon.* Covenant upon an indenture of leaſe, and breach was aſſigned in non-payment of rent according to the covenant in the indenture; the plaintiff demurred generally; and adjudged *per totam curiam*, that *nil debet* is no plea in this caſe upon the indenture. [But that was a plea of *nil debet* to a breach in an action of covenant.] But as to the preſent caſe they ſaid, there had been many actions of the very like nature as this brought of late years, and it never had been before attempted, to plead ſuch a plea; and if it ſhould be admitted, it would put plaintiffs under inſuperable difficulties, and to great and unneceſſary expenſes. For they muſt bring witneſſes, to prove the execution of the deed or articles, that the contract was regiſtred, when the books firſt opened, that he tendred the ſtock, &c. On the other hand, the defendant cannot be prejudiced, by confining him, as hitherto has been practiſed, to anſwer the facts in the declaration, or deny the deed if he will, or to plead the contract was not regiſtred, &c. And by the

2 Keb. 347.
Shelbury verſ.
Watcar.

leave of the court he may have liberty to plead more than one of theſe things, whereby he will be ſecure of relying upon all proper defenſes, and the plaintiff will by the plea have pointed out to him what will be neceſſary for him to come prepared at the trial to prove. But they principally relied on the caſe of *Smith verſ. Whitehead*, ſaid by them to be adjudged *Trin.* 9 *Geo. B. R.* that in debt brought by the plaintiff as aſſignee of the ſheriff upon a bail-bond, *nil debet* was no good plea; which comes up to this caſe, becauſe the defendant is not concluded by the aſſignment of the ſheriff, being as to him a ſtranger, but as a matter of fact, as alſo the arreſt, *&c.* which *Forteſcue* juſtice ſaid was ſo adjudged. And it was adjudged *Paſ.* 10 *Geo.* between Sir *John Williams et al' verſ. Webb.* in this court, that in an action of debt brought by aſſignees of commiſſioners of bankrupts, *nil debet* was held an ill plea. Therefore they concluded this plea was ill, and judgment ought to be affirmed.

Smith verſ. Whitehead.

And of that opinion was the whole court. For there is a difference, where the ſpecialty is but an inducement to the action, and matter of fact is the foundation of it, there *nil debet* will be a good plea; as in debt for rent by indenture, the plaintiff need not ſet out the indenture; ſo in debt for the eſcape, or on a *devaſtavit* againſt an executor, the judgment is but inducement, and the eſcape and *devaſtavit* are the foundations of the action: but where the deed is the foundation, and the fact is but inducement; *nil debet* is no plea, as in this caſe, the articles are the foundation of the action; and therefore they held, *nil debet* was no good plea, becauſe it would make the jury judges of the validity of the deed. Beſides, this having been never attempted before, where there have been abundance of actions of this nature, is a ſtrong argument, that it was generally taken, this plea could not be pleaded, which otherwiſe the counſel for defendants would certainly have adviſed their clients to have pleaded, ſince it would have been of ſo great advantage to them, and have put the plaintiffs under very great difficulties. And the chief juſtice *Raymond* and juſtice *Reynolds* relied much upon the authority of the caſe of *Smith verſ. Whitehead*, which they took to be a very oppoſite caſe. Judgment was affirmed. *Tueſday June* the 6th, 1727. See *Hardr.* 332.

Thomas and John Blake *verſ.* John Dodemead and Sarah his wife, late Sarah Aſtrill.

Intr. *Trin.* 12 *Geo.* Rot. 529. et Intr. *Paſchae* 13 *Geo.* B. R. Rot.

S. C. 2 Stra. 775.

Where neceſſary to lay a venue.

ERROR upon a judgment given in the Common Pleas againſt *John* and *Thomas Blake* in a *ſcire facias* brought there by *Dodemead* and his wife, which ſet out, that the ſaid *Sarah*, *dum ſola*, recovered againſt the *Blakes* 600*l.* debt, and 20*l.* coſts, *executio tamen judicii praedicti adhuc reſtat facienda, ac praedicta Sara poſt redditionem judicii praedicti cepit in virum praedictum Johannem Dodemead, &c.* the defendants *veniunt et defendunt vim et injuriam quando, &c. et petunt judicium de narratione praedicta, quia dicunt, quod narratio praedicta materiaque in eadem contenta minus ſufficientia in lege exiſtunt, &c.* and ſo demur, and ſhew for cauſe, that the plaintiffs *Dodemead et uxor non oſtendunt curiae hic diem nec locum in quibus dicta Sara cepit praedictum Johannem D. in virum ſuum, &c. Et praedicti Johannes D. et Sara dicunt, quod ipſi per aliqua praeallegata ab executione ſua de debito et dampnis praedictis verſus praefatum T. B. et J. B. habenda praecludi non debent, quia dicunt, quod breve de ſcire facias praedictum materiaque in eodem contenta bona et ſufficientia in lege exiſtunt ad ipſos J. D. et S. executionem ſuam praedictam verſus praedictos T. B. et J. B. manutenendum, &c.* And judgment was given in the Common Pleas for the plaintiffs *Dodemead* and his wife. Upon which a writ of error being brought, it was argued by ſerjeant *Hawkins* and Mr. *Lee* for the plaintiffs in error, that the writ was ill; becauſe no place was alleged, where the plaintiffs in the original action were married. For where a thing is alleged as a fact, and is material, it is traverſable, and in ſuch caſe it is neceſſary to allege a place where it was done. Now here *Sarah*'s taking *Dodemead* for her huſband is a material fact to intitle them to this *ſcire facias* upon that judgment recovered againſt the defendants by *Sara dum ſola*; and therefore a place ought to be alleged, where ſhe took him for her huſband. 35 *H.* 6. 50. In debt brought by *A.* againſt *B. A.* declared that *B.* granted to the plaintiff *A.* an annuity, till *A.* was promoted to a competent benefice; and ſhewed, that he, *viz. A.* ſuch a time took a wife, and that the annuity was in arrear before he took this wife amounting to the ſum demanded: and the declaration was adjudged to be naught, becauſe the plaintiff had not alleged a place, where he took his wife. *Owen* 23. lord *Dacre*'s caſe. In debt upon an account taken before auditors aſſigned, the declaration

tion did not allege a place were the auditors were aſſigned. *Moore* 527. *Mathuris verſ. Weſtreray*, in covenant againſt a leſſee by aſſignee of the reverſion of the term for years (out of which the defendants leaſe was derived) the defendant pleaded, he had aſſigned his term before the grant to the plaintiff, and held ill; becauſe he did not allege a place where he aſſigned the term. And *Hob.* 233. when a material fact and traverſable is alleged, a place muſt be laid, where it was done. And 2 *Lev.* 227. *Chapman verſ. Fothergill.* And in a *ſcire facias* as here, the party intitled to the benefit of the judgment marries, a place where the marriage was is alleged, *Co. Intr.* 623. *Theſaurus brevium* 118, 119. This might be good after a verdict, but in this caſe there is a ſpecial demurrer, and this defect ſhewn for cauſe. 2. It was urged for the plaintiff in error, that he had demurred in the common pleas to the declaration, whereas there was no declaration, but only the writ of *ſcire facias*; and the plaintiff below had joined in demurrer in maintenance of his writ; and therefore this was a diſcontinuance.

But it was argued by Mr. *Reeve* and Mr. *Strange e contra* for the defendants in error, that the judgment was well given. And they inſiſted, this was only a ſurmiſe relating to the perſon of the plaintiff, and was but in nature of an exception in abatement; and that as to matters which go in abatement of a writ only, it is not neceſſary to lay a *venue*. 1 *Salk.* 6. *Lett verſ. Mills.* The defendant pleaded, *quod ſuſcepit ordinem militarem et jam miles exiſtit*; and it was held, there need be no *venue*, where he was knighted; for any thing that concerns the perſon ſhall be tried where the action is laid. 1 *Salk.* 2. *Weſt verſ. Sutton.* And they ſaid, that the precedents in the Common Pleas were generally as this is. In *Officina brevium* 259, & 283. there are two *ſcire facias's* juſt as this, in the like caſe. 2. As to the other objection, they ſaid this could be no diſcontinuance, for though the plaintiff in error demurred in the Common Pleas wrong, yet the plaintiff below has not joined in that, but has made his demurrer proper and right. And therefore they prayed, the judgment might be affirmed. And *June* the 6th, upon the authority of ſeveral precedents cited, and for the ſaid reaſons given by the counſel for the defendant in error, judgment was affirmed. And this does not claſh with any of the caſes cited on the plaintiff in error's behalf; becauſe thoſe were of material facts, which went to the point of the action, and did not barely go to the perſon or point of the writ, and therefore a *venue* ought to be laid as to them.

The King *againſt* Thomas Betts.

Conviction by the Commiſſioners of Hackney-coaches.

THE defendant was committed by the commiſſioners for licencing Hackney coaches, upon an information exhibited before them by one *Timothy Bowyer* the informer againſt the defendant, for that the defendant the 14th of *July* 12 *Geo.* preſumed to ſtand and ply with a coach and horſes for hire at *Whitechappel* bars in the open ſtreet, within the weekly bills of mortality, and then and there drove his coach with horſes for hire from thence to places within the weekly bills of mortality, *contra formam ſtatuti*, not being a perſon licenced purſuant to the act of parliament; and the commiſſioners gave judgment againſt him, that he ſhould forfeit 5 *l.* *&c.*

This information was grounded upon 1 *Geo. cap.* 57. *ſect.* 3. whereby it is enacted, that from and after the 24th of *June* 1715, no perſon or perſons ſhall preſume to ſtand, ply, or drive for hire with any coach whatſoever, hearſe, or coach-horſes, or ſhall let to hire any mourning coach or coach-horſes to attend or wait on any funeral, within the cities of *London* and *Weſtminſter*, or ſuburbs of the ſame, or within the pariſhes or places within the weekly bills of mortality, except ſuch as ſhall be licenced, *&c.* under penalty of forfeiture of 5 *l.* *&c.* The fact ſtated by the commiſſioners, as proved by the witneſſes, and confeſſed by the defendant, was this, *viz.*

That the defendant the ſaid 14th of *July*, and long before, and ever ſince, was a common ſtage-coachman, uſing to drive a ſtage-coach between *Bow* in the county of *Middleſex*, being a place without the pariſhes and places within the bills of mortality, and the ſaid *Whitechappel* bars in the pariſh of *Whitechappel* in the county of *Middleſex*, being within the pariſhes and places within the weekly bills of mortality; and at the time mentioned in the information, *viz.* the ſaid 14th day of *July*, ſtood with his ſtage-coach and horſes in the high ſtreet at the ſaid place called *Whitechappel* bars, and plied and offered for hire to carry any perſons wanting ſuch carriage to *Bow* or *Stratford* in his ſtage-coach; and that the defendant then and there took into his ſtage-coach three perſons, and carried them thence in his ſtage-coach to a place called *Whitechappel* turnpike, being a place within the weekly bills of mortality, and there at *Whitechappel* turnpike the defendant in the way from *Whitechappel* aforeſaid to *Bow* and *Stratford* aforeſaid ſet down out of his ſtage coach one of the ſaid three perſons, and received of him ſix pence for his hire, for carrying him, *&c.* that the defendant drove his coach from thence, and carried the two other perſons from thence to *Bow*, and there ſet them down, and received of each of them 6 *d.* for hire, for carrying them in his ſtage coach; and that the defendant before in that day had come with his ſtage-coach from *Bow*, and had not ſet up his ſtage coach at any inn or at any other place, but ſtood with his ſaid ſtage-coach and horſes in the ſaid high ſtreet plying as aforeſaid, and had no licence to carry perſons in his ſaid ſtage-coach for hire.

This conviction being removed into the King's Bench by *certiorari*, Mr. *Abney* moved to quaſh it, becauſe the fact ſtated in the conviction was not an offenſe within the act of parliament of 1 *Geo. c.* 57. *ſect.* 3. nor within any of the acts about licencing coaches, *&c.* Mr. *Reeve e contra* for the King. But the court were of opinion, this was not within the acts; for the defendant did not ply to drive or carry, or drove or carried perſons, only within the weekly bills of mortality, but he plied with his ſtage-coach to carry them the ſtage he drove, *viz.* to *Bow* or *Stratford*; and though the party was ſet down within the weekly bills, *viz.* at *Whitechappel* turnpike, yet he paid for the whole ſtage. But if the defendant had took leſs than his hire for the whole ſtage; in this caſe the court inclined to be of opinion, that would have been within the acts of parliament. 2. The court held, that *par.* 3 of 1 *Geo. c.* 57. was made to prevent plying or driving for hire, or letting coaches or horſes for hire, to wait and attend upon funerals, which was not this caſe. The conviction was quaſhed, *June* 7, 1727.

William Townſend *againſt* Henry Thorpe.

S. C. 2 Stra. 776.

Pariſh clerk is a ſpiritual officer, and may be there deprived.

THE plaintiff being clerk of the pariſh of *Warminſter* in the county of *Wilts*, in *Hilary* term 1725 moved for a prohibition, to ſtay a ſuit againſt him in the court held before the defendant as ſurrogate of the vicar general of the biſhop of *Saliſbury*, for having led a wicked, lewd and debauched life, and for having committed and attempted to commit ſeveral filthy, obſcene and unnatural acts of lewdneſs and incontinence; the libel ſetting out particularly ſeveral obſcene acts committed by him with *Nicholas Deane*, *John Hawkins* and *William Bleek* [ſpecifying the beaſtly acts in the libel, which amounted to evidences of attempts to commit ſodomy]; for being a common and notorious drunkard, much addicted to curſing and ſwearing, *&c.* for being a profaner of the Lord's day: and this ſuit was againſt the plaintiff as clerk of the pariſh of *Warminſter*; and the libels ſet out the 91ſt canon, that all pariſh clerks ſhould be of an honeſt and ſober life and converſation; and the ſuit was for puniſhment, and to remove the plaintiff from the office of pariſh-clerk, *&c.* and this motion was grounded upon a ſuggeſtion, that theſe matters were conuſable by the King's temporal courts, *&c.* and that two indictments were found againſt him at the ſeſſions of *oyer* and *terminer* for the county of *Wilts*, for an aſſault with intent to commit ſodomy with *Dean* and *Hawkins*, for the ſame facts charged in the libel. And a rule being made, to ſhew cauſe; it was argued againſt the prohibition by Dr. *Andrews*, Mr. *Fazakerley* and Mr. *Strange*, in *Hilary* term 1725. and by ſerjeant *Chapple* for the prohibition. Whereupon a rule was made, that a prohibition ſhould go, and the plaintiff ſhould declare upon it; which he accordingly did, turning his ſuggeſtion into a declaration. To which the defendant pleaded, to have a conſultation, after taking by proteſtation that the plaintiff was guilty of the crimes mentioned in the libel ſet out in the declaration, that the naming and making the pariſh-clerk of the parochial church of *Warminſter* aforeſaid, as often as there was a vacancy, *pertinuit et de jure pertinere debuit et adhuc debet* to the vicar of that church for the time being; that the plaintiff before the exhibiting the libel, *viz.* 2 *June* 3 *Geo.* 1. by virtue of the eccleſiaſtical canons was named and made clerk of the ſaid pariſh-church by *J. L.* clerk, vicar of the ſaid church, and that the plaintiff the place and ſervice of clerk of the ſaid pariſh-church by virtue of that nomination and making from thence to this time had held and enjoyed; that the defendant *Henry*, as ſurrogate of the vicar general, *&c.* at the promotion of *T. L.* and *R. S.* churchwardens of that church, *traxit in placitum praedictum Willielmum in praedicta curia Chriſtianitatis de et pro materiis praedictis* in the libel mentioned, before the prohibition delivered to the defendant, *ea intentione ad ipſum* the plaintiff, *pro hujuſmodi malegeſtura ſua praedicta, pro reformatione morum ejus, et pro ſalute animae ipſius Willielmi, juxta leges eccleſiaſticas caſtigando et puniendo, et a loco et ſervitio ſuo parochialis clerici eccleſiae praedictae amovendo, libellando verſus eum in eadem curia Chriſtianitatis de et pro materiis praedictis, &c. prout ei bene licuit, &c.* and prays a conſultation. To this plea the plaintiff demurred, and the defendant joined in demurrer. And the cauſe came on in the paper this term to be argued by counſel. But the counſel for the defendant deſiring only liberty to proceed againſt the plaintiff in the eccleſiaſtical court, to deprive him of his office; and the court being of opinion, that the plaintiff, though nominated by the vicar generally, was intituled to hold the office for his life, which reſolution they grounded upon the authority of 2 *Salk.* 536. the caſe of the pariſhes of *Gatton* and *Melwitch*; and that although an offenſe was puniſhable in the temporal and not in the ſpiritual courts, yet there might be a proceeding thereupon in the ſpiritual court to deprive a clerk of a pariſh-church, though they could not proceed to puniſh him for it. So is 1 *Siderf.* 217.

P. 11 W. 3.
B. R. biſhop of St. David's againſt Lucy.
Ante, 450.

1 *Lev.* 138. *Slader verſ. Smallbrook*; proceedings allowed in the ſpiritual court to deprive a perſon of orders he having forged the letters of ordination, though they could not have proceeded there to puniſh for the forgery: to prevent the repeating the long arguments uſed upon the motion, where the queſtion was made, whether all the crimes in the libel were not puniſhable only by the temporal laws, or whether of ſome of them the eccleſiaſtical court could not have conuſance, which would be unneceſſary, ſince ſuppoſing they were all of them puniſhable only by the temporal laws, yet there might be proceedings upon them, to deprive the plaintiff of his office; the court gave judgment, that the prohibition ſhould ſtand as to all but the proceeding for a deprivation, and as to that a conſultation ſhould go. *June* 13, 1727. Intr. *Trin.* 12 *Geo. B. R.* Rot.

Mich. Term

1 Georgii 2. regis. B. R. 1727.

HIS *late Majeſty King* George *dying at* Oſnabrug *the* 11*th of* June *laſt, the judges commiſſions by the act of parliament were to continue in force for ſix months from that time, unleſs ſooner determined by the ſucceſſor. But about the middle of* September *his preſent Majeſty King* George *the ſecond gave directions, for paſſing new patents, which were paſſed accordingly to all the late King's judges, except Mr. juſtice* Forteſcue, *whoſe patent was ſuperſeded; and Sir* Francis Page *was removed out of the Common Pleas into the King's Bench in his room*; *and* Spencer Cowper, *Eſq*; *Attorney General to his Majeſty when prince of* Wales, *and chief juſtice of* Cheſter *(which place he had granted to him by the late King, to be chief juſtice of* Cheſter *to him, his heirs and ſucceſſors,* quamdiu ſe bene geſſerit) *appeared to a Writ returnable in Chancery the firſt day of this term, commanding him, to take upon him the degree of a ſerjeant at law, and was ſworn in Chancery, and performed the uſual ceremonies, and then by patent was created one of the judges of the Common Pleas in the room of Sir* Francis Page.

Holliday *againſt* Fletcher, adminiſtratrix of Moſes Fletcher.

Intr. *Trin.* 13 *Geo.* 1. B. R. rot.

S. C. 2 Stra. 781.

Calling the defendant adminiſtrator in the declaration, is ſufficient without a ſpecial averment.

IN an action upon the caſe upon ſeveral promiſes for goods ſold and delivered to the inteſtate, the plaintiff declared againſt the defendant *Phillis Fletcher, vid', adminiſtratric. omnium et ſingulorum bonorum et catallorum jurium et creditorum quae fuerunt Moſis Fletcher nuper viri ſui defuncti, tempore mortis ſuae, qui obiit inteſtatus, in cuſtodia marreſchalli marreſchalciae, &c.* and then ſets out the promiſes made by the inteſtate, *&c.* The defendant demurred to the declaration, and aſſigned for cauſe of demurrer, that it is not alleged or ſhewn, that *adminiſtratio omnium et ſingulorum bonorum, &c. unquam commiſſa fuit, nec per quem metropolitanum ordinarium officialem aut alium officiarium (ſi ulla) ei fuit commiſſa, &c.* The plaintiff joined in demurrer. And Mr. *Wynne* for the plaintiff admitted, that a plaintiff was not obliged in his declaration againſt an adminiſtrator to ſhew by whom adminiſtration 1 Sid. 228. was committed; becauſe it did not poſſibly lie in his knowledge, who granted adminiſtration. But then the plaintiff ought to allege, that adminiſtration was committed to the defendant. And ſo is the caſe of *Bracton verſ. Liſter*, 2 *Ventr.* 84. expreſs in point; where it was held by the court, that the omiſſion of the alleging, that letters of adminiſtration were committed to the defendant, was incurable. But Mr. *Huſſey* for the plaintiff argued, that it was alleged in the declaration, that the defendant was adminiſtratrix; for the plaintiff declares againſt her, *adminiſtratric. &c.* and that was traverſable, and therefore ſufficient, without alleging, adminiſtration was committed to her. He ſaid, that indeed the method of declaring againſt an adminiſtrator in the Common Pleas was different, for there it is *A. B.* adminiſtrator of *C. D. &c. ſummonitus fuit ad reſpondendum* E. F. but then in the declaration the defendant is not alleged to be adminiſtrator, as in this caſe; and therefore it muſt be alleged, that adminiſtration was committed, in the declaration, otherwiſe the defendant will be deprived of the benefit of traverſing that fact. And therefore in a caſe lately between *Rooke* and *Helmer* it was adjudged, that a declaration againſt an adminiſtrator, for want of alleging that fact, was ill; and probably that was the reaſon of the caſe of *Bracton, verſ. Liſter*, in 2 *Ventr.* for that was in the Common Pleas. The court having took time to conſider of it, at another day gave judgment for the plaintiff. For they held, that ſuing the defendant as adminiſtratrix did of neceſſity imply, that adminiſtration was committed to her; for no perſons can be adminiſtrators, but by having letters of adminiſtration granted to them; and that the defendant might in this caſe have traverſed that fact alleged, that ſhe was adminiſtratrix; which they held likewiſe to be ſufficiently averred, by ſuing her as adminiſtratrix, *&c.* as above. Judgment for the plaintiff, *November* the 23d 1727.

The King *verſ.* the inhabitants of Aynhoe

TWO juſtices of peace, by their order under their hands and ſeals of 22 *Sept.* 1727, removed *Thomas Edmonds* and *Elizabeth* his wife from the pariſh of *Aſhenden cum Pollicutt* in the Shaw's Par. Law, cap. 53. ſec. 18.

Inhabitants of Brightwel and Weſthanning.

2 Salk. 535. Rudwick and Dunsfold.

county of *Bucks* to the pariſh of *Aynhoe* in the county of *Northampton*, as the place of their laſt legal ſettlement. From which order the inhabitants of *Aynhoe* appealed to the next quarter ſeſſions of the peace held for the county of *Bucks*, 5 *October* 1727. where upon hearing the order of the two juſtices it was confirmed; in which order of confirmation the fact was ſtated ſpecially, to the intent a *certiorari* might be brought to remove the orders into the King's Bench, that the opinion of that court might be had thereupon. And the fact ſpecially ſtated was this, *viz.* that the ſaid *Thomas Edmonds* about fourteen years ſince was hired for a year to *Abraham Wrighton* at *Aynhoe*, and ſerved him the ſame year, and received his year's wages, and afterwards at *Michaelmas* 1725 went to Mr. *Thomas Potter* at *Biſſiter* in the county of *Oxon* to be hired; who told him he would not hire him then, for that he expected a man-ſervant in three weeks; but if he the ſaid *Thomas Edmonds* would ſupply the place of ſuch man-ſervant till he came, then he the ſaid *Thomas Potter* would pay him for his time: whereupon the ſaid *Thomas Edmonds* entered into the ſervice of the ſaid *Thomas Potter*, and lived there till near *Chriſtmas* following, and then was hired to him and ſerved him at *Biſſiter* till *Michaelmas* then following; and then at *Michaelmas* 1726 he was hired at *Biſſiter* aforeſaid for a year to his ſaid maſter *Potter*, and ſtayed in ſuch ſervice till the *Midſummer* following, and no longer. Theſe orders being accordingly removed into the King's bench by *certiorari*, it was argued by Mr. *Lee* for the defendants, that the order ought to be quaſhed, *Thomas Edmonds* appearing to be laſt ſettled at *Biſſiter*; becauſe, though the ſtatute requires a hiring for a year and a ſervice for a year, it does not require the hiring and ſervice ſhould be under the ſame contract. And he relied upon the caſe of the inhabitants of *Brightwell* and *Weſthanning*, as the very caſe in point: where it was reſolved and ſettled, *Hil.* 1 *Geo.* 1. *B. R.* when the earl of *Macclesfield* was chief juſtice. Mr. *Reeve e contra* argued, that it did not appear, *Edmonds* was ſettled at *Biſſiter*; becauſe he inſiſted, he ought to be hired for a year, and ſerve that year. And he ſaid, it had been held between the inhabitants of *Rudwick* and *Dunsfold*, that if a poor man is hired for half a year, and ſerves that half year, and then is hired to the ſame maſter for another half year, and ſerves that half year alſo, that would not make a ſettlement. But the court upon the authority of the caſe of *Brightwell* and *Weſthanning* held, theſe hirings and ſervice did make a ſettlement; for he was hired for a year, and ſerved a year. And the orders were quaſhed.

Hilary Term

1 Georgii 2. regis. B. R. 1727.

Hannah Lee *verſ.* John Pilmy. *Error.* C. B.

Intr. *Trin.* 13 *Geo.* 1. C. B. Rot. 2110. Intr. *Hil.* 1 *Geo.* 2. B. R. Rot.

THE plaintiff brought an action of debt upon a bond, as executrix to her husband, againſt the defendant *Pilmy* in the Common Pleas. *Pilmy* confeſſed the action, whereupon judgment was given for *Lee.* Upon which judgment *Pilmy* brought a writ of error in the King's Bench, and aſſigned for error by his counſel Mr. *Parker*, that this action was brought by the plaintiff as executrix in the *debet* and *detinet* whereas it ought to be in the *detinet* only. But to this it was anſwered by Mr. *Draper*, that this would be aided after verdict by the *Oxford* act. 1 *Lev.* 250. 1 *Sid.* 379. *Frewin et ux. verſ. Painton.* And the act of 4 *Ann. cap.* 16. *par* 2. extends all the ſtatutes of *jeofails* to judgments to be entered upon confeſſion, *&c.* And of this opinion was the court, and judgment affirmed, *Feb.* 8, 1727.

Debt by executrix in the *debet & detinet* aided after verdict.

Carter *verſ.* Jewell.

THE defendant was took up upon an eſcape warrant made by my brother *Forteſcue.* And a motion was made to diſcharge him and the warrant, becauſe he was took upon it the 6th of *January* inſtant; and my brother *Forteſcue* was removed from his office of judge of the King's Bench in *October* before; his patent being determined upon the demiſe of the late King. And the perſon was diſcharged, and the warrant alſo.

One taken on an eſcape warrant of a judge after his patent was determined by the king's death.

The King *verſ.* Sir Edmund Elwell, Joſeph Billers Eſq; Daniel Monty Eſq;

S. C. 2 Stra. 794.

Intr. *Mich.* 1 *Geo.* 2. n. 2.

Where there is a conviction the court will not diſcharge on the warrant of commitment, without having the conviction before them.

THE defendants were convicted upon view of three juſtices of the peace in *Kent*, of a forcible detainer; and were committed by them to *Maidſtone* gaol, till they ſhould pay a fine to the King. Upon which they ſued out a *certiorari*, to remove the conviction into the King's Bench, and a *habeas corpus* to bring up their bodies. The conviction returned was, *Kant. ſſ. Memorandum, quod* 15 *Sept.* 1 *Geo.* 1. *apud Beckenham in comitatu Kantiae Elizabetha Elwell queſta eſt nobis E. B. P. B. et W. P. tribus juſticiariis, &c. quod Edmundus Elwell nuper de London Bar. I. B. et D. M. in meſuagium ipſius Elizabethae, et exiſtens domum manſionalem ipſius Elizabethae E. vocatum Langley Houſe, ſituatum infra parochiam de B. praedictam, ingreſſi ſunt et ipſam E. E. de meſuagio praedicto, unde eadem E. E. tempore ingreſſus praedicti fuit ſeiſita ut de libero tenemento ipſius E. E. pro termino vitae ſuae, illicite ejecerunt, expulerunt et amoverunt, et meſuagium illud ab ipſa Elizabetha E. illicite manu forti et armata potentia adhuc tenent et ab ipſa detinent, contra formam ſtatuti in hujuſmodi caſu editi et proviſi, unde eadem E. E. adtunc, ſcilicet eodem* 11 *die Septembris, apud parochiam de B. praedictam, petit a nobis ſic ut praefertur juſticiariis exiſtentibus ſibi in hac parte remedium congruum apponi juxta formam ſtatuti, &c. quibus quidem querimonia et petitione per nos praefatos juſticiarios auditis, nos praefati E. B. baronettus, P. B. et W. P. juſticiarii praedicti ad meſuagium praedictum perſonaliter accedimus, et adtunc et ibidem invenimus et videmus praefatos E. E. I. B. et D. M. praedictum meſuagium vi et armis, illicite, manu forti et armata potentia detinentes contra formam ſtatuti in hujusmodi caſu editi et proviſi, prout ipſa eadem Elizabetha Elwell ſic ut praefertur nobis queſta eſt: ideo conſideratum eſt per nos praefatos juſticiarios, quod praedicti Edmundus Elwell, Joſephus Billers et Daniel Monty de manu forti detentione praedicta per viſus noſtros proprios adtunc et ibidem ut praefertur habitos convicti ſunt et quilibet eorum convictus eſt, ſecundum formam ſtatuti praedicti; ſuper quo nos praefati juſticiarii praefatos E. E. I. B. et D. M. adtunc et ibidem arreſtari facimus; et iidem E. E. I. B. et D. M. convicti exiſtentes, et quilibet eorum convictus exiſtens, ſuper viſus noſtros proprios, de manu forti detentione praedicta ut praefertur, per nos praefatos juſticiarios committuntur, et quilibet eorum committitur, ad gaolam dicti domini Regis comitatus praedicti apud Maidſtone in comitatu Kantiae praedicto, proximam gaolam ad praedictum meſuagium exiſtentem, ibidem remanſuri quouſque finem* *fecerint, et quilibet eorum finem fecerit dicto domino Regi pro offenſis ſuis reſpectivis praedictis, de quibus quidem praemiſſis ſupradictis hoc fieri facimus recordum: in cujus rei teſtimonium nos praefati E. B. bar' P. B. et W. P. arm' juſticiarii praedicti huic recordo manus noſtras et ſigilla noſtra appoſuimus apud parochiam de Beckingham praedictam in comitatu Kantiae praedicto decimo quinto die Septembris anno regni dicti domini Regis nunc primo ſupradicto.*

E. Bettenſon,
P. Burrel,
W. Paſſenger.

Exception being taken to this conviction, that it was ill, becauſe the commitment was of the defendants to gaol *ibidem remanſur.* till each ſhould have paid a fine to the King; and the juſtices of the peace have aſſeſſed no fine; ſo that it amounts to an indefinite commitment to priſon, which is illegal. Againſt which it was argued by ſerjeant *Whitaker* for the King, that this court might aſſeſs the fine, and ſo they did in the caſe of the King *verſus Chaloner*, 1 *Keb.* 585. But as to that caſe the court ſaid, the party ſubmitted to a fine, a very ſmall one being ſet, upon the circumſtances of the caſe. And the judges were all of opinion, that the juſtices might and ought to ſet the fine, they being beſt appriſed from their view of the nature of the offenſe, and that they need not *eo inſtante* ſet it, but might adjourn for a little time to conſider of the fine. And juſtice *Page* ſaid, lord chief juſtice *Holt* held ſo in the caſe of the Queen *verſus Leighton* warden of the *Fleet*. They held alſo, that if a *certiorari* came to them, they might proceed to ſet a fine, and compleat their judgment, and it would be no contempt. And therefore they all held, that this commitment being, that the defendants ſhould lie in priſon till they pay their fine, and no fine was ſet; the conviction was naught, and was quaſhed, and the defendants diſcharged *February* 18, 1727.

George Turvil *againſt* Steven Aynſworth.

S. C. 2 Stra. 787.

Any variation in the name of a corporation is fatal.

THE defendant gave the plaintiff a note under his hand, *viz. London*, 31 *May* 1720. I promiſe to accept of Mr. *George Turvill* or his aſſigns 800 *l. South Sea* ſtock on the 31 *May* 1721. and pay him or his aſſigns 5600 *l.* for the ſame, witneſs my hand *Steven Aynſworth*. The plaintiff gave the defendant the like note, promiſing to transfer, *&c.* And in an action brought upon this promiſe, the plaintiff declared, that the defendant in conſideration that the plaintiff had promiſed to transfer to the defendant upon the 31ſt of *May* 1721. 800*l. in capitali fundo gubernatoris et ſocietatis* *mercatorum Magnae Britanniae negotiantium ad maria auſtrialia et alia loca Americae et pro incitatione piſcationis, Anglice vocato South Sea* ſtock, promiſed to accept it, and pay 5600*l.* &c. Upon *non aſſumpſit* pleaded, the cauſe came to be tried before me laſt *Trinity* term at *Guildhall*; and upon the trial the defendant's counſel took ſeveral exceptions. 1. That the contract, though regiſtred, was not regiſtred according to the act of parliament. 2. That there was not proof of a proper tender by the plaintiff to transfer, &c. and, 3. That the plaintiff had miſtook the name of the *South Sea* company, for there was no ſuch word as *auſtrialia* for *South* but the proper *Latin* word was *auſtralia*. Whereupon it was agreed, the plaintiff ſhould have a verdict, with liberty for the defendant to move for a new trial, if the court of King's Bench ſhould be with him in any of his exceptions. As to the two firſt I was clear of opinion upon the trial, and ſo was the court of King's Bench upon the ſubſequent motion, 1. that the contract was regiſtred according to the act, the plaintiff having regiſtred that note which the defendant gave, though he had not regiſtred the note he gave the defendant, it being out of his power, the defendant having that in his cuſtody: 2. that the evidence was a proof of a proper tender to transfer, &c. But then as to the third exception, it being moved in the King's Bench and argued by council on both ſides, the court was unanimous of opinion, that the plaintiff had failed in proving his declaration; for the evidence being of a promiſe to accept *South-Sea* ſtock, and the name of the corporation being ſet out with an inſenſible and improper word, *viz. auſtrial'* inſtead of *auſtral'* did not deſcribe that corporation, and by conſequence the agreement ſet out in the declaration was to transfer a different ſtock from that which was proved by the evidence. And they held, that if the word *auſtrial'* was rejected, as the counſel for the plaintiff would have had it, that would not help the plaintiff; for then the corporation deſcribed would be, the governor and company of merchants trading to the ſeas and other places in *America*, &c. but would not be that corporation, part of whoſe ſtock was proved to be agreed to be transferred. And the verdict was ſet aſide, and a new trial granted, *February* the 7th 1727.

S. C. 2 Stra. 793.

Lea *verſ.* Welch. *Error* C. B.

Intr. *Trin.* 13 *Geo.* 1. B. R. Rot. 304.

Leaving out *ſuper ſe aſſumpſit* ill.

THE plaintiff below *William Lea* brought an action upon the caſe againſt *Richard Welch* in the Common Pleas, and declared upon ſeveral promiſes; and the firſt count was, that the defendant *Welch* was indebted to the plaintiff in 10 *l.* for goods ſold and delivered,

vered, *et ſic inde indebitatus exiſtens idem Richardus poſtea, ſcilicet* the ſame day and year at, *&c. praedictas decem libras praefato Willielmo cum inde poſtea requiſitus eſſet bene et fideliter ſolvere et contentare vellet.* There were other counts in the declaration. The defendant let judgment go by *nil dicit*, and after a writ of inquiry executed and intire damages found, judgment was given for the plaintiff. Upon which the defendant *Welch* brought this writ of error. And Mr. *Parker* for the plaintiff in error took an exception to the declaration, becauſe it was not alleged, that the defendant promiſed the plaintiff, that he would pay; ſo that there was no promiſe by the defendant, which was the foundation of the action. And he cited 1 *Lev.* 164. *Buckler verſ. Angell*, as a caſe adjudged in point. In *aſſumpſit* the plaintiff declared, that in conſideration that he would ſurrender a term, the defendant *ſolvere vellet* 10 *l.* after verdict for the plaintiff upon *non aſſumpſit* judgment was arreſted, becauſe no promiſe was laid, and then no iſſue was joined. The ſame caſe, 1 *Sid.* 246. He cited alſo *Cro. El.* 913. *Noy* 50. *Law againſt Saunders*, that after a verdict it would not be good.

S. C. Raym. 23.
1 Keb. 878.

Mr. *Clive* for the defendant in error relied upon the caſe of *Roe verſ. Gatehouſe*, 2 *Salk.* 663. where in caſe upon ſeveral promiſes, in the ſecond count there was an omiſſion as here of laying a promiſe by the defendant, and yet the court held it good, and affirmed the judgment upon the writ of error brought. He cited alſo 1 *Sid.* 306. *Bedford verſus Uffington.* But the court held, that the caſe of *Roe verſ. Gatehouſe* did not come up to the preſent caſe, becauſe there was a promiſe laid in the firſt count, and it is upon that the court there laid great ſtreſs, and ſaid that the nominative caſe ſhould go quite through, but here is the defect in the firſt count. And the caſe of *Buckler verſ. Angell* as reported by *Levinz* is the very caſe. And therefore they held, the declaration was ill, and judgment was reverſed, *Feb.* 6. 1727.

Eaſter Term

1 Georgii 2. regis. B. R. 1728.

The King *verſ.* Thomas Hayes.

Intr. *Paſch.* 13 *Geo.* 1. n. 14. B. R.

Indictment for forgery, defendant pilloried, and one of his ears cut off.

This is now death by a late ſtatute. See 2 Stra. 843.

AN indictment was found 20th *Feb.* 1726. at *Hicks's Hall* before the juſtices of *oyer* and *terminer* for *Middleſex* againſt the defendant and one *William Hayes*, for that they intending to defraud the executors of *Edmund Longbotham* of 280*l.* 30th of *October* 1720. forged a certain writing *vocatum* a bond, purporting to be an obligatory writing under the hand and ſeal of the ſaid *Edmund Longbotham*, and to bear date the 18th of *June* 1718. to the ſaid *Thomas Hayes*, in the penalty of 560*l.* with condition to pay 280*l.* on the firſt of *December* next following the date, *&c.* then the indictment proceeds, that the ſaid jurors further preſent upon their oaths, that the two defendants afterwards, *viz.* the ſaid 30th of *October* 1720. did publiſh the ſaid writing ſo by them forged as aforeſaid as a true bond, *&c. contra formam ſtatut. &c.* then the indictment goes on, and the ſaid jurors further ſay upon their oaths, that the ſaid defendants afterwards, *ſcilicet* the ſaid 30th of *October anno ultimo ſupradicto quoddam* [not ſaying *aliud*] *falſo fabricatum ſcriptum*, purporting to be made under the hand and ſeal of the ſaid *Edmund Longbotham*, and to bear date the 18th of *June* 1718. to the ſaid *Thomas Hayes*, in the penalty of 560*l.* with condition to pay 280*l.* upon the 1ſt of *December* next following the date of that writing, did publiſh, knowing it to be forged, *&c. contra formam ſtatut. &c.* The defendants removed this indictment into the King's Bench by *certiorari*, and pleaded not guilty; and the cauſe came on to trial before me the ſitting after *Trinity* term 1727. And upon producing the forged bond in evidence, it was inſiſted upon by the defendants counſel, that there was a material variance between that produced in evidence and that laid in the indictment; for it was laid in the indictment, *in quo* *quidem ſcripto mentionatur praedictum Edmundum Longbotham* [Note, he had not before been ſet out to have been of any place] *per nomen Edmundi Longbotham de Limehouſe in parochia de Stepney in comitatu Middleſex*; but the bond produced in evidence was, *Edmundum Longbotham de Limehouſe in peroch. de Stepney in comitatu Middleſex*; whereas *peroch.* does not ſignify a pariſh, nor is there any ſuch word, the conſequence of which would be, that he is deſcribed to be of a different place than he is mentioned to be of in the forged bond; and therefore a material variance. But the counſel for the King, not admitting the variance to be material, alleged, that the defendant having removed this indictment by *certiorari*, made up the record and brought it down; and that this was not thus in the original indictment, but the record was made up wrong on purpoſe, that he might be acquitted; for the counſel for the proſecutor ſaid, they were inſtructed, that the original indictment was in *peroch.* and ſo agreed with the forged bond produced in evidence. Whereupon I propoſed, they ſhould proceed in the trial, and if the jury ſhould be of opinion, that the defendant did forge the bond produced in evidence, they ſhould find a ſpecial verdict, upon which the variance would appear, and if material the defendant would have the benefit of it, and the proſecutor would have an opportunity to apply to the court, and try if it could not be ſet right, ſuppoſing this fault was made in the record of *niſi prius* contrary to the indictment by the defendant or his clerk in court. Upon which the trial went on, and after a good deal of evidence of both ſides (but the ſtrength of the evidence was clearly with the proſecutor) the jury brought in their verdict, that the defendants were guilty of forging the writing purporting the bond given in evidence; and thereupon they found their verdict ſpecially, that the defendant might have the benefit of the variance, &c. Afterwards in *Hilary* term 1727. it was moved on behalf of the proſecutor in this cauſe, that the *niſi prius* roll might be amended by the plea roll, and the word *paroch.* in the indictment in the *niſi prius* roll made *peroch.* as it was in the indictment upon the plea roll, the record having been made and carried down to trial at *niſi prius* by the defendant's clerk in court, as was ſuppoſed, to procure an acquittal. And after hearing counſel on both ſides, the court made a rule for an amendment accordingly, *January* 25, 1727. whereby there was no variance between the forged bond ſet out in the indictment and that found in the ſpecial verdict, remaining upon the record. And now this term the cauſe was ſet down in the paper to be argued upon the ſpecial verdict, which ſpecial verdict was this: the jury found, that the defendant 30th of *October* in the indictment mentioned, at the place in the indictment laid in the county of *Middleſex* for that purpoſe, did forge *quoddam ſcriptum ſuper papyrum, Anglice vocatum* a bond, *in verbis literis et figuris ſequentibus, viz. Noverint univerſi, &c.* and ſo find it *in haec verba*, with the condition, exactly as laid in the firſt part of the indictment: and then the jury farther find, that the defendants afterwards, *viz.* the ſaid 30th of *October*, *praedictum falſum fabricatum et controfactum ſcriptum ſuper papyrum in verbis literis et figuris praedictis ut praefertur expreſſum et ſpecificatum*, by the ſaid defendants *ut praefertur*, forged, *falſò et ſcienter* at the place laid in the indictment for that purpoſe in *Middleſex* did publiſh: but whether upon the whole matter the defendants or either of them are or is guilty *de tranſgreſſione contemptu falſò fabricatione et malegeſtura praedictis in indictamento praedicto interius ſpecificatis modo et forma* as by the ſaid indictment againſt them is ſuppoſed, or not, the jury are ignorant, and pray the advice of the court; and if the court ſhall be of opinion, they are guilty, or either of them is guilty *de tranſgreſſione contemptu falſò fabricatione et malegeſtura praedictis*, then they find them guilty; and if the court ſhall be of opinion, they are not guilty, *&c.* then they find them not guilty, *&c.* And it was argued by Mr. ſerjeant *Eyre* and Mr. *Fazakerley* for the defendants, that no judgment could be given againſt them upon the verdict, becauſe it was imperfect and incomplete, inaſmuch as that in the indictment three diſtinct offenſes are charged, 1. That the defendants forged the bond dated 18th of *June* 1718. 2. That they publiſhed that very forged bond. 3. That they publiſhed *quoddam ſcriptum falſò fabricatum* 18th of *June* 1718, knowing it to be forged, which muſt be took to be a different bond from that charged to be forged in the beginning of the indictment. It is not ſaid *idem ſcriptum*, but *quoddam*, which muſt be took to be another than what was mentioned before. But as to that laſt offenſe the jury have found nothing, for they only find, that they forged *quoddam ſcriptum*, *&c.* and ſo ſet it out (which now ſince the record is amended exactly, agrees with that firſt ſet out in the indictment) and that they publiſhed that forged writing, *&c.* and then make the general concluſion: but ſay nothing as to the defendants publiſhing the laſt writing, knowing it to be forged; but as to that, they ought to have found the defendants not guilty. And they cited ſeveral caſes, to prove that a verdict that finds but part of the matter put in iſſue, and ſays nothing as to the reſt, is inſufficient; becauſe the jury have not tried the whole iſſue; as in an information of intruſion into a meſuage and 100 acres of land, on the general iſſue the jury find the defendant guilty as to the land, but ſay nothing as to the meſuage; this is ill for the whole. *Co. Lit.* 227. *a.* and the judgment given upon that verdict was reverſed. So *Cro. Eliz.* 133. *Finymore verſus Sanky.* Debt for 7*l.* 13*s.* 4*d.* on *nil debet* the jury found, that the defendant owed 6*l.* 13*s.* 4*d.* but ſaid nothing as to the reſt; after judgment given for the plaintiff, judgment

Hardr. 166. Rochel & ux. verſ. Struddle. M. 9 W. 3. Miller verſ. Tretts. Ante, 324.

ment was reverſed. So if ſeveral iſſues are joined, and the jury find ſome of them well, and as to the others find a ſpecial verdict, which is imperfect; a *venire facias de novo* ſhall be granted for the whole. 2 *Roll. Abr.* 722. *pl.* 19. They cited alſo caſes where upon defects in the ſpecial verdict, a *venire facias de novo* ſhould iſſue; as *Cro. Jac.* 31. *Auncelme verſ. Auncelme.* In treſpaſs for entring into lands, *&c.* the jury *quoad parcellam tenementorum* find a ſpecial verdict, and ſay nothing as to the reſt; a *venire facias de novo* iſſued. To the ſame purpoſe is *Cro. Jac.* 113. *Woolmer verſ. Caſton*, and *Cro. Jac.* 653. *Treſwell verſ. Middleton.* They urged farther, that in this caſe there was no fact found, that could be applicable to the publiſhing this laſt forged writing, what is found being applicable to the firſt; and therefore the court have no foundation to conſider of this laſt offence, though the verdict is ſpecial. And for that 2 *Siderſ.* 86. *Street verſ.* Sir *Will. Roberts*, was cited, where it is laid down, that in all ſpecial verdicts the judges will not adjudge upon any matter of fact, but that which the jury declare to be true by their own finding, and therefore the judges will not adjudge upon an inquiſition or *aliquid tale* found at large in a ſpecial verdict; for their finding the inquiſition does not affirm, that all in it is true. They concluded with citing 3 *Lev.* 55. *Graves verſ. Morley.* Treſpaſs for taking his coat and cloak; on not guilty the jury found a ſpecial verdict, that the defendant being a conſtable took the coat for a tax, but ſay nothing as to the cloak; and the court held the whole was diſcontinued. And therefore they inſiſted, that in the preſent caſe the whole was diſcontinued, or elſe that a *venire facias de novo* ought to iſſue; but that no judgment could be entred on this ſpecial verdict againſt the defendant.

On the other ſide it was argued by Mr. ſerjeant *Sheppard* for the King, that the court might and ought to give judgment againſt the defendant; for though he agreed many of the caſes put by the counſel for the defendant to be good law, yet in this caſe, as the defendants plea goes to all in the indictment, ſo does the ſpecial verdict; for their concluſion is, whether the defendants are guilty *de tranſgreſſionibus contemptibus falſo fabricationibus et malegeſturis praedictis, &c.* and then the court will judge, whether the defendants are not guilty of the whole, or of what part thereof they are not guilty.

The court agreed, that the caſes cited out of *C. L.* and *Cro. Eliz.* are certainly law; for if a jury finds but part of the matter put in iſſue, and ſays nothing as to the reſt; the verdict is ill, and a *venire facias de novo* ſhall iſſue, if no judgment is given; but if judgment is given upon ſuch verdict, it ſhall be reverſed. So if a ſpecial verdict is imperfect, and don't take in the whole in iſſue, a *venire facias*

de

de novo ſhall be granted. Or if the ſpecial verdict is ſuch, that no judgment can be given upon it, as the caſe cited of *Cro. Jac.* 31. But then the court held, that in this caſe, as the not guilty went to the whole indictment, ſo the verdict was found as to all the offences charged in the indictment. They have found all the facts proved before them, and ſubmit it to the court, whether that does not maintain all the charges. They might doubt, though the proof was but of forging one bond, and the publication of that bond, whether they upon their oaths could ſafely ſay, he was not guilty of publiſhing *quoddam ſcriptum*, *&c.* knowing it to be forged, it not being alleged in the indictment, that it was *aliud ſcriptum* different from the firſt, and therefore would leave that to the judgment of the court. Then in this caſe the indictment being for three diſtinct offences, which in their nature are ſeveral, and the facts found by the ſpecial verdict fully maintaining the three firſt charges, as to them the verdict was found for the King; but as to the third offence, when they conſidered whether any fact found maintained that, the court was of opinion, no fact found in the ſpecial verdict did prove that; becauſe they took it, that although the indictment did not mention *aliud ſcriptum*, yet when it mentioned it by the way of *quoddam ſcriptum*, it was not to be took to be the ſame as that mentioned before; and then proof, but of forging one bond, and publiſhing that one bond, *&c.* that was not properly applicable to this laſt charge; and therefore held, that as to this laſt charge the verdict was with the defendants; and declared the ſpecial verdict had found the defendants guilty as to the two firſt offences, and not guilty as to the laſt. *May* 27, 1728.

At another day Mr. ſerjeant *Eyre* moved for the defendants in arreſt of judgment. And his exception was to the *diſtringas*, that it was *ad faciendum quandam juratam inter*, *&c. de quibuſdam tranſgreſſionibus contemptibus et falſis fabricationibus unde indictati exiſtunt*; whereas the indictment was for forging and publiſhing a forged bond, but there was no treſpaſs nor contempt in the indictment. And in the indictment one offenſe was for publiſhing a forged bond knowing it to be forged, which is not in the *diſtringas*; which is a fatal fault, as the counſel for the defendant argued, and cited *Cro. Eliz.* 622. *Clerk verſ. Clerk*, the action was an ejectment, and the *venire facias* was *ad faciendum juratam in placito tranſgreſſionis*, whereas it ſhould have been, *in placito tranſgreſſionis et ejectionis firmae*, and therefore held a miſ-trial, and a *venire facias de novo* was awarded. So 2 *Lev.* 85. *Gunter verſus Clayton*; in caſe for an eſcape againſt a ſheriff upon an arreſt, they declared upon a *latitat in placito tranſgreſſionis*, and the writ produced was *in placito tranſgreſſionis acetiam billae* 20 *l.* and this was held an incurable variance. And in the preſent caſe, the variances

between

between the indictment and *diſtringas* are as incurable. But the maſter and clerks of the Crown Office certifying the court, that this was the conſtant form of making out the *diſtringas* in ſuch caſes; that there precedents were all ſo, and that if this exception was allowed, it would overturn all their judgments after verdicts for miſdemeanors and forgeries, *&c.* the court over-ruled the exception.

The defendant *Thomas Hays* was afterwards brought up for judgment. And Mr. ſerjeant *Chapple* and Mr. *Ketelby* moved, that as this indictment was founded upon the ſtatute of the 5 *Eliz. cap.* 14. judgment muſt be given againſt the defendant *Thomas Hays* (*William Hayes* not being in cuſtody) according to that ſtatute, and that *Joan Longbotham* their client, being the party grieved, ought to have double coſts and damages. For by the 3d *par.* of 5 *Eliz. c.* 14. it is provided, that if a perſon is convicted for forging a bond, or of publiſhing a forged bond knowing it to be forged, that then he ſhall pay unto the party grieved his double coſts and damages, to be found and aſſeſſed in ſuch court, where ſuch conviction ſhall be, *&c.* And now the conviction being in this court, they inſiſted, the court ought to find and aſſeſs the damages; and cited for that, 3 *Inſt.* 171, 2. *Grevile verſ. Hind*, and 2 *Brownl.* 49. where they were aſſeſſed by the court where the party was convicted, *viz.* in the Star Chamber. But the court was in great doubt, whether they could, or if they could, what methods they ſhould take to find and aſſeſs the damages in this caſe. For by the 2d *par.* of that ſtatute of 5 *Eliz. c.* 14. which inflicts the penalty for forging or publiſhing a falſe deed, whereby another's freehold ſhould be moleſted, *&c.* it is enacted that if any perſon ſhould thereof be convicted, either upon action or actions of forgery of falſe deeds to be founded upon that ſtatute at the ſuit of the party grieved, or otherwiſe according to the order and due courſe of the laws of this realm, or upon bill or information to be exhibited into the court of Star Chamber according to the order and uſe of that court, he ſhould pay unto the party grieved his double coſts and damages, to be found or aſſeſſed in ſuch court where ſuch conviction ſhould be, *&c.* then by *par.* 3. which fixes the penalty for forging a bond, *&c.* which is the preſent caſe, it is enacted, that if any perſon ſhall be convicted by any of the ways or means aforeſaid, he ſhall pay to the party grieved his double coſts and damages, to be found or aſſeſſed in ſuch court where ſuch conviction ſhall he, *&c.* So that by the plain proviſion of the act the Star Chamber had power to aſſeſs theſe damages and coſts, and upon that the caſes cited were founded. So in forgery of falſe deeds the jury might give the damages, *&c.* But in an indictment no damages were to be given at common law; and therefore ſince no caſe nor precedent had been cited or produced, where damages have been given by the court upon ſuch an indictment; the court thought it required conſideration, whether it could be done, and by what methods they ſhould inform themſelves what the damages were, *&c.* and that therefore this coming on towards the cloſe of *Trin.* term 1728. if the proſecutrix inſiſted upon the damages, it muſt go over till the next term. And thereupon the proſecutor's counſel, being very deſirous to have judgment, they waived the conſideration of the damages and coſts, and prayed their judgment as to the reſt according to the ſtatute. Whereupon judgment was given againſt the defendant *Thomas Hays*, that he ſhould be ſet upon the pillory at *Charing Croſs* ſuch a day, and there have one of his hears cut off, and ſhould be impriſoned for one whole year without bail or mainpriſe. And accordingly he did ſtand in the pillory, and one of his ears was cut off.

S. C. 2 Stra. 797.

Evans *verſ.* Hicks.

Privilege of Ambaſſadors.

RULE upon hearing counſel of both ſides was made, to diſcharge the defendant out of execution by virtue of the ſtatute of 7 *Ann. cap.* 12. it being made appear to the court, that he was a domeſtick ſervant of the envoy from the elector *Palatine*, *viz.* his ſecretary, and that all the ſteps preſcribed by the act were purſued. *May* 25, 1728.

Trin.

Trin. Term

2 Georgii 2. regis. B. R. 1727.

Edward King and Judith his wife *verſ.* Thomas Jones. *Error.*

Intr. *Hil.* 13 *Geo.* 1. B. R. Rot. 470.

S. C. 2 Stra. 811.

Coverture of the Defendant after the action brought cannot abate the plaintiff's writ.

THomas *Jones* brought an action upon the caſe upon ſeveral promiſes in this court by original againſt the defendant *Judith* as a *feme ſole* by the name of *Judith Parnell*; and declared that ſhe was indebted to the plaintiff 22d of *October* 1726. in 203*l.* &c. for goods ſold and delivered, &c. The defendant *Judith* pleaded in this manner; *et praedicta Juditha King quae arreſtata fuit per nomen Judithae Parnell* by her attorney pleaded *non aſſumpſit.* Upon which iſſue being joined, at the aſſiſes a verdict was found for the plaintiff, for 41*l.* 18*s.* and coſts 40*s.* Upon which judgment was given for the plaintiff *Jones* for the damages and coſts *de incremento*, in all 63*l.* Thereupon an entry was made upon the record, that *die lunae in tribus Paſchae* 13 *Geo.* 1. *veniunt quidam Edwardus King et praedicta Juditha in propriis perſonis ſuis*, and produced a writ of error *de et ſuper praemiſſis praedictis*, which writ follows *in haec verba*; which was a writ of error directed to the juſtices of the King's Bench, reciting that *in recordo et proceſſu acetiam in redditione judicii loquelae quae fuit in curia noſtra, coram nobis inter Thomam Jones et Juditham uxorem Edwardi King per nomen Judithae Parnell, &c. poſteaque, &c. veninut praedicti Edwardus King et Juditha per nomina Edwardi King et Judithae uxoris ejus* by their attorney, and aſſign for error, that it appears in the ſaid record, that the ſaid *Judith comperuit et placitavit in placito praedicto ut femina ſola per attornatum ſuum, ubi in facto eadem Juditha tempore comparentiae et placitationis praedicto fuit cooperta cum ipſo praefato Edwardo King viro ſuo, viz. apud, &c. et ſic eadem Juditha tempore comparentiae praedictae non facere ſeu nominare aliquem attornatum nec comperuiſſe aut placitaſſe debuit ſine praedicto viro ſuo, &c. Jones* the defendant in error came in, and after ſeveral imparlances pleaded to the aſſignment of errors, that the ſaid *Edward King* and *Judith ad dicendum ſeu allegandum pro errore ad judicium praedictum revocandum quod ipſa eadem Juditha praedicto tempore cooperta fuit cum ipſo praefato Edwardo King prout ſuperius pro errore per praedictas Edwardum et Juditham allegatur admitti non debent quia dicit quod* he the ſaid *Thomas Jones* 18 *October* 13 *Geo.* 1. ſued out of Chancery a writ againſt the ſaid *Judith* as a *feme ſole*, *de et in placito praedicto in recordo praedicto mentionato*, and ſo ſets it out at large; and that the ſheriff of *Surrey* returned a *nichil*, whereupon a *capias* iſſued againſt the ſaid *Judith*, upon which the ſheriff returned a *non fuit inventa*; whereupon he ſued out a *teſtatum* into *Middleſex*, to which the ſheriff returned a *cepi*, and that he had her body ready, *&c.* and that then and there in this court *venit praedictus Edwardus King in propria perſona ſua, et quidam Johannes Kitſon in propria perſona ſua*, and the ſaid *Edward King* and *John* entered into a recogniſance to the ſaid *Edward Jones* in 80*l.* under this condition, that *ſi contingeret eandem Juditham, in praedicto placito convinci*, that ſhe the ſaid *Judith* ſhould pay the ſaid *Jones* the damages recovered, or render her body to the cuſtody of the marſhal of the *Marſhalſea* of this court, *&c. prout patet per recordum praedictorum ſeparalium brevium et retornorum eorundem brevium ac per recordum recognitionis praedictae hic in curia de recordo reſidentia plenius liquet et apparet, &c. unde petit judicium ſi praedicti Edwardus King et Juditha contra recognitionem praedictam ſic ut praefertur de recordo remanentem ad dicendum ſeu allegandum quod praedicta Juditha praedicto tempore fuit cooperta cum ipſo praefato Edwardo King prout ſuperius pro errore per ipſos Edwardum et Juditham allegatur admitti debeant, &c. et quod judicium praedictum in omnibus affimetur, &c.* To which plea in bar of the aſſignment of errors there was a demurrer, and joinder in demurrer.

And ſerjeant *Chapple* for the plaintiffs in error inſiſted, that the error aſſigned being a matter of fact, *viz.* coverture, it was confeſſed by the plea to the aſſignment of errors; in the ſame manner as if infancy is aſſigned for error, it is confeſſed by a plea of *in nullo eſt erratum*; and in that caſe, if the defendant in error would conteſt it, he ought to take iſſue upon it. 1 *Lev.* 294. *Grell verſ. Richards*; and *Raym.* 231. *Oakeover verſ. Overbury.* Then the coverture being confeſſed, the judgment is erroneous, for a *feme covert* cannot appear by attorney; and if ſhe does, and judgment is given againſt her, her huſband and ſhe ſhall join in a writ of error, and reverſe the judgment. So is 18 *E.* 4. 4. *Br. error* 173. *Br. joinder in action* 88. & 1 *Roll. Ab.* 748. *pl.* 18. *Hayward verſ. Williams. Stile* 254, 280. where an action was brought againſt a *feme covert* as a *feme ſole*, and ſhe pleaded to iſſue as a *feme ſole*, and afterwards judgment was given againſt her, and ſhe was took in execution; ſhe and her husband may bring a writ of error, otherwiſe her husband would be prejudiced in the loſs of her company and care about his family; and he has no other means to help himſelf. But in caſe of a fine, the husband may enter and avoid it. And in 1 *Rol. Ab.* 759. *Edwards verſ. Simpſon*, which is the like caſe, it is ſaid, that they may aſſign for error, that ſhe was a *feme covert* at the time of the appearance and plea. And ſo the error is aſſigned in this caſe; and therefore he prayed, that judgment might be reverſed.

Serjeant *Whitaker* for the defendant in error inſiſted upon it, that the judgment was well given, and ought to be affirmed. For. 1. he ſaid, that the original writ was well brought, for *Judith* at the time of the ſuing of the original, *capias* and *teſtatum*, was a *feme ſole*, for the aſſignment of error is, that ſhe was a married woman *tempore comparentiae ſuae*, &c. Then when a writ is well ſued out, a defendant or tenant cannot by his own act abate the plaintiff or demandant's writ. *Litt. ſect.* 410. *Co. Li.* 248. *b.* And though *Judith* might marry, ſhe could not defeat the plaintiff's writ thereby. 2. She has pleaded as a *feme ſole*, *et praedicta Juditha King* who was arreſted by the name of *Judith Parnell.* Now the *praedicta* makes that ill pleading, for ſhe confeſſes herſelf the ſame perſon, and a *feme ſole*; for which purpoſe he cited 1 *Lutw.* 22, 23. 2 *Cro.* 482. 2 *Ro. Rep.* 50, 88. *Forteſcue verſ.* Sir *John Markham.* 3. He inſiſted that *Edward King* was eſtopped by the recogniſance he entred into, to aſſign this for error, he having entered into the recogniſance for *Judith*'s appearance as a *feme ſole.*

But the court were of opinion, that ſince the writ was ſued out right at firſt againſt *Judith* as a *feme ſole*, ſhe could not by her own act defeat the plaintiff's writ. And therefore this caſe was plainly diſtinguiſhable from the caſes cited out of *Brook* and *Ro. Abr.* for there the defendant was a *feme covert* at the ſuing the writ; but here ſhe was at that time and after a *feme ſole.* And in 2 *Ro. Rep.* 53. *Mich.* 16 *Jac.* 1. *Haydon verſ. Miller*, becauſe it did not ſufficiently appear to the court, that ſhe was *covert* at the time of the original proceſs ſued out, which ought to be expreſly averred in the aſſignment of the error, judgment was there affirmed; which was a caſe of the like nature as this. And the court affirmed this judgment *July* 5, 1728.

S. C. 2 Stra. 811.

Quinden. Trin. is on a Sunday.

The King *verſ.* Mr. Gumley & al'.

AN information was exhibited againſt the defendants, for a great aſſault, battery and wounding, committed by them upon *Wilkins* the printer, *&c.* And on not guilty pleaded, it was tried before me at *Guildhall*, and the defendants were found guilty. And Mr. *Fazakerley* and Mr. *Bootle* moved in arreſt of judgment, that the *diſtringas* was returnable *die Martis proxime poſt quindenam Trinitatis*, and the day of *niſi prius* was *die lunae proxime poſt quindenam Trinitatis*; that *Trinity Sunday* was *June* the 16th, and that *octab. Trinitatis* was the *Monday* ſeven-night after, which was the 25th of *June*, and that the *quindena Trinitatis* was the *Monday* fortnight after *Trinity Sunday*, which was the 1ſt of *July*; then the *dies lunae proxime poſt quindenam Trinitatis* would be 8 *July*. But the *diſtringas* was returnable *die Martis proxime poſt quindenam Trinitatis*, which was *July* 2. and by conſequence the day in bank was before the day of *niſi prius*; and therefore that this trial being had 1 *July*, which was before the day of *niſi prius*, and in truth was the *quindena Trinitatis*, that therefore the trial was without authority, and the verdict ought to be ſet aſide. And they cited 33 *H.* 6. 45. and *Dier* 97. that a verdict taken after the day in bank was ill. But the court was of opinion, that *Sunday* the 24th was the *quindena Trinitatis*, and the return-day; for all *quindena's*, *octabis's*, *&c.* are incluſive; and then *die lunae proxime poſt quindenam Trinitatis* was *July* 1. and the trial right. *Salk.* 626. *Harvey againſt Broad*, and *Davies verſ. Salter*. *Shower* 60. *Whitmore verſ.* manucaptors of *Wheeler*, adjudged in point. 6 *Mod.* 148, 159, 250. And the exception was over-ruled, *July* 10, 1728.

S. C. 2 Stra. 810.

Attachment againſt a witneſs for not attending a trial.

Wyat *verſ.* Winkford.

MR. *Gapper* moved laſt *Eaſter* term for an attachment againſt *Rolf Baily*, for not attending at the aſſiſes at *Wincheſter*, to give his evidence, to prove the hand of a ſteward of a manor to a copy of court-roll, being *ſubpoenaed* and having received one guinea for his charges, and being promiſed to have one guinea *per diem* while there, and his charges paid. And a rule was made, to ſhew cauſe, *&c.* And now 2 *July* in this term ſerjeant *Baines* moved to diſcharge the rule, for that an attachment ought not to go, but the party injured had his action upon the ſtatute of *Eliz.* And he ſaid, that ſuch a rule had been granted by the King's Bench between *Hammond* and *Stewart*; but upon ſhewing cauſe, the rule was afterwards diſcharged. And he ſaid alſo, that ſuch a rule was granted againſt one *Joſ. Roſſington, Mich.* 10 *Geo. Nov.* 28. between *Daliſon* and *Aland*, for not appearing at *Guildhall* before lord chief baron *Mountague*, being *ſubpoenaed* as a witneſs; but that rule was after diſcharged. But the court in this caſe thought it was a good foundation for an attachment, the diſobedience to the *ſubpoena* being a contempt to the court; and though an action might be brought on the ſtatute, yet that was a more dilatory method, and more difficult to proceed in, which encouraged witneſſes not attending frequently upon the trials, at which they were *ſubpoenaed* to appear and give evidence. And therefore the rule was made abſolute, *July* 2. The original rule was granted *May* 21, 1728.

John Harriſon *verſ.* Thomas Bottomley. *Error.* C. B.

Intr. *Paſch.* 13 *Geor.* C. B. Rot. 582. & *Paſch.* 1 *Geor.* 2. B R.

S. C. 2 Stra. 809.

What a ſufficient certainty in trover.

HArriſon brought an action of *trover* againſt *Bottomley* in the Common Pleas, and among other things declared for *una parcella ſegeſtrium involucrorum et funium, Anglice* pack-cloths, rappers and cords, *&c.* and the defendant having let judgment go by *nihil dicit*, a writ of inquiry was executed, and intire damages found for the plaintiff, and final judgment given for him in the Common Pleas. Upon which *Bottomley* ſued this writ of error, returnable in the King's Bench. And the error aſſigned was, that *parcella* was too uncertain a deſcription, that no body could tell what quantity was meant thereby; and to prove it ſeveral caſes were cited. *Cro. Eliz.* 865. *Granvel verſ. Rhobotham.* In *trover de una parcella piſcium, Anglice* ling, after verdict the judgment was reverſed, becauſe *parcella* was an uncertain deſcription. 2 *Lev.* 176. *Hicks verſ. Pendarvis, trover de quadam parcella lintea*, judgment after verdict was arreſted for the incertainty. So in 2 *Lev.* 295. *Wade verſ. Hatcher*, treſpaſs for taking *unam parcellam penſarum laniarum, Anglice* a quantity of linen yarn, judgment ſtayed after verdict for the plaintiff. And a caſe was cited to have been in this court, *Trin.* 1 *Geo. Kempſter verſ. Nelſon*, where a replevin brought *pro parcella panni lintei* was adjudged not to lie for the incertainty.

Kempſter verſ. Nelſon.

Mr. *Lee* for the defendant in error ſaid, the caſe of *Kempſter* was intirely different, for there was to be judgment for a return of the thing itſelf; but this action being only to recover damages, it was certain enough. And ſo it was held, *Stiles* 199. *Graves verſ. Drake, trover pro ſex parcellis plumbi cinerei, Anglice* pewter porringers; where it was adjudged good. And 1 *Lev.* 303. *Jenny verſ. Norris*, where it was adjudged, that a *quantum meruit pro quadam parcella fili* was good, and it was held, ſo it would be in *trover*, damages only being to be recovered, for finding which the jury had proof before them. After conſideration of the caſes, the court were of opinion, that parcel ſhould be looked on as an intire thing, the ſame as a bundle; and therefore affirmed the judgment, *July* the ſecond, 1728. There was another caſe between *White* and *Graham*, upon a writ of error brought to reverſe a judgment in *trover* for a parcel of diamonds, among ſeveral other things; and the ſame exception was taken, and judgment was affirmed, *Hil.* 2 *Geo.* 2. *Feb.* 7. 1718. which was entred *Paſchae* 1 *Geo.* 2. *C. B. Rot.* 434. and *in B. R. M.* 2 *Geo.* 2. *Rot.*

Graham verſ. White. 2 Stra. 827.

John Watkins *verſ.* Walter Weſt and William Weſt.

Intr. *Hil.* 1 *Geo.* 2. B. R. Rot. 163 or 164.

Juſtification in treſpaſs under the proceſs of an inferior court, how to be pleaded.

IN treſpaſs for taking the plaintiff's goods, and carrying them away; the defendants pleaded, that the town of *Uſke* in the county of *Monmouth* is an ancient borough; that there had been there from time out of mind a court of record held *coram praepoſito ejuſdem burgi pro tempore exiſtente* of all perſonal actions ariſing within the ſaid borough, and that before the time when, &c. at the ſaid court of record held at the ſaid borough *ſecundum conſuetudinem et uſum ejuſdem burgi* 23 *Apr.* 12 *Geo.* 1. before the then provoſt, one *Anne Hughs* levied a plaint in treſpaſs upon the caſe againſt the plaintiff *Watkins*, &c. and then and there prayed proceſs againſt the plaintiff, &c. *ideo* then and there at the ſame court, &c. there iſſued out of the ſaid court, according to the cuſtom aforeſaid, a certain precept in writing to the bailiffs of the ſaid borough directed, whereby by the ſaid court *praeceptum fuit eiſdem ballivis miniſtris dictae curiae exiſtentibus et eorum cuilibet, quod attachiarent ſeu aliquis eorum attachiaret praedictum* the plaintiff *per bona et catalla ſua infra burgum praedictum*, ſo that he ſhould appear at the next court to be held the 26th of *April* to anſwer the ſaid *Anne*: which precept was afterwards and before the return, *viz.* the ſaid 23d of *April*, delivered by the ſaid *Anne* at the borough aforeſaid, within the juriſdiction of the ſaid court, to the defendants *adtunc ballivis curiae illius exiſtentibus in forma juris exequendum*, by virtue of which precept the ſaid defendants then bailiffs and officers of the ſaid court being at the requeſt of the ſaid *Anne* then and there made, afterwards and before the return of the precept, *ſcilicet* the ſaid 23d of *April*, at the borough aforeſaid, and within the juriſdiction of the ſaid court, the ſaid plaintiff by his goods in the declaration mentioned did attach, to be at the then next court of the ſaid borough to be held at the ſaid borough the ſaid 26th of *April*, to anſwer the ſaid *Anne*, *&c.* and took and carried away the ſaid goods, and detained them, with intent to redeliver them to the ſaid plaintiff upon his appearance in the ſaid court at the return of the ſaid precept, to anſwer the ſaid *Anne*, *&c.* and that they returned the precept to the then next court, *&c.* which was the ſame taking and carrying away of the goods, *&c.* and traverſe the taking, *&c.* the day laid in the declaration, or at any time before the iſſuing, or after the return of that precept, *&c.* The plaintiff demurred to the plea, and the defendant joined in demurrer. And judgment was given for the plaintiff, that the plea was ill, becauſe the juſtification is under a precept directed to the bailiffs of the borough, being officers of the court; but the defendants aver, that they were bailiffs of the court and officers, but don't aver that they were bailiffs of the borough; and if they were not, though they might be bailiffs of the court and officers of the court, yet the precept was not directed to them, and then they could not execute it, nor juſtify under it. For there might be both bailiffs of the borough, and alſo bailiffs of the court, diſtinct officers; but the precept was only directed to the bailiffs of the borough, but it was not directed to the bailiffs of the court, nor to the officers of the court. *July* 5, 1728. I cited the caſe of *Britton verſ. Cole*, adjudged *Hil.* 9 *Wil.* 3. *B. R.* 1697. where in treſpaſs for taking ſheep, *&c.* the defendant pleaded, that a *levari facias* iſſued out of the Exchequer directed to the ſheriff of *Glouceſter*, to levy iſſues and profits of lands found in an inquiſition upon an outlawry againſt *Creſſet* at the defendant's ſuit, by virtue of which writ the ſheriff made a precept to *Anthony* and *Joſeph Powell*, commanding them to levy, and that the defendant requeſted *Anthony* and *Joſeph Powell* to take the cattle in the declaration, becauſe they were *levant* and *couchant* upon the land, *ſuper quo John Powell* and *Joſeph Powell* took the cattle, *&c.* held that *John Powell* could not juſtify executing the proceſs, he not being named in the warrant, but a meer ſtranger.

Ante, 305.
Comyns 51.
1 Salk. 395.

Canning *verſ.* Wright. *Error.* C. B.

Intr. *Mich.* 1 *Geo.* 2. B. R. Rot. 389.

S. C. 2 Stra. 807.

What writ of error is not amendable.

ERROR was brought by *Canning* to reverſe a judgment given againſt him in the Common Pleas, after verdict in ejectment, wherein he was defendant. The writ of error was *teſte* 23 *October* 12 *Geo.* 1. and returnable *octabis Martini Mich.* term 12 *Geo.* 1. And by the record certified the judgment appeared not to be given till *Hil.* term following, 12 *Geo.* 1. whereupon it was held clearly, the record was not well removed by this writ of error. Then Mr. *Parker* for the plaintiff in error moved, that the writ of error might be amended by the ſtatute of 5 *Geo.* 1. *cap.* 13. But upon reading the ſtatute, we were clear of opinion, it could not be done, for it would be to amend the writ contrary to the truth of the caſe, for the judgment in fact was not given till *Hil.* term 12 *Geo.* 1. and therefore this was not ſuch a variance as was intended to be amended by that act. The motion for an amendment was denied, *July* 2, 1728. See 1 *Siderf.* 104.

Elkins *verſ.* Paine.

Writ of error where not amendable.

ELKINS recovered judgment in a *ſcire facias* againſt *Paine*, *Field*, and two others, in the *Marſhalſea*, as bail for one *Croſby*; and *Paine* and *Field* only brought a writ of error, which was ill, and the record not removed thereby. Mr. *Parker* moved, that this writ of error might be amended by virtue of the ſtatute of 5 *Geo.* 1. *cap.* 13. But the court held, the writ was not amendable, the other defendants not having joined in the writ of error. And the writ of error was quaſhed. Intr. *Hil.* 1 *Geo.* 2. *B. R. Rot.*

Jacob Lopes Henriques, Judah Senior Henriques, Iſaac Senior Henriques, William Hubbald, and Charles Nelſon, *againſt* the general privileged Dutch company trading to the Weſt Indies.

S. C. 2 Stra. 807.

Intr. *Paſch.* 11 *Geo.* 1. C. B. Rot. 417. et Intr. *Trin.* 2 *Geo.* 2. B. R. Rot.

1 Stra. 612.

IN a writ of error brought by *Henriques* and the others, to reverſe a judgment given againſt them by the court of Common Pleas in a *ſcire facias* brought againſt them by the *Dutch Weſt India* company, upon their recogniſance as bail for one *Jacob Senior Henriques Van Moyſes* in an action upon the caſe for money lent brought againſt him by the ſaid company, by which recogniſance the plaintiffs in error obliged themſelves jointly and ſeverally in the ſum of 20000 *l.* The caſe appeared to be thus; The *ſcire facias* was ſued out *Hil.* term 10 *Geo.* 1. returnable *octabis purif.* at the return of which *ſcire facias* the ſaid company appeared by *William Bordrigge* their attorney, and the ſheriff having returned a *ſcire feci*, the plaintiffs in error appeared by *William Gilbert* their attorney, and imparled to the firſt return of *Eaſter* term then next;

and then pleaded, there was no record of any ſuch recogniſance as was ſet out in the *ſcire facias.* To which the company replied, that there was ſuch a record. Whereupon judgment was given by the court of Common Pleas, that there is ſuch a record, and judgment was, that the ſaid company ſhould have execution againſt the ſaid plaintiffs in error ſeverally for the ſaid ſeveral ſums of 20000*l.* by them ſeverally acknowledged; *conſideratum eſt etiam*, that the ſaid company recover againſt the plaintiffs in error 6*l.* 10*s. pro damnis miſis et cuſtagiis ſuis quae ſuſtinuerunt occaſione dilationis executionis praedictae*, to the ſaid company *ad requiſitionem ſuam per curiam hic adjudicata juxta formam ſtatuti, &c.* Upon this writ Mr. *Strange* counſel for the plaintiffs in error inſiſted upon two errors. The firſt was, that the plaintiffs in error had among others aſſigned want of warrants of attorney on record, and upon a *certiorari* directed to the chief juſtice of the Common Pleas he had certified there were no warrants of attorney of *Hilary* and *Eaſter* terms in the 11th year of the late King, but the defendants in error having ſuggeſted, that there were warrants of attorney of *Eaſter* term in the 11th year of the late King, another *certiorari* was granted to the chief juſtice of the Common Pleas, *&c.* to which he had returned warrants of attorney in this cauſe both by the plaintiffs and defendants of *Eaſter* term in the eleventh of the late King. But Mr. *Strange* inſiſted, thoſe were not good warrants, becauſe they were warrants of *Eaſter* term, whereas the *ſcire facias* was returnable *octabis Purificationis* in *Hil.* term, at which day the plaintiff below came by his ſaid attorney, but the warrant returned is a warrant of *Eaſter* term following, which could not be a warrant to appear the *Hilary* term before. To which it was anſwered by Mr. *Reeve* for the defendants in error, that a warrant of attorney might have been entered at any time before judgment. 41 *Edw.* 3. 1. *b.* 1 *Roll. Abr. tit. Attorney I.* But by the 32 *Hen.* 8. *cap.* 30. *par.* 2. attornies are to enter their warrants of record of the ſame term the iſſue is entred on record; and by the 18th of *Eliz. cap.* 14. attornies are to deliver in their warrants to be entred or filed on record, in ſuch manner and form as theretofore by the laws or ſtatutes they ought to have done. And the ſtatute of 4 *Ann. cap.* 16. gives no direction when the warrants of attorney are to be filed; but only ſays, ſo that there be warrants of attorney duly filed according to the law as is now uſed. And in the preſent caſe the warrant of attorney is entred of the ſame term the *placita* is of, *Eaſter* term 11 *Geo.* 1. And he cited a caſe in this court adjudged *Trin.* 8 *Geo.* 1. between *Noke* and *Caldicot*; where in error upon a judgment of the Common Pleas want of a warrant of attorney was aſſigned for error, and a warrant was returned upon a *certiorari* directed to the chief juſtice of the Common Pleas of a term ſubſequent to the *placita*; and it was held to be no error. And the

Noke and Caldicot.

court were unanimouſly of opinion, that this was no error in the preſent caſe, for the reaſons given by Mr *Reeve*.

Then Mr. *Strange* aſſigned his other error, which was, that by 8 & 9 *W*. 3. *cap*. 10. *par*. 3. coſts of ſuit are only given to the plaintiff in a *ſcire facias*, if he obtains judgment or an award of execution againſt the defendant after plea pleaded, or demurrer joined. But in this caſe the court of Common Pleas have given judgment, that the plaintiff ſhall recover againſt the defendant 6*l*. 10*s*. *pro damnis miſis et cuſtagiis ſuis occaſione dilationis executionis*, &*c*. whereas they have no power to give damages for the delay of the execution. To which Mr. *Reeve* offered as an anſwer, that the damages occaſioned by the delay of execution were the coſts and charges the plaintiff was put to in ſuing the *ſcire facias*, and by conſequence were his coſts of the ſuit; and that the word *damna* imported in this caſe no more. 2. He ſaid, that the judgment was for two diſtinct things, one an award of execution of a *ſcire facias*, for the ſum contained in the recogniſance, and the other for theſe *damna*; and therefore if the laſt was erroneous, that part of the judgment for the 6*l*. 10*s*. might be reverſed, but the award of execution ſhould be confirmed. And for that he cited a caſe between *Green* and *Waller*, *intr. Hil*. 13 *W*. 3. *B. R. Rot*. 20. where in a writ of error brought here to reverſe a judgment of the King's Bench in *Ireland*, which affirmed a judgment of the Common Pleas in *Ireland*, in debt upon a bond; and upon a demurrer after ſpecial pleading, the judgment of the King's Bench affirmed the judgment of the Common Pleas in *Ireland*, and further gave coſts upon the affirmance; and as to that part of the judgment as to coſts the entry was, *conſideratum eſt quod* the plaintiff in the original action *recupe-raret* inſtead of *recuperet*, which was held error: the court of King's Bench here affirmed the judgment of the King's Bench in *Ireland*, which affirmed the judgment of the Common Pleas there, and reverſed the judgment of the King's Bench in *Ireland* which gave the coſts. And the court were all of opinion, that the judgment as to the 6*l*. 10*s*. *pro damnis miſis et cuſtagiis* was erroneous, and therefore they reverſed the judgment as to that, and affirmed the judgment as to the adjudication of execution, and awarded execution againſt the ſeveral plaintiffs in error, only for the ſums in the recogniſance. *July* 5, 1728.

1 Ro. Ab. 771. N. 23.

Afterwards theſe plaintiffs in error brought a writ of error in parliament upon this judgment given by the court of King's Bench, which was heard by the houſe of Lords, *April* 25, 1730. And beſides the errors inſiſted on in the King's Bench, the plaintiffs in error by their counſel, Mr. *Bootle* and Mr. *Wynne* inſiſted, that no recogniſance in *England* could be given to this *generalis privi-*

legiata ſocietas Belgica ad Indos occidentales negotians, for that the law of *England* does not take notice of any foreign corporation, nor can any foreign corporation in their corporate name and capacity maintain any action at common law in this kingdom, and that therefore the recogniſance was void in law. 2. They inſiſted, that if any ſuch recogniſance could be acknowledged to this pretended company, yet no ſuit could be upon it here, without ſetting out the proper names of the perſons concerned, who make the company, and how conſtituted or privileged, and alleging the recogniſance to be entred into by them *per nomen* of ſuch a company. And if judgment had been for the plaintiffs in error againſt this pretended company, the plaintiffs could not have levied their coſts upon them. But to this it was anſwered by Mr. *Reeve* and Mr. *Fazakerley* for the company, that the plaintiffs were eſtopped by their recogniſance, to ſay there was no ſuch company. And where an action is brought by a corporation, they need not ſhew how they were incorporated; for if the name is proper for a corporation, they need not ſhew how they were incorporated, becauſe the name argues a corporation; but upon the general iſſue pleaded by the defendant the plaintiffs muſt prove they are a corporation. *Hob.* 211. *Norris verſ. Staps.* And the judgment of the King's Bench was affirmed by the houſe of Lords, *Saturday*, *April* 25, 1730. and the plaintiffs in error ordered to pay 100 *l.* coſts.

Dutch Weſt-India company v. Henriques Van Moyſes.

Note, the original action brought by this company againſt *Jacob Senior Henriques Van Moyſes* was an action upon the caſe upon ſeveral promiſes, *viz.* for money lent, *&c.* and *non aſſumpſit* pleaded. The cauſe was tried before lord chief juſtice *King* at *niſi prius* in the Common Pleas, *Michaelmas* term 1734. upon which trial the caſe appeared to be, that *Jacob Senior Henriques Van Moyſes* became indebted to the company in 180,000 guilders, amounting to about 17,390 *l. ſterling*, for ſo much borrowed of them in the bank of *Amſterdam*, and obliged himſelf by contract, to repay the ſame with intereſt; and for further ſecuring thereof, he pledged to the company ſeveral ſhares of *Weſt-India* ſtock, which upon his abſconding were ſold by decree of the court of *Schepens* for 60,900 guilders, toward ſatisfaction of the debt and intereſt. And for the reſt of the money borrowed this action was brought. And upon the trial, lord chancellor *King* told me, he made the plaintiffs give in evidence the proper inſtruments whereby by the law of *Holland* they were effectually created a coporation there. And after hearing the objections made by the counſel for *Jacob Senior Henriques Van Moyſes*, he directed the jury to find for the plaintiffs; who accordingly did, and gave them 13,720 *l.* damages. And afterwards a motion was made in the Common Pleas to ſet aſide the verdict, but by the unanimous opinion of that court the motion was denied.

Mich.

Mich. Term

2 Georgii 2. regis. 1728.

Robert Moore, Eſq; and the lady Anne his wife, *againſt* George Jones, Eſq;

S. C. 2 Stra. 814.

Intr. *Paſch.* 1 *Geo.* 2. B. R. Rot. et intr. *Mich.* 1 *Geo.* 2. C. B. Rot. 879.

Per ſcriptum factum apud W. *conceſſit* does not import a deed.

Robert Moore and the lady *Anne* his wife brought a writ of error returnable in the King's Bench, upon a judgment given againſt them in the Common Pleas in an action of covenant, brought againſt them by *George Jones*, Eſq; in which the plaintiff *Jones* declared, *quod cum per quoddam ſcriptum factum apud Weſtmonaſterium* (the action being laid in *Middleſex*) *in comitatu praedicto*, 6th of *Decemb.* 1715, by which writing, *&c.* *Anne* counteſs dowager of *Suſſex*, *Charles Skelton*, Eſq; and lady *Barbara* his wife, and the ſaid *Anne* wife of the ſaid *Robert Moore*, by the name of the honourable the lady *Anne Leonard*, granted to the ſaid *George Jones*, *pro ejus conſilio tunc impenſo et impoſterum impendendo* to the ſaid counteſs of *Suſſex*, and *Charles*, and lady *Barbara* his wife, and the ſaid lady *Anne*, 50 *l.* to the ſaid *George* and his aſſigns, *exinde tunc* for and during the natural life of the ſaid *George*, if the ſaid counteſs of *Suſſex*, and *Charles* and lady *Barbara* his wife, and lady *Anne*, or any of them ſhould ſo long live, payable half-yearly, *&c.* then the declaration ſets out a joint and ſeveral covenant from the ſaid counteſs, *Charles Skelton* and lady *Anne*, for the payment of the ſaid annuity, and aſſigns a breach in non-payment of ſeveral half-yearly payments of the ſaid annuity, *ad damnum* of the plaintiff *Jones* 300 *l.* Upon *oyer* prayed by the defendants *ſcripti in narratione praedicti Georgii mentionati*, the writing is ſet out *in haec verba*, which imported a grant of an annuity as ſet out in the declaration, and concludes, In witneſs whereof we have hereunto ſet our hands and ſeals the 6th of *December*

1715. After *oyer* of which writing the defendants pleaded in bar, that the plaintiff *George* after the 29th of *September* 1723 (for non-payment of arrears of the annuity incurred after the day of the breach being aſſigned) to any of the ſaid parties, *conſilium non impendit.* To which plea the plaintiff *George* demurred generally. After which the record goes on, *ſuper quo praedicti Robertus et Anna, licet ſolemniter exacti, ad jungendum in moratione in lege cum praefato Georgio non veniunt, ſed defaltam fecere*; *ob quod, &c.* an interlocutory judgment was given for the plaintiff *Jones*, and a writ of inquiry awarded and executed, and damages found, 250*l.* *&c.* and final judgment given for the plaintiff. Upon which this writ of error was brought. And three errors were inſiſted upon by the counſel for the plaintiffs in error.

1. The firſt was, that it did not appear by the declaration, that the writing mentioned in the declaration was the deed of the defendant, *&c.* for if it was not, an action of covenant could not be maintained upon it.

2. That the breaches were ill aſſigned for the non-payment of the annuity, which were aſſigned in this manner, *viz. quod praedicta comitiſſa Suſſex, Carolus et domina Barbara uxor ejus, et praedicta domina Anna dum ipſa ſola fuit, et praedicti Robertus et domina Anna poſt ſponſalia inter eos celebrata, non ſatisfecerunt ſive ſolverunt, nec eorum aliquis ſatisfecit ſive ſolvit, neque eorum aliquis cauſavit ſatisfieri ſive ſolvi, eidem Georgio ſive aſſignatis ſuis ſummam viginti quinque librarum de praedicta annuitate quinquaginta librarum eidem Georgio debitam ſuper viceſimum quintum diem Martii anno Domini* 1723. and ſo in the ſame manner alleges the non-payment of ſeveral ſubſequent half-yearly payments, *&c.*

3. The third error was, that the reaſon of the judgment of the Common Pleas was, becauſe the plaintiff in error and defendant below did not join in demurrer, and yet judgment was given againſt him, as upon default, which could be only when a day was given; but no day was given him here, and therefore the judgment ſhould rather have been entred as upon a *nihil dicit.*

This caſe was argued three ſeveral times, by Mr. *Filmer*, Mr. *Wynne* and Mr. *Robinſon*, for the plaintiffs in error, and by Mr. *Reeve*, Mr. ſerjeant *Chapple* and Mr. *Huſſey*, for the defendant in error. And the counſel for the plaintiffs in error inſiſted upon it, that it could not be diſputed, but that an action of covenant muſt be grounded on a deed; that in this caſe the writing mentioned in the declaration did not appear to be a deed, for it was neither mentioned to be ſealed, nor any technical word uſed in the declaration, that imported a deed, as *factum*, *indenturam*, *&c.* and they relied upon the caſe of *Southwel verſ. Brown*, *Trin.* 39*Eliz. B. R. Cro. Eliz.* 571. where in covenant the plaintiff declared, that the defendant *per ſcriptum articulorum*, made between the defendant on the one part and the plaintiff on the other, *convenit*, *&c.* and after verdict for the plaintiff, the declaration was adjudged to be ill, becauſe it was not alleged, that the writing was *ſigillo defendentis ſigillatum*. But if the word *factum* had been in inſtead of *ſcriptum*, or it had been *ſcriptum factum*, it might have been good. So in 3 *Lev.* 234. *Blenherhaſſet verſ. Peirſon*; in defeaſance of a condition of a bond the defendant pleaded, that the plaintiff *per ſcriptum ſuum ſub manu ſua ſignatum* agreed to inlarge the time of payment of the money compriſed in the condition; and it was adjudged, the plea was ill, becauſe this writing ſet out in the plea did not import a deed, but the defeaſance muſt be by deed.

On the other ſide it was argued by the counſel for the defendant in error, that it ſufficiently appeared by this declaration, that the writing upon which the plaintiff declared muſt be took to be a deed, and ſhould be ſo intended to be by the court; that delivery of the deed is eſſential to the eſſence of a deed, and yet there is no occaſion to aver in the declaration, it was delivered. That to declare that *J. S. per ſcriptum ſuum obligatorium*, without ſaying *ſigillo ſuo ſigillatum*, *conceſſit ſe teneri*, *&c.* is good. 2 Ventr. 107. *Cro. Eliz.* 747. *Peirſon verſ. Hodges*, *Cro. Jac.* 420. *Aſhmore verſ. Rapley.* 1 *Ventr.* 70. *Green verſ. Cubit.* Yet in propriety of expreſſion that does not import it was a deed, but may equally be true of a promiſſory note, which may be ſaid to oblige the party who ſigns it to a performance of it. So to declare, *J. S. per factum*, *&c.* without ſaying, *ſuum*, or *factum ſuum ſigillatum*, is good, cited by *Houghton* juſtice, 2 *Ro. Rep.* 228. in *Heaton* and *Wolf*'s caſe. Or to ſay, that *J. S. per indenturam convenit*, without ſaying *ſigillo ſuo ſigillatam*, is good. 4 *Leon.* 175. Sir *Francis Engleſfield*'s caſe. The ſame, *per indenturam ſuam demiſit*, 1 *Salk.* 141. 4 *Ann. B. R. Vivian verſ. Campion.* All which caſes were agreed by the court to be law, becauſe *factum* and *indentura* are terms of art, which import a deed; and ſo of *ſcriptum obligatorium*, 'tis a proper word for a bond. And the conſtant courſe of the Common Pleas is to declare in that manner upon a bond.

The next thing the defendant in error's counſel inſiſted on was, that the word *factum* was in the declaration, and it was agreed in the caſe before cited, *Cro. Eliz.* 571. that if the word *factum* had been in the declaration, it had been good. But to that it was anſwered by the court, that *factum* in this caſe was not inſerted in the declaration as a ſubſtantive importing a deed, but it was only to introduce the place where it was made, for it was *ſcriptum factum apud Weſtmonaſterium*, and therefore could not make it good. If otherwiſe it would be ill. Then the defendant in error's counſel argued, that the declaration was good, becauſe it was an action of covenant; and the word *convenit* imports, that it muſt be by deed, for a covenant cannot be but by deed. In the *Regiſter* the writ is, *quod teneat ei conventionem*, not mentioning any deed. In 1 *Sid.* 375. in covenant the declaration was *per quoddam ſcriptum teſtatum exiſtit*, that the defendant covenanted, and it was there held good. So in 1 *Lutw.* 333. *Aldworth verſ. Hutchinſon*, exception was, that the writing containing the covenant was not ſaid to be *ſigillo ſuo ſigillatum*; *ſed non allocatur*, ſays the book; for *per curiam* it is ſaid, the defendant thereby covenanted, which could not be, unleſs it was a deed. To which it was anſwered by the court, that a writ ſets out the matter ſhortly, and is called *breve, quia breviter intentionem proferentis explanat.* 1 *Inſt.* 17 *a.* 73 *b.* But the declaration muſt be (as *Coke* expreſſes it, *Co. Lit.* 17.) more narrative and ſpacious, and certain both in matter and in circumſtance of time and place, *&c.* and though the writ is, *quod teneat conventionem*, yet no inſtance can be ſhewn, where a declaration ſetting out that the defendant *convenit* generally to do ſuch an act, *&c.* has been held good. Nor can it be ſo, for the defendant to an action of covenant may plead, *non eſt factum*; which is the general iſſue; but that plea he cannot plead, if no deed is ſet out in the declaration. And as to the caſe in 1 *Sid.* 375. *Stevenſon verſ. Stevenſon*, the exception was, that there was no preciſe affirmation, for it was *per quoddam ſcriptum per quod teſtatum exiſtit*; and the court held, it was all one as if it had been *per quoddam ſcriptum teſtatum exiſtit*, which had been held good; that is in reſpect of the ſetting it out with a *teſtatum exiſtit*, which appears from the exception, that it was not a preciſe affirmation: but it don't appear by that book, but that *ſigillo ſigillatum* was in the declaration; nor no exception took, that that was omitted; and therefore that caſe is no authority as to the preſent queſtion. As to the caſe 1 *Lutw.* 333. it was anſwered by the court, that it appears by the declaration as ſet out in the entry, *page* 330. that the writing was ſealed by the defendant; for it is, that the defendant *per quoddam ſcriptum, quod* the plaintiff *ſigillo ſuo ſignatum hic in curia profert, &c.* However the caſe in *Cro. Eliz.* 571. is otherwiſe, that ſuch a declaration as this is ill; upon which authority the court relied; and held therefore, that nothing before inſiſted upon by the counſel for the defendant in error had anſwered the exception took by the counſel for the plaintiff in error.

Then the counſel for the defendant in error inſiſted, that this fault was helped by the ſetting out the inſtrument *in haec verba* upon the *oyer* prayed; for the writing ſet out on the *oyer* concludes, in witneſs whereof we have hereunto ſet our hands and ſeals 6 *December* 1715. ſo that thereby it appears, this writing was ſealed by the defendant, and that by the declaration. For when *oyer* is prayed of a bond, and it is ſet out, it becomes part of the plaintiff's declaration. *Carthew.* 301. *Abney* and *Hedges* ſheriffs of *London* againſt *White*. The plaintiffs brought an action upon a bail-bond, and did not ſhew it was entered into to them by the name of ſheriffs, the defendant prayed *oyer* of the bond generally, and of the condition, and made the entry in the uſual form, *viz. petit auditum ſcripti obligatorii praedicti, et ei legitur*, &c. *petit etiam auditum conditionis ſcripti illius, et ei legitur in haec verba*; then the defendant pleaded the ſtatute of *H.* 6. and that the bond was given for eaſe and favour, &c. the plaintiffs entred upon the record the defendants praying *oyer* of the bond, &c. and then ſet forth the bond itſelf as well as the condition, *et petunt quod ſcriptum praedictum irrotuletur in haec verba*, by which it appeared, the bond was took by the name of ſheriffs of *London*, and then replied and traverſed, that it was took for eaſe and favour; and upon demurrer held *per curiam*, the plaintiffs had avoided the defendant's plea of the ſtatute, becauſe now it appeared upon the record, that the bond was took by the plaintiffs by the name of ſheriffs. And by *Holt* chief juſtice, *Carthew* 513. if the defendant prays *oyer* of a bond and condition, and it is entred *in haec verba*, it is parcel of the plaintiff's declaration, and not of the defendant's plea. And they relied much upon the caſe *Cro. Car.* 209. Sir *William Courtney verſ.* Sir *Richard Greenville.* Error upon a judgment in the Common Pleas in debt; the plaintiff declared, that the defendant 18 *May* 4 *Car. conceſſit ſe teneri* to the plaintiff in 280*l.* *ſolvendis*, &c. *et profert hic in curia ſcriptum praedictum quod debitum praedictum teſtatur*, &c. the defendant demands *oyer conditionis ſcripti obligatorii praedicti*, which being read, he pleaded payment; and after iſſue thereupon, judgment for the plaintiff; exception was took, that it is not ſaid, *quod per ſcriptum obligatorium conceſſit*; but *per curiam*, becauſe the plaintiff ſhewed the writing, whereby he demanded the debt, and the defendant by his plea ſhews it was an obligation with a condition, and iſſue is took thereupon, and found for the plaintiff; the declaration is good enough; at leaſt it appears to the court, the plaintiff hath a juſt debt, and good cauſe to recover; and judgment was affirmed.

But the court were unanimous of opinion, that the defect in the declaration was not made good by the entry of the inſtrument *in haec verba* upon the *oyer* prayed; for though the inſtrument ſays, in witneſs whereof we have ſet our hands and ſeals; yet that does not ſhew the deed was actually ſealed, for ſealing is a fact which ought to be poſitively averred, or elſe ſomething ſhould be in the declaration which neceſſarily imports it was ſealed; and therefore this is not like the caſe in *Carthew* 301. for there it did appear by ſetting out the bond upon the *oyer*, that it was entred into to the plaintiffs *per nomina vicecomitum civitatis London*: nor does the caſe in *Cro. Car.* 209. come up to this caſe, for there the defendant by praying *oyer conditionis ſcripti obligatorii praedicti*, admits it to be a bond. And therefore the court held, the declaration was ill, and judgment was reverſed *November* 12, 1728. As to the other exceptions the court gave no abſolute opinion.

Smith *verſ.* Maſon

Intr. *Mich.* 2 *Geo.* 2. B. R. Rot.

S. C. 2 Stra. 816.

Addition.

IN caſe upon a promiſſory note, the defendant was ſued by original by the addition of gentleman; and he pleaded in abatement, that he is, and at the time of ſuing the original and long before was, a merchant reſiding and trading within the city of *London*, *abſque hoc quod die impetrationis praedicti brevis originalis* of the plaintiff *vel antea vel poſtea fuit generoſus*, *&c.* And upon demurrer it was adjudged, the defendant ſhould anſwer over, becauſe by the ſtatute of additions, 1 *H.* 5. *cap.* 5. the plaintiff may ſue the defendant either according to his addition of degree or miſtery; and this writ being brought by the addition of his degree, he ought to have ſhewed, what degree he was of, to ſhew the plaintiff might have a better writ, *November* 14, 1728. The like point was adjudged, *Paſch.* 8 *Geo.* 1. *B. R. Maſon verſ. Ruſſel*, where the defendant being ſued as yeoman, he pleaded he was a horner, and traverſed that he was a yeoman; and judgment was given *quod reſpondeat ulterius*. Same point adjudged *Trin.* 9 *Geo.* 1. *B. R. Horſpoole verſ. Harriſon.*

Sir John Ereskine *verſ.* Murray. *Error.* C. B.

S. C. 2 Stra. 817.

Intr. *Mich.* 2 *Geo.* 2. B. R. Rot. intr. *Paſch.*
1 *Geo.* 2. C. B. Rot. 717.

Need not aver the acceptance of a bill was in writing.

*W*Illiam Murray brought an action againſt the defendant Sir *John Ereskine* upon an inland bill of exchange; wherein he declared, that he 1 *March* 1727. at *Weſtminſter* in the county of *Middleſex*, made his bill of exchange in writing, to the ſaid Sir *John* directed, and by the ſaid bill requeſted the ſaid Sir *John* upon the 10th day of the ſaid month of *March* to pay to the ſaid *William Murray*, or order, at his manſion-houſe in *Edinburgh*, 200*l.* ſterling, *pro valore in manibus ipſius Johannis de denariis accommodatis de eodem Willielmo*; that the defendant Sir *John* acepted the bill, *ac ratione inde ſecundum conſuetudinem mercatorum* became liable to pay, *&c.* and being ſo liable, promiſed to pay the ſaid 200*l.* to the plaintiff *Murray*, *&c.* The defendant *Ereskine* let judgment go againſt him by *nihil dicit*, and after execution of a writ of inquiry and final judgment given againſt him, he brought this writ of error.

The firſt exception took by Mr. *Wynne* and Mr. *Robinſon* counſel for the plaintiff in error was, that it was not alleged, that the bill was drawn according to the cuſtom of merchants.

But to this it was anſwered by Mr. *Reeve* counſel for the defendant in error, and ſo reſolved by the court, that the law took notice of the cuſtom of merchants, without ſetting it out ſpecially; and if the bill as ſet out in the declaration appeared to be within the cuſtom of merchants, it was ſufficient. Beſides, after ſetting out the bill and acceptance, it is ſaid, *ratione inde ſecundum conſuetudinem mercatorum* the defendant below became liable, which they held was ſufficient.

2d Exception was, that it was not averred, that the bill was ſigned by Mr. *Murray*. 3d Exception was, that the defendant had not accepted the bill by underwriting the ſame under his hand. See 9 *W.* 3. *c.* 17. and 3 & 4 *Ann. cap.* 9. *par.* 4 & 5.

As to the ſigning, it was anſwered, that it is alleged, that the plaintiff made his bill of exchange in writing to the ſaid Sir *John Ereskine* directed, and by the ſaid bill requeſted; which of neceſſity implies, the plaintiff's name was writ in the bill, elſe he could not requeſt; and the ſaying he made the bill in writing, imports he writ or ſome body by his authority writ, which will be the ſame thing, and imports a ſigning, if it is neceſſary in caſe of inland bills of exchange. And ſuch a way of declaring was held ſufficient in caſes of promiſſory notes, where the act 3 & 4 *Ann. c.* 9. requires, that the party who makes the bill, or ſome perſon intruſted by him, ſhould ſign it. *Mich.* 7 *Geo.* 1. *B. R. Taylor verſ. Dobbins*, and *Mich.* 11 *Geo.* 1. *B. R.* 1724. *Elliot verſ. Cooper*. [*Ante*, 1376.]

The fourth and laſt exception was, that the bill was not laid to be for value received; but it is, *pro valore in manibus ipſius Johannis de denariis accommodatis de eodem Willielmo*, which is nonſenſe, for it ſhould be *accommodatis per eundem Willielmum*, not *de eodem Willielmo*. But the court held, *pro valore in manibus ipſius Johannis* had been ſufficient; and the other words might be rejected as ſurpluſage; the court held that the meaning was, lent by the ſaid *William*, though the *Latin* might not be ſo correct. And the judgment of the Common Pleas was affirmed, *Nov.* the 23d, 1728.

George Blenkinſon and William Waite *verſ.* Francis Iles. *Error.*

Hil. 1 *Geo.* 2. B. R. Rot.

THE plaintiffs brought a writ of error upon a judgment given againſt them in the court of the borough of *Knareſborough*, in an action of treſpaſs brought againſt them *vi et armis*, for breaking and entring *Iles*'s houſe, and taking away his goods, after verdict. The writ of error was directed to the ſteward of the court of the borough of *Knareſborough* in the county of *York*, and the writ of error was returned by the earl of *Burlington* as ſteward of that court; and the *placita* was, *in curia domini regis pro burgo de Knareſborough in comitatu Eborum apud in burgo praedicto infra juriſdictionem ejuſdem curiae ſecundum uſum et conſuetudinem burgi praedicti a tempore cujus contrarii memoria hominum non exiſtit in eodem burgo uſitatum et approbatum*, *Monday* 22d of *June* 1724. *coram Theſher ſubſeneſchallo curiae ibidem.* Mr. *Filmer* for the plaintiff in error took exception,

No neceſſity to ſhew how an under ſteward of a court was appointed.

1. That it did not appear, the under ſteward had power to hold the court; for the writ of error was directed to the ſteward, who is to be ſuppoſed to be the judge, and he returns the writ; and it is not ſaid the under ſteward was appointed by deputation in wri-

ting from him, nor that he had power to make a deputy. *Sed non allocatur*; for *per curiam*, that the court was held according to the cuſtom uſed time out of mind, imports that by the cuſtom the under ſteward might hold the court, and there was no neceſſity to ſhew how he was appointed.

Of a plea of treſpaſs, without *vi et armis* is well enough in the plaint.

The ſecond exception was, that the plaint was ſaid to be *de placito tranſgreſſionis* generally, not ſaying whether it was treſpaſs on the caſe, or *vi et armis*; which it was inſiſted was ill, and for that *Stile's rep.* 86. *Hales verſ. Moore* was cited, where in error upon a judgment in an inferior court, the plaint was *de placito debiti* generally, which was ſaid to be uncertain, becauſe the defendants could not know what was demanded, and *Bacon* juſtice held it a good exception, and a rule was pronounced for reverſal, *niſi*, *&c.* *Sed non allocatur*; for the count aſcertained which ſort of treſpaſs it was for, *viz. vi et armis*, and treſpaſs *vi et armis* is an action of treſpaſs. And as to the caſe of debt, in the King's Bench the bills are *de placito debiti* generally.

Though a *capias* as firſt proceſs in an ferſeior court is irregular, yet appearance cures it.

Third exception, that the firſt proceſs was a *capias*, whereas it ought to be an attachment. 1 *Roll. Ab.* 780. *L.* 6. In debt, if a *capias* is the firſt proceſs, and not a ſummons, though the defendant appears, and pleads to iſſue, and found againſt him, yet it is error, and not aided by the appearance, 3 *&* 4 *Jac.* 1. *Sed non allocatur*; for *per curiam*, it is aided by the defendant's appearance. And the like caſe as cited before in *Rolle* was adjudged directly contrary, 11 *Jac.* 1. *B. R. Inch verſ. Goodfield*, which was after the former caſe. And judgment was affirmed, *Nov.* 26, 1728.

John Neale, Eſq; *verſ.* William Ovington. *Error.* C. B.

S. C. 2 Stra. 819.

Intr. *Trin.* 2 *Geo.* 2. B. R. Rot. et Intr. *Trin.* 12 *Geo.* 1. C. B. Rot. 1385.

THE defendant in error, *William Ovington*, brought an action in the Common Pleas againſt the ſaid *John Neale*, and declared, that the ſaid *John* and *Edmund Waller*, Eſq; 23d of *Nov.* 1725. *fecit quandam notam ſuam in ſcriptis vocatam* a promiſſory note, *et eandem notam adtunc et ibidem cum manu ſua propria ſignavit et per eandem notam praedicti Johannes et Edmundus conjunctim aut ſeparatim promiſerunt ſolvere eidem Willielmo vel ordini* 1100 *l. pro valore recepto per eoſdem Johannem et Willielmum*; by reaſon whereof, and by virtue of the ſtatute, *&c.* the ſaid *John* became ſeparately liable to pay to the ſaid *William* the ſaid 1100 *l.* *&c.* Upon *non aſſumpſit* pleaded, verdict and judgment was given againſt the ſaid *John Neale*. Upon which he brought this writ of error. And upon argument this judgment was reverſed, *Nov.* 26, 1728. becauſe the note is laid to be made by two perſons, Mr. *Neale* and Mr. *Waller*, and the verb is in the ſingular number, *fecit*, ſo that it don't appear to be made by Mr. *Neale*, againſt whom the action is brought, but might be by Mr. *Waller*, and it don't appear to make Mr. *Neale* liable by his ſigning. 2. The note does not import, they promiſed ſeverally; for the note ſet out is, that they promiſed jointly or ſeverally, which is not poſitive, they promiſed ſeverally; for it ought to have been, that they promiſed jointly and ſeverally. Mr. *Robinſon* counſel for the plaintiff in error, and Mr. *Strange* counſel for the defendant in error.

The King *againſt* Thomas Stone.

Informer no witneſs againſt a deer-killer.

THE defendant was convicted by a juſtice of peace of *Dorſetſhire* for killing a fallow deer of the king's in *Cranborn Chace*; and the conviction was quaſhed, becauſe the informer was the witneſs; divers convictions having been quaſhed for the ſame reaſon before. *Nov.* 28, 1728.

John Burchell adminiſtrator of William Burchell *verſ.* Oliver Slocock.

Intr. *Mich.* 2 *Geo.* 2. B. R. Rot.

What ſhall be a good promiſſory note within the ſtatute of 3, 4 Ann. c. 9.

THE plaintiff brought an action on the caſe againſt the defendant upon a promiſſory note, wherein the plaintiff declared, that the defendant *Oliver Slocock* and one *Thomas Williford* 24 *Mar.* 1725. *&c. fecerunt quandam notam ſuam in ſcriptis vocatam* a promiſſory note *manibus ſuis propriis adinde ſubſcriptis*, bearing date the ſame day and year, and delivered the ſaid note to the inteſtate *Will. B.* by which note the ſaid *Oliver* and *Thomas conjunctim et diviſim promiſerunt ſolvere* to the ſaid *Will.* 101 *l.* 12 *s.* in three months after the date of the ſaid note, *valore recepto de praemiſſis in vico vocato Roſemary Lane* late in the poſſeſſion of one *Thomas Rower Sherwin*, *ratione quorum quidem praemiſſorum nec non vigore ſtatuti*, *&c.* And in the declaration there were other counts, but to this count the defendant demurred, and ſhewed for cauſe, that the note ſet out in that count is not a promiſſory note within the ſtatute. And the plaintiff joined in demurrer. But the court held it clearly to be a promiſſory note within 3 & 4 *Annae*, *cap.* 9. And judgment was given for the plaintiff. *Nov.* 26, 1728.

The King *againſt* William Kent.

Conviction for keeping a gun to deſtroy game.

THE defendant was convicted for keeping a gun for deſtroying the game, not being qualified by law, *&c.* And the conviction being removed into the King's Bench by *certiorari* was quaſhed, becauſe the information was ſet out to be exhibited 2 *Nov.* 1 *Geo.* 2. and the witneſs was ſworn and made his oath of the truth of the facts contained in the information the ſaid ſecond of *Nov.* 1 *Geo.* 2. But the ſummons of the defendant, his appearance, and making defenſe, and the conviction, was laid to be the the 2d of *Octob.* 1 *Geo.* 2. which was before the information and examination of the witneſs, *&c.*

James Tully *againſt* Frances Sparkes and Chriſtopher May, executors of William Donalſon.

S. C. 2 Stra. 867.

Intr. *Paſch.* 1 *Geo.* 2. B. R. Rot. 203.

The bankruptcy of the obligor doth not diſcharge a bond conditioned for his Executor to do an act.

THE plaintiff brought an action of debt againſt the defendants for 800*l.* wherein the plaintiff declared, that *William Donalſon* in his life, *viz.* the 6th of *May* 1704, by his bond then dated obliged himſelf, his heirs, executors and adminiſtrators, to the plaintiff *Tully* and one *Philip Rudſby*, whom the plaintiff ſurvived, in the ſaid ſum of 800*l.* *&c.* with condition under the ſaid bond ſubſcribed, that if the heirs, executors or adminiſtrators of the ſaid *William* ſhould pay to the ſaid plaintiff *Tully* and *Philip*, or the ſurvivor of them, or the executors or adminiſtrators of the ſurvivor of them, 400*l.* within two months after the death of the ſaid *William*, in caſe one *Martha Latimer* ſhould marry the ſaid *William*, and ſhould happen to ſurvive him, in truſt for the benefit and behoof of the ſaid *Martha*, her executors, adminiſtrators or aſſigns, then the obligation ſhould be void, otherwiſe ſhould remain in full force, and the plaintiff in fact ſays, that after the making the ſaid bond, *viz.* the 8th of *May* in the ſame year 1704, the ſaid *Martha* married the ſaid *William Donalſon*; and that after the ſaid marriage, *viz.* the 17th of *May* 1727, the ſaid *Philip Rudſby* died and the plaintiff ſurvived him; and that the ſaid *William* the ſame day and year made his will, and the defendants his executors, and afterwards, *viz.* 3d of *Jan.* in the ſame year, the ſaid will not being revoked, died, and the ſaid *Martha* ſurvived him, and is yet alive; and that after the death of the ſaid *William Donalſon*, *viz.* 10th of *April* 1728, the defendant *Frances* proved the ſaid will *debita juris forma*; that the ſaid *Frances* and *Chriſtopher* or either of them did not pay to the plaintiff the ſaid 400*l.* within two months after the death of the ſaid *William* according to the ſaid condition, whereby the bond became forfeited; *unde actio accrevit* to the plaintiff, to demand of the ſaid defendants the ſaid 800*l.* but the defendants the ſaid 800*l.* though often requeſted, have not yet paid, nor hath either of them paid it, *&c.*

The defendants after praying *oyer* of the bond and condition (which was granted) plead in bar; that the ſaid *William Donalſon* being a ſubject born of this kingdom after the making of the bond, *viz.* the 8th of *January* 1720, and for ſeven years before that time and more, and afterwards, exerciſed the trade of a biſket baker, and got his living in that trade; and that he ſo uſing that trade the 8th of *January* became indebted to *R. H. G. S. J. C.* and divers other perſons, in the ſum of 200*l.* and more; and being ſo indebted, and after the 20th of *May* 1716, *viz.* the 9th of *January* 1720. his ſaid debts not being paid, became a bankrupt, *&c.* and the ſaid *William* ſo being a bankrupt, the 8th of *February* following a commiſſion of bankruptcy under the great ſeal *debita juris forma emanavit* againſt him, directed to, *&c.* as by the ſaid commiſſion appears; by virtue whereof afterwards, *viz.* the firſt of *March* in the ſaid year the commiſſioners declared him a bankrupt, *&c.* and that he ſurrendered himſelf, and conformed as by the ſtatute 5 *Geo.* intituled an act for the better preventing frauds committed by bankrupts is provided; that the commiſſioners the 16 of *March* following certified to the lord chancellor under their hands and ſeals, *&c.* that four fifths of his creditors in number and value, who had duly proved their debts, ſigned the certificate, and certified their conſent to allow the ſaid certificate, and to diſcharge the ſaid bankrupt; that the 10th of *April* 1721, three of the ſaid commiſſioners under their hands and ſeals certified the lord chancellor ſuch ſigning and conſent of the ſaid creditors, that the 7th of *July* 1721 the certificate was confirmed by the lord chancellor, and was entred on record in Chancery by virtue of an order of the lord chancellor made upon the petition of the bankrupt bearing date the 8th of *July* 1721; the bankrupt having firſt ſworn, that the certificate and conſent of his creditors thereto were obtained juſtly and without fraud, as by the certificate produced in court and by the records of the ſaid court fully appears. To which plea the plaintiff demurred, and the defendant joined in demurrer.

5 Geo. 1. cap. 24.

This caſe was argued *Trinity* term laſt, 1728, by Mr. *Strange* for the plaintiff, and by Mr. *Joceline* for the defendant. And firſt, exception was took to the plea, becauſe it did not ſhew, who were the petitioning creditors, nor in what ſums they were creditors. Now by the act of 5 *Geo.* 1. *cap.* 24. no commiſſion is to iſſue on the petition of one creditor, unleſs his debt is 100 *l.* nor upon the petition of two creditors, unleſs the debt is 150 *l.* nor on the petition of three or more, unleſs their debt is 200 *l.* and therefore that is a matter neceſſary to be averred, for it is traverſable; for if the creditors that petitioned for the commiſſion are not creditors to ſuch a value, the iſſuing the commiſſion will be void.

On the other ſide it was argued for the defendant, that it was alleged in the plea, that the commiſſion iſſued *debita juris forma*, which was ſufficient, for it has been adjudged in *Lutw.* 274. *Lawſon verſ. Lamb*, that in an action brought by aſſignees of commiſſioners of bankrupts, they need not ſet out the proceedings of the commiſſion and commiſſioners at large. And in *Lutw.* 451. *Slaughter verſ. Pierrepoint*, it was held that it need not appear in a plea of aſſignment by commiſſioners of bankrupts, that the bankrupt was indebted in 100 *l.*

But the court held the plea naught for this exception. For as to the caſe in *Lutw.* 274. that was in caſe of a declaration brought by the aſſignees, wherein a ſhort way of declaring hath been allowed upon the authority of a great number of precedents. But as to the other caſe in *Lutw.* 451. of a plea, that was long before the ſtatute of 5 *Geo.* 1. *cap.* 24. *par.* 20. which is expreſs, that no commiſſion ſhall iſſue, unleſs the creditors, who petition for a commiſſion, are creditors in ſuch ſums as are mentioned for that purpoſe in that act. But in this plea it is ſo far from mentioning, in what ſums the petitioning creditors were creditors, that it does not mention there was any petition at all. But by the 13 *Eliz. cap.* 7. *par.* 2. the chancellor is impowered to iſſue a commiſſion only upon complaint made to him in writing.

But it was farther inſiſted upon by the counſel for the plaintiff, that this bond was not diſcharged by the act of bankruptcy and certificate within the intention of the acts. Nor is the defendant aided by the act of 7 *Geo.* 1. *cap.* 31. for explaining and making more effectual the ſeveral acts concerning bankrupts; for the 400 *l.* in the condition was payable at a day after the bankruptcy committed, *viz.* within two months after the death of *William Donalſon* the bankrupt, and upon two contingencies, *viz.* if *Martha Latimer* married him, and ſurvived him. And a caſe was cited between *Godling* and *Godling*, *Paſch.* 11 *Ann.* where in an action of debt upon a bond dated before the act of bankruptcy committed by the defendant, it appeared, the money in the condition was not payable till after the act of bankruptcy; the defendant inſiſted he ought to be diſcharged upon common bail by virtue of the ſtatutes about bankrupts, but it was ruled that he ſhould be held to ſpecial bail. And the plaintiffs could not come to prove this debt within the ſeventh *Geo.* 1. *cap.* 31. becauſe it depends upon two contingencies.

On the other ſide it was inſiſted on for the defendants, that this was *debitum in praeſenti*, though it was *ſolvendum in futuro. Cro. Jac. Neal verſ. Sheffield*, 254. and therefore would be barred by the act of bankruptcy and certificate, *&c.*

But all the judges were of opinion, that a creditor upon a bond, with condition to pay money at a future day ſubſequent to the act of bankruptcy, before 7 *Geo.* 1. *cap.* 31. could not be admitted to prove ſuch debt, or to have any dividend, before ſuch ſecurity became payable. And that act recites it to have been a queſtion, for remedy whereof that act was made. And it would be hard upon the former acts, to put ſuch a conſtruction as to bar a man of his debt, when he could not come in to the commiſſion, and have the benefit of it. Then as to the ſtatute 7 *Geo.* 1. *cap.* 31. that enacts, that any perſon who hath given or ſhall thereafter give credit on ſuch ſecurity as aforeſaid, [referring to the ſecurities mentioned in the recital] to any perſon who was or ſhould become a bankrupt, upon a good and valuable conſideration *bona fide* for any ſum of money or other matter or thing whatſoever, which ſhould not be due or payable at or before the time of ſuch perſons becoming bankrupts, ſhall be admitted to prove his bond, *&c.* for the ſame, in ſuch manner as if it was payable preſently, and not at a future day, and ſhall receive a proportionable dividend, *&c.* of ſuch bankrupt's eſtate in proportion to the other creditors of ſuch bankrupt, deducting only thereout a rebate of intereſt, and diſcounting ſuch ſecurities payable at future times, after the rate of 5*l.* *per cent. per annum* for what he ſhall ſo receive, to be computed from the actual payment thereof, to the time ſuch debt or ſum of money ſhould or would have become payable in and by ſuch ſecurities as aforeſaid. Then follows a clauſe, that the bankrupt ſhould be diſcharged of ſuch ſecurities. Now it being uncertain, whether this bond ſhould ever become due or not, it depending upon two contingencies which had not both happened at the time of the act of bankruptcy committed, it was impoſſible to make ſuch abatement of 5. *per cent.* as the act directs; and therefore this bond, the court held, was not within that act; and therefore they were of opinion, to give judgment for the plaintiff. But Mr. *Joceline* took an exception to the declaration, that it was not averred, that the 400*l.* was not paid by the heirs of *William Donalſon*, nor that the 400*l.* was ſtill due; but only that the defendants had not paid it; which was a fatal fault. And the court being of that opinion, Mr. *Strange* moved *July* 10, in *Trinity* term 1728.

for leave to diſcontinue upon payment of coſts, which was granted.

Afterwards the plaintiff brought a new action on the ſame bond againſt the defendants, but amended the fault in the former declaration, by averring, that the heir of *Donalſon* had not paid the 400 *l.* nor any body elſe. And the defendant amended his plea in ſeveral things; to which there was a demurrer by the plaintiff, and a joinder in demurrer; which record is entred *Mich.* 2 *Geo.* 2. *B. R. Rot.* And the cauſe coming on in the paper *Nov.* 26, this *Mich.* term, judgment was given by the whole court upon the merits, that the plaintiff's debt was not barred by the matter compriſed in the plea, becauſe it was not within 7 *Geo.* 1. *cap.* 31. for the reaſons mentioned before.

Palmer *verſ.* Ekins.

S. C. 2 Stra. 817.

Intr. *Trin.* 11 *Geo.* 1. B. R. Rot. 347.

What amounts to *nil habuit in tenementis.*

THE plaintiff *Henry Palmer*, as aſſignee of *John Palmer*, brought an action of covenant againſt *Elizabeth Ekins* for non-payment of rent, wherein he declared, that *John Palmer* was ſeiſed in fee of the meſuage, *&c.* and being ſo ſeiſed, the 27th of *March* 1716. by indenture made between him on the one part, and the defendant on the other part (one part of which indenture ſealed by the defendant the plaintiff produces in court) demiſed to the defendant a meſuage in the pariſh of St. *Michael Crooked Lane London*, for twelve years from *Lady Day* 1716. rendring 18 *l. per annum* during the ſaid term to the ſaid *John Palmer*, his heirs and aſſigns, payable at four quarterly payments; that the defendant by the ſaid indenture covenanted to pay the ſaid rent at the days and times in the ſaid indenture mentioned to the ſaid *John Palmer*, his heirs and aſſigns; that by virtue of this demiſe the defendant entred, and continued poſſeſſed of this meſuage, *&c.* till after the 26th of *March* 1725. That *John Palmer* being ſeiſed of the reverſion in fee, by leaſe and releaſe dated the 22 & 23 *Nov.* 1723. conveyed it to *Henry Palmer* the plaintiff in fee: then the plaintiff aſſigns his breach, in the defendant's not paying three quarters rent due and ending *Lady Day* 1725. The defendant, *proteſtando* that *John Palmer* did not make ſuch leaſe, for plea ſays, that *John Palmer* was ſeiſed in fee of this meſuage 19th of *Nov.* 1706. and being ſo ſeiſed by leaſe and releaſe dated the 19th and 20th of *Nov.* 1706. conveyed this meſuage, *&c.* to one *John Bragg* in fee; and traverſes, *abſque hoc*, that *John Palmer ad aliquod tempus poſt praedictum* 20th of *Nov.* 1706. *ſeiſitus fuit de meſuagio praedicto in* *dominico ſuo ut de feodo, modo et forma* as the plaintiff declares. To this plea the plaintiff demurred generally, and the defendant joined in demurrer.

This caſe was argued at ſeveral times by Mr. ſerjeant *Girdler*, Mr. ſerjeant *Baines*, and Mr. *Fazakerley* for the plaintiff, and by Mr. ſerjeant *Belfield*, Mr. *Uſher*, and Mr. *Filmer* for the defendant. And the 26th of *Nov.* 1728. I at my brothers deſire delivered the opinion of the court, that the plea was ill, and the plaintiff ought to have judgment. And we reſolved,

1. That the defendant could not plead, *John Palmer nil habuit in tenementis* at the time of the leaſe made, to an action brought by *John Palmer*, ſuppoſing he had not conveyed to the plaintiff: becauſe it appearing upon the face of the declaration, that the leaſe was made to her by indenture made between *John Palmer* and her, which ſhe had executed; ſhe is eſtopped by the indenture. And for that purpoſe the caſe of *Kemp verſ. Goodhall*, *Paſch.* 4 *Annae*, *B. R. Salk.* 277. in debt for rent by indenture, if the defendant pleads, *nil habuit in tenementis*, the plaintiff may demur and need not reply the eſtoppel, becauſe it appears upon the declaration: but if the defendant plead, *nil habuit in tenementis*, and the plaintiff replies, *habuit*, *&c.* the jury may find the truth notwithſtanding the indenture.

2. That the aſſignee ſhall take advantage of the *eſtoppel*, *C. L.* 352. 4 *Co.* 53. Privies in eſtate as the feoffee, leſſee, *&c.* ſhall be bound and take advantage of *eſtoppels*, 1 *Salk.* 276. *Trevivan verſ. Lawrence.* If *A.* leaſe by indenture to *B.* lands in which he hath nothing, and afterwards *A.* purchaſes the lands in fee, and ſells them to *D.* and his heirs, *D.* ſhall be eſtopped. And where the eſtoppel works on the intereſt of the land, it runs with the land, into whoſeſoever hands the land comes.

3. That this plea of the defendant amounted to a ſpecial *nil habuit in tenementis*, for by the inducement to the traverſe ſhe ſhews, that *John Palmer* in 1706, long before he made the leaſe to the defendant, which was in 1716, conveyed in fee to *Bragg*. If ſo, *John Palmer* had nothing in the meſuage, *&c.* when he made the leaſe. For an eſtate in fee-ſimple is always intended to continue, unleſs it be ſhewn to be conveyed away or determined. Therefore this plea amounts to a ſpecial *nil habuit in tenementis*, which is no more to be admitted to be pleaded by a leſſee by indenture, than a general *nil habuit in tenementis*. But the defendant by a proper inducement might have made this traverſe good; as if he had pleaded in his inducement to the traverſe, that *J. S.* was ſeiſed of the me-

ſuage in fee, and being ſo ſeiſed conveyed it to *John Palmer* for his life, and that *John Palmer* being ſo ſeiſed made the leaſe to the defendant, and afterwards conveyed to the plaintiff, and that then *John Palmer* died; whereby he would have ſhewed, that an intereſt paſt by the leaſe to the defendant as long as *John Palmer* lived, and that by his death the leaſe was determined; then ſuch traverſe as in the preſent caſe would have been good. For the *eſtoppel* that appeared upon the face of the declaration, would have been avoided, by ſhewing an intereſt paſt; and ſuch plea would not have amounted to a *nil habuit in tenementis*, becauſe an eſtate for life would have appeared to have been in *John Palmer*. But no intereſt appears to be in *John Palmer* in this caſe, when the leaſe was made to the defendant; nor can the court intend there was any intereſt in him, ſince the plea ſets out a conveyance before the leaſe to *Bragg* in fee-ſimple, which eſtate muſt be intended to continue.

But it was objected by the defendant's counſel, that an aſſignee by *eſtoppel* cannot maintain an action of covenant. And for that *Moore* 419. *pl.* 577. ſo held in the caſe of *Nokes verſ. Ander*, *Cro. Eliz.* 373, 436, 437. where the plaintiff declared, that *John King* let the lands, 10 *Eliz.* to the defendant for a term of years, that the defendant granted them by indenture to one *Abell*, in which the defendant covenanted, that *Abell* and his aſſigns ſhould peaceably enjoy without interruption of any perſon; that *Abell* 15 *Eliz.* aſſigned to the plaintiff; and then alleges farther, that long before *John King* had any thing in the land, one *Robert King* was ſeiſed thereof in fee, *viz.* 7 *Eliz.* and being ſo ſeiſed died ſeiſed 15 *Eliz.* whereupon the land deſcended to *Thomas King*, who entered upon the plaintiff and ouſted him; and after a verdict for the plaintiff it was moved in arreſt of judgment, that the plaintiff not having ſhewn, that *John King* had any thing, when he made the leaſe to the defendant, and the defendant having granted to *Abell* by indenture, nothing paſſed thereby, but by *eſtoppel*; then when *Abell* aſſigned to the plaintiff, nothing paſſed; for leſſee by *eſtoppel* cannot aſſign any thing over; and then the plaintiff is not ſuch an aſſignee as could maintain an action of covenant againſt the defendant; and the court were of that opinion, that covenant will not lie upon an aſſignment of an eſtate by *eſtoppel*. And that upon the whole record it appeared, that the the plaintiff was but aſſignee by *eſtoppel*; for the defendant having traverſed the eſtate laid in the declaration in *John Palmer*, the plaintiff by his demurrer has confeſſed the plea to be true, that *John Palmer* had not ſuch eſtate, when he made the leaſe, as the plaintiff has alleged.

To which it was anſwered, that the caſe cited out of 3 *Cro.* 436. does by no means come up to the caſe in queſtion. For there upon the very face of the declaration, it being alleged, that *Robert King* was ſeized in fee, before *John King* made the leaſe to the defendant, and alſo when the defendant aſſigned to *Abell*, and alſo when *Abell* aſſigned to the then plaintiff, no eſtate being laid to be in *John King*, when he made the leaſe to the defendant; it appeared to the court, that the leaſe from the defendant there to *Abell* was only a leaſe by *eſtoppel*, and nothing of an intereſt could paſs thereby, and conſequently nothing could paſs by *Abell*'s aſſignment to the plaintiff. But here upon the face of the declaration a good title appears in the plaintiff; and that being ſo, the declaration of itſelf is good, and the defendant by her plea pleads a fact, which by her indenture ſhe is eſtopped from pleading, which makes the plea ill, and what is ill pleaded no demurrer confeſſes. No more than if the plaintiff declares in debt for rent by indenture, the defendant pleads *nil habuit in tenementis*, and the plaintiff demurs; this demurrer does not confeſs, that the plaintiff had nothing in the lands. The defendant being then eſtopped by her indenture, from pleading this ſpecial *nil habuit in tenementis*; the plaintiff as aſſignee of the land (which he muſt be took to be notwithſtanding this ill plea) may take advantage of the *eſtoppel*. But in truth the caſe in *Croke* was adjudged for the defendant, becauſe no breach appeared in the declaration. It was objected farther, if by poſſibility an intereſt could paſs to the defendant by this leaſe, it could not work by eſtoppel; now though it is pleaded that *John Palmer* granted in fee to *John Bragg*, yet *Bragg* might regrant him an eſtate *per auter vie*, of which he might be ſeiſed when he made the defendant the leaſe, ſo that an intereſt might paſs during the life of *ceſtuy que vie*. To which it was anſwered, that a conveyance being pleaded from *John Palmer* to *Bragg*, it is to be preſumed to continue, the contrary not being ſhewn.

Another objection was, that *eſtoppels* are odious, and not to be conſtrued or raiſed by implication. The anſwer to which was, here was no conſtruction by implication, but a plain *eſtoppel* appeared upon the face of the declaration as to the matter pleaded in this plea.

The laſt objection was, that the plaintiff had demurred generally, whereas if he would have took advantage of this, he ought to have demurred ſpecially, and aſſigned this for cauſe; eſpecially ſince the ſtatute of 4 *Annae*, *cap.* 16. for the amendment of the law, which enacts, that the judges ſhall give judgment according as the very right of the cauſe and matter in law appear to them, *&c.*

To which it was anſwered, that the right of the cauſe and matter in law appear to be with the plaintiff; for the court and juries are bound by *eſtoppels*, as when the plaintiff's title in ejectment is by *eſtoppel*, and the defendant pleads the general iſſue; ſuch title is a good title in law, 1 *Salk.* 276. *Trevivan verſ. Lawrence.* And judgment was given for the plaintiff *Nov.* 26, 1728.

Thomas Bowers *verſ.* Robert Mann.

S. C. 2 Stra. 819.

Intr. *Mich.* 13 *Geo.* 1. C. B. Rot. 522. et *Paſch.* 1 *Geo.* 2. B. R. Rot.

Errors are not verified by a *certiorari* teſted before the writ of error.

THE plaintiff *Bowers* brought a writ of error upon a judgment given againſt him by *nihil dicit* in debt upon a bond in the Common Pleas. And he aſſigned in *Trin.* term 1728, want of an original, and want of a warrant of attorney, and one *certiorari* was directed to the chief juſtice of the common Pleas as to the warrant of attorney, and another *certiorari* was directed to the *cuſtos brevium* of the Common Pleas, which bare *teſte* the 21ſt of *June* 1727, which was before the errors were aſſigned, upon which the *cuſtos brevium* returned, that there was no original, *&c.* The defendant in error pleaded, *in nullo eſt erratum.* And judgment was affirmed, *niſi*, *&c.* becauſe the plaintiff in error ought to take out a *certiorari* to verify his error, that there was no original; but this *certiorari* bearing *teſte* before the aſſignment of the errors, could not be a *certiorari* upon that aſſignment of errors. Mr. *Strange* for the defendant in error.

Hilary Term

2 Georgii 2. regis, B. R. 1728.

Emery *verſ.* Bartlett.

Intr. *Hil.* 2 *Geo.* 2. B. R. Rot. 154.

S. C. 2 Stra. 827.

What muſt be alledged to be *infra juriſdiction.* in an inferior court.

IN error brought by *Bartlett*, to reverſe a judgment given againſt him by the court of record of the city of *Litchfield*, in an action upon the caſe upon ſeveral promiſes, brought by *Emery* againſt him, and judgment by default, and a writ of inquiry executed, and intire damages found, and final judgment given. In the declaration there were two counts. The firſt was upon a promiſſory note made within the juriſdiction of the court, and ſubſcribed by the defendant, by which he promiſed to pay *Emery* 59 *l.* 10 *s.* upon demand for value received. And the exception to that count was, that it was not averred, that the value was received within the juriſdiction of the court. For Mr. *Parker* for the plaintiff in error inſiſted, that that was the foundation of the note, and that therefore it was neceſſary to be received within the juriſdiction, to give the court a juriſdiction over the cauſe. The ſecond count was upon an *inſimul computaſſet*, wherein the plaintiff *Emery* below declared, that the defendant *Bartlett* accounted with her within the juriſdiction of the court, for divers ſums of money *antetunc debitis et ei adtunc aretro inſolutis exiſtentibus*, &c. And the exception to this was, that it was not averred, that the ſums of money were due within the juriſdiction of the court. And it was urged, that if the debt was not contracted within the juriſdiction of the court, the laying the accounting to be within it would not be ſufficient, becauſe the accounting did not alter the nature of the debt. And for that were cited the caſes of *Harrenden verſ. Palmer*, *Hob.* 88. *Done verſus Thorn*, *Allen* 72. *Cony verſ. Laws*, *Stiles Rep.* 472. Sir *Thomas Jones* 47. and 2 *Lev.* 165. *Bull verſ. Palmer*. But the court were of opinion as to the firſt, that the promiſſory note being laid to have been made within the juriſdiction was ſufficient, becauſe whether it was for value received or not it would not be material, for an action upon a promiſſory note payable to a man or order, though it was not for value received, is maintainable upon the ſtatute of 3 & 5 *Ann. cap.* 9. and if value received is in the note, there is no occaſion to prove that the value was paid. As to the exception to the ſecond count, the court alſo over-ruled it, becauſe the action was grounded upon the ſtated account, which was laid to be ſtated within the juriſdiction. And though the ſtating the account might not alter the nature of the debt, yet giving the ſtated account in evidence, would be good evidence to prove the declaration. And judgment was affirmed, *Feb.* 7, 1728.

S. C. 2 Stra. 822.

Burroughs *verſ.* Willis.

Barriſter may lay the *venue* in *Middleſex*.

THE defendant had obtained a rule to change the *venue* out of *Middleſex*, in an action for money received to the plaintiff's uſe, upon the common *affidavit*, that the cauſe of action (if any) aroſe in *Hampſhire*. Mr. *Filmer* moved for the plaintiff, to diſcharge the rule, becauſe the plaintiff was a barriſter, and maſter in Chancery, and therefore had a privilege to lay his action in *Middleſex*, where his attendance was required, and cited 2 *Salk.* 670. *Knight verſ. Farnaby*. And the court being of opinion, this fell within the reaſon of that caſe, the rule was diſcharged. See 2 *Salk.* 668. *Seaman verſ. Ling*. *Carthew* 126. *Biſſe verſ. Harcourt*. Mr. *Huſſey* for the defendant.

Eaſter

Eaſter Term

2 Georgii 2. regis, B. R. 1729.

Uſher Eſtwick aſſignee of the ſheriff of Middleſex *againſt* Edward Cooke.

Intr. *Paſch.* 2 *Geo.* 2. B. R. Rot.

IN debt upon a bail-bond brought by the plaintiff as aſſignee of the ſheriff of *Middleſex*, the plaintiff declared, that after the firſt day of *Trinity* term *A. D.* 1706. *viz.* the 18th of *July anno regni domini Georgii* 2. *nunc regis, &c. ſecundo*, the plaintiff proſecuted *extra curiam dicti domini regis coram ipſo rege* (*eadem curia apud Weſtmonaſterium in comitatu Middleſex adtunc tenta exiſtente*) a writ of *capias ad reſpondendum*, to the then ſheriff of *Middleſex* directed; and ſo proceeds, and ſets out the writ, the delivery to the ſheriff, the warrant, arreſt, and giving the bail-bond by the defendant, and the aſſignment to the plaintiff, *&c.* To which declaration the defendant demurred, and the plaintiff joined in demurrer. And Mr. *Strange* for the defendant took exception to the declaration, that it appeared thereby, that the writ was ſued out in the long vacation out of term time; for the court muſt judicially take notice of the beginning and end of the terms, as well moveable as immoveable, and that the 18th of *July* was after *Trinity* term was ended, and therefore that the writ was a void writ, for it was not poſſible to be ſued out of the court of King's Bench then ſitting at *Weſtminſter* the 18th of *July*, when it was vacation time, no ſuch court being then ſitting at *Weſtminſter*. And the writ being void, the arreſt was illegal, and the bail-bond thereupon given void alſo. Mr. *Reeve* for the plaintiff inſiſted, that there was *veritas facti* as well as *veritas legis*. And though a writ is to be took in law, to be ſued out at the time when it bears *teſte*; and that is the laſt day of *Trinity* term, when the writ is ſued out in *Trinity* vacation; yet in fact it is conſtant experience, and the courſe of the court, which is the law of the

A writ of *capias ad reſpondendum* teſted in vacation is void.

court, that writs are ſued out in the long vacation, though they bear *teſte* the laſt day of *Trinity* term before. And therefore this, as it may be ſo in fact, ſo it is confeſſed to be ſo by the general demurrer, and therefore well enough. For which he cited Sir *Thomas Jones* 149. 1 *Ventr.* 362. *Walburgh verſ. Saltonſtall*; where in a declaration a *latitat* was alleged to be ſued out of the King's Bench 21 *Jan.* and the jury found the writ bore *teſte* 28 *Nov.* but in fact was ſued out 21 *Jan.* and it being according to the truth of the fact it was held good, and judgment was given for the plaintiff, *niſi*, *&c.* But the court being unanimous of opinion, that it was ill, and that it was not according to the truth of the fact, for it could not the 18th of *July* be ſued out of the court of the King's Bench then ſitting at *Weſtminſter*, when the court did not nor could not ſit out of term, the plaintiff deſired leave to diſcontinue, which was granted him, *May* 13, 1729. *Ante*, 1 vol. 4.

Naylor qui tam *verſ.* Scott.

A cuſtom for a fee to the vicar for churching a woman, in what caſe void.

IN a prohibition granted to ſtay a ſuit in the Spiritual Court by the vicar of *Wakefield*, grounded upon a cuſtom for a due for churching of women, which was alleged to be this, *viz.* That every inhabitant keeping an houſe and having a family in *Wakefield* in *Yorkſhire*, and having a child or children born in that pariſh at the time of churching the mother of the child, or at the uſual time after her delivery when ſhe ſhould be churched, have time out of mind paid ten pence to the vicar of that pariſh, for or in reſpect of ſuch churching, or at the uſual times when the mother of ſuch child ſhould be churched. Iſſue was taken upon the cuſtom, and a verdict was found for the defendant, that there was ſuch a cuſtom. And upon motion made to the court by Mr. *Filmer* for the plaintiff, in arreſt of judgment, to prevent the granting a conſultation, the court being of opinion, that it was a void cuſtom, 1. becauſe it was not alleged, what was the uſual time the women were to be churched, and therefore uncertain; 2. becauſe it was unreaſonable, becauſe it obliged the huſband to pay, if the woman was not churched at all, or if ſhe went out of the pariſh, or died, before the time of churching; judgment was arreſted; Mr. *Crowle* counſel for the defendant in the prohibition.

Trin.

Trin. Term

3 Georgii 2. regis, B. R. 1729.

The King *againſt* Valentine Boyles.

S. C. 2 Stra. 836.

Quo warranto lies for ſetting up a new office.

IN an information in nature of a *quo warranto* exhibited by the maſter of the crown office as the King's coroner and attorney, *&c.* for uſurping the office of one of the bailiffs of *Southwold* in *Suffolk*, the information ſet forth, that *villa de Southwold in comitatu Suffolk eſt antiqua villa, quodque infra villam praedictam* for ten years laſt paſt and long before there were and yet are two bailiffs from time to time by the commonalty of the ſaid *ville* yearly choſe and to be choſe, and that the office of bailiff *villae praedictae* for all the time aforeſaid was and yet is *officium publicum et officium magnae fiduciae et praeheminentiae infra villam praedictam tangens regimen et gubernationem villae illius, et adminiſtrationem publicae juſtitiae infra eandem villam, viz. apud villam praedictam,* and that the defendant 26 *April* 1 *Geo.* 2. and from thence *continue poſtea hucuſque apud villam praedictam abſque aliquo legali warranto, &c.* did uſe and exerciſe the ſaid office, and ſtill there uſes and exerciſes it, and claims to be one of the bailiffs of the ſaid *ville*, and to have and enjoy divers liberties to the ſaid office of one of the bailiffs of the ſaid town belonging, *&c.* To this information the defendant demurred, and the king's coroner, *&c.* having joined in demurrer, Mr. *Huſſey* for the defendant inſiſted that a *quo warranto* was the King's writ of right, for uſurping franchiſes and liberties, 2 *Inſt.* 282. The exerciſe of an office may be ſuch a franchiſe, as for the uſurpation of it a *quo warranto* may lie, if it is a publick office; but in this caſe the office in the information, ſeems to be only a private office, for which no *quo waranto* would lie; for it is not ſhewn, that this *ville* of *Southwold* is a corporate town, nor is it ſaid, ſo much as that it is a borough; and therefore the court cannot look upon the bailiff of this town, to be an officer of a publick nature. *Sed non allocatur*; for *per curiam* there is no neceſſity, to ſet out particularly in theſe ſort of informations, the whole conſtitution of the place, or to ſhew whether the office is by charter or preſcription; but if it is alleged, to be an office, which appears upon the face of the information, to concern the publick, it is ſufficient againſt a perſon that uſurps it. Now here it is alleged to be a publick office, and concerns the government of the *ville*, and the adminiſtration of publick juſtice, which is confeſſed by the demurrer. And judgment was given for the King, *June* 12, 1729.

Mich. Term

3 Georgii 2. regis, B. R. 1729.

Lowe *againſt* Davies and others.

Intr. *Trin.* 13 *Geo.* 1. B. R. Rot.

S. C. Bernard. 238.
Ibid. 367.
What ſhall be a deviſe of an eſtate for life, and not in tail.
2 Vern. 449.

EJECTMENT for meſuages and lands in *Shrewſbury* on the demiſe of *William Fowler* and *Mary* his wife. On not guilty pleaded, the jury found a ſpecial verdict which was very long, by finding ſeveral conveyances and common recoveries; but the queſtion was wholly upon what eſtate paſſed by the will of *Daniel Jevon* to his youngeſt ſon *Benjamin Jevon.* The will was found at large, but the queſtion aroſe upon this ſhort caſe. *Daniel Jevon* the deviſor, being ſeiſed of the lands in queſtion, by his will duly executed, dated 21 *June* 28 *Car.* 2. deviſed part of them to his wife dame *Anne Jevon* for and during her natural life, and from and after her deceaſe then to his ſon *Benjamin Jevon* and his heirs lawfully to be begotten, that is to ſay, to his firſt, ſecond, third, and every ſon and ſons ſucceſſively, lawfully to be begotten of the body of the ſaid *Benjamin*, and the heirs of the body of ſuch firſt, ſecond, third, and every other ſon and ſons ſucceſſively lawfully iſſuing, as they ſhall be in ſeniority of age and priority of birth, the eldeſt always and the heirs of his body to be preferred before the youngeſt and the heirs of his body, and in default of ſuch iſſue then to his right heirs for ever. Other part of the lands were deviſed to his wife for life, and from and after her deceaſe to his ſaid ſon *Benjamin* and to the heirs of his body, as in manner and form aforeſaid is expreſſed; but for want of ſuch heirs, then to the uſe of his right heirs for ever. Other lands he deviſes to his eldeſt ſon *Thomas* and his heirs lawfully to be begotten, the firſt, ſecond, third, and every other ſon and ſons ſucceſſively of the body of the ſaid *Thomas* lawfully begotten, and the heirs of ſuch firſt, ſecond and third ſon lawfully ſucceeding one another, and in default of ſuch iſſue to his ſon *Benjamin* as heretofore expreſſed, and in default of ſuch iſſue to his right heirs for ever. Other lands he deviſes to his ſon *Benjamin*, and the heirs of his body lawfully to be begotten, the firſt, ſecond, third, and every other ſon and ſons ſucceſſively of the body of the ſaid *Benjamin* lawfully to be begotten, and the heirs of the body of ſuch firſt, ſecond and third, and every other ſon and ſons ſucceſſively lawfully iſſuing, as they ſhall be in ſeniority of age and priority of birth, the eldeſt always and the heirs of his body to be preferred before the youngeſt and the heirs of his body, and in default of ſuch iſſue then to his right heirs for ever. *Daniel Jevon* the deviſor died 22 *June* 28 *Car.* 2. 1676. and left his widow and three ſons, *Thomas* his eldeſt, *Richard* his ſecond ſon, and *Benjamin* his youngeſt ſon. *Thomas* the eldeſt ſon died without iſſue. *Richard* the ſecond ſon died, and left *Mary* the wife of *Fowler* his daughter and heir, and alſo right heir to *Dan. Jevon* the teſtator, who were leſſors of the plaintiff. The defendant claimed under *Benjamin*, who after a ſurrender by his mother of her eſtate for life to him, ſuffered a common recovery, to the the uſe of him and his heirs, and afterwards conveyed it to *Waring*, under whom the defendants claimed. So that the ſingle queſtion upon this ſpecial verdict was, whether *Benjamin Jevon* by this will was tenant in tail, or only tenant for life? If he was tenant in tail, by the ſuffering the common recovery that would be barred, and alſo the remainder to the right heirs of his father, under which the leſſor of the plaintiff claimed. But if he was but tenant for life, the recovery would not effect the reverſion deſcended to the plaintiff but ſhe would have a good title. Mr. *Wilbraham* for the defendants argued, that the teſtator knew the difference between deviſing an eſtate for life, and an eſtate in tail; for in ſeveral parts of the will he gave to his wife an expreſs eſtate for life; but to *Benjamin* he did not give it only for his life, but to him and the heirs of his body, which was undoubtedly an eſtate tail in a will, and therefore that eſtate could not be defeated by the ſubſequent words. For where an expreſs eſtate is given by a will, that ſhall not be defeated by ſubſequent words by an implication. *Dier* 171. 1 *Ventr.* 231. *Cro. Eliz.* 248. *Atkins verſ. Atkins.* And as to the firſt deviſe to *Benjamin* (though there is ſome difference in the penning that and the ſubſequent deviſe to him) a *videlicet* may correct or reſtrain what went before, or explain it; but if it is contrary to what went before, it muſt be rejected as void. *Hob.* 171. Now it was inſiſted on, an expreſs eſtate tail being given to *Benjamin* by the firſt words, and no expreſs eſtate for life, the *viz.* that comes after, and the ſubſequent words in the other deviſes, cannot turn that only into an eſtate for life in *Benjamin*, with intails to his ſons ſucceſſively; for what follows the *viz.* and the other deviſes to the ſons, is contrary to the expreſs deviſe to *Benjamin*. *Sed non allocatur*; 4 Mod. 319.

catur; for *per curiam*, the whole will muſt be took together, and one part explained by the other; and the intent was moſt manifeſt, that the deviſor in all the deviſes of the lands in queſtion deſigned to give *Benjamin* only an eſtate for life, and not an intail; and the *viz.* and the other clauſes, were not contrary, but explanatory of what *heirs of the body* of *Benjamin* the deviſor meant. And judgment was given for the plaintiff *November* 18, 1729, by the unanimous opinion of all the judges. Mr. *Willes* was counſel for the plaintiff.

Henry Haydock *verſ.* Roger Lynch.

Intr. *Mich.* 3 *Geo.* 2. B. R. rot.

What ſhall not be a good bill of exchange. 8 Mod. 265. Ante 1481, 1482. 10 Mod. 394. 316.

IN an action upon the caſe upon ſeveral promiſes, the plaintiff in his firſt count declared, that one *Thomas Rogers* 8 *Aug.* 1728. &c. according to the cuſtom of merchants his certain bill of exchange with his own hand and in the name of the ſaid *Thomas* ſubſcribed did make, dated the ſame day and year, and directed the ſaid bill of exchange to the ſaid *Roger*, and thereby requeſted the ſaid *Roger* to pay to the ſaid *Henry* or his order 14*l.* 3*s.* out of the fifth payment, when it ſhould become due, and it ſhould be allowed by the ſaid *Thomas*, which was afterwards accepted by the defendant, *ratione quorum praemiſſorum* the defendant became liable to pay the ſaid 14*l.* 3*s.* to the plaintiff *Henry*, and ſo being liable promiſed to pay, &c. Then there were other counts in the declaration, to which counts the defendant pleaded *non aſſumpſit*, &c. and as to this count the defendant demurred. And it was inſiſted upon by Mr. *Parker* for the defendant, that this action was not maintainable upon this bill as a bill of exchange, according to the reſolutions in the caſes of *Jocelin verſ. Laſerre*, *Paſch.* 1 *Geo.* 1. *B. R.* [*Ante*, 1362.] and *Jenney verſ. Herle*, *Paſch.* 10 *Geo.* 1. *B. R.* 1724. [*Ante*, 1361.] And of that opinion was the court, and *Nov.* 20, 1729. gave judgment for the defendant. Mr. *Strange* for the plaintiff.

Henry Mifflin *alias* Peters and others *verſ.* Sir William Morgan.

Intr. *Mich.* 2 *Geo.* 2. C. B. Rot. 544. et *Mich.* 3 *Geo.* 2. B. R. Rot.

What is a good Allegation of the aſſignment of a bail-bond by the ſheriff.

IN error upon a judgment by *nihil dicit* in debt upon a bail-bond, penalty 500*l.* obtained by the plaintiffs *Mifflin* and others againſt Sir *William Morgan* as aſſignees of the ſheriff of *Glouceſter*, the error aſſigned was, that the plaintiffs did not ſhew, that the ſheriff aſſigned the bond to them by indorſing the ſame and atteſting it under his hand and ſeal in the preſence of two or more credible witneſſes, according to the words of the ſtatute of 4 *Ann. cap.* 16. *par.* 20. but only alleged, that the ſheriff at the requeſt and coſts of the plaintiff in the ſuit, according to the form of the ſtatute in that caſe lately made and provided, did aſſign to the plaintiffs the ſaid bond, which Mr. *Strange* inſiſted for the plaintiff in error was not ſufficient, without ſhewing particularly, that the bond was aſſigned as the act directed, by indorſement, &*c.* But the court unanimouſly over-ruled this exception; all defects, which would have been aided by a verdict, being aided after judgment by *nil dicit* by that act of 4 *Ann. cap.* 16. *par.* 2. for amendment of the law, and it being expreſly alleged, that the bond was aſſigned *ſecundum formam ſtatuti.* Mr. *Parker* for the defendants in error. And judgment was affirmed, *Nov.* 18, 1729.

Carth. 304.

The King *againſt* the mayor, aldermen and burgeſſes of Doncaſter in the county of York.

Mandamus to reſtore one to the office of capital burgeſs of a corporation.

A *Mandamus* was granted, directed to the mayor, aldermen and burgeſſes of *Doncaſter*, commanding them to reſtore *Chriſtopher Scott* to the office of a capital burgeſs of that corporation. To which they made a return, whereby it was ſet out, that the corporation was a corporation by preſcription, &*c.* and that ſeveral charters had been granted to them by ſeveral Kings, by one of which their laſt name was made, that of mayor, aldermen and burgeſſes, &*c.* that by letters patent of 16 *Car.* 2. he appointed a mayor, twelve aldermen, and twenty-four capital burgeſſes, which mayor, aldermen and capital burgeſſes were thereby appointed to be the common-council of the corporation: by the ſame letters patent the mayor was appointed to be choſe out of the aldermen, and the aldermen out of the capital burgeſſes, and the capital burgeſſes out of the free burgeſſes, in a particular manner mentioned in the letters patent; then they returned, that time out of mind there had been three chamberlains of the ſaid borough, one called the *ſenior* chamberlain, another the middle chamberlain, and the other *junior* chamberlain of the ſaid borough, which till the granting the charter of *Charles* the Second had been always choſe by the whole body out of the burgeſſes, and from the making that charter had been choſe by the mayor, aldermen and capital burgeſſes, out of the capital burgeſſes; which chamberlains reſpectively continued from their elections three years; and that the firſt year ſuch perſon was called the *junior* chamberlain, the ſecond year middle chamberlain, and the third year *ſenior* chamberlain; and that the buſineſs of the ſecond chamberlain was to take care of the lands and poſſeſſions of the corporation, and to receive the rents, *&c.* and to give a true account of them: then the return ſets out, that after *Scott* was choſe a capital burgeſs, and took the oath, which was ſet out at large, which was, among other things, well and truly to ſerve the mayor, aldermen and burgeſſes of the borough, as one of the capital burgeſſes thereof, and well and truly to perform and keep all ſuch orders and by-laws as are or ſhould be made by the mayor, aldermen and capital burgeſſes, for the good government of the borough, and in all things according to his power truly and faithfully to ſerve the mayor, aldermen and burgeſſes, for the moſt benefit of the corporation and inhabitants; then the return ſets out, that *Scott* 23 *May* 1718 was choſen chamberlain, that he became middle chamberlain, and took upon him the execution of that office 1719. that he as middle chamberlain received ſeveral ſums of money of the tenants of the corporation, mentioning them particularly, due to the corporation, of which he gave no account, *&c.* but concealed and detained them to his own uſe, and as middle chamberlain charged the corporation with ſeveral ſums of money as laid out for them, which he never laid out, mentioning them alſo particularly; and that he, while he was a capital burgeſs and chamberlain of the ſaid borough, obſtinately and voluntarily refuſed to obey ſeveral orders and laws by the mayor, aldermen and burgeſſes, for the good of the ſaid borough made, contrary to the duty of his office of capital burgeſs, and contrary to the tenor of his oath, contrary to the truſt repoſed in him, *&c.* that the mayor, aldermen and capital burgeſſes afterwards, *viz.* *&c.* in common-council aſſembled, ordered that *Scott* ſhould anſwer the ſeveral articles, matters, miſbehaviours and offences aforeſaid, and that he had notice of them in writing, and was ſummoned to appear at a particular day to anſwer them; that he did appear, and put in his anſwer, and was heard, *&c.* that a further day was given him, when he was heard again; that a further day was given him, to ſhew cauſe why he ſhould not be removed from his office of capital burgeſs for the miſbehaviours and offences aforeſaid, at which day *Scott* appeared at the common-council then held, and was heard again, and upon examination and conſideration had by the mayor, aldermen, and capital burgeſſes in common-council then aſſembled, of all and ſingular the premiſſes, as well of the articles, matters, miſbehaviours and offenſes aforeſaid, laid to the charge of the ſaid *Scott*, as of the matters and anſwers he alledged in his defence; and upon examination of witneſſes it appeared to them, the mayor, aldermen, and capital burgeſſes in council aſſembled, that *Scott* was guilty, *&c. ideo* they then and there adjudged, he ſhould be removed, *&c.* and did then and there remove him, from his office of capital burgeſs, for his ſaid offences and miſbehaviours, *&c.* After argument by Mr. *Bootle* againſt this return, and by Mr. *Fazakerley* for it, *Nov.* 28, 1729. the court unanimouſly awarded a peremptory *mandamus*, to reſtore *Scott* to the office of a capital burgeſs. For they held firſt, that it did not appear ſufficiently by this return, that *Scott* had miſbehaved himſelf in the office of a capital burgeſs. For as to the charge, that he had obſtinately and voluntarily refuſed to obey orders and laws, *&c.* contrary to the duty of his office, and his oath; that was too general a charge, for the particular laws ought to have been ſpecified. But what he was charged with in this return related to his office of chamberlain, and not to his office of capital burgeſs, *viz.* not accounting for the rents he received, and charging them with payments which he never made; and therefore this might have been a good reaſon to remove him from the office of chamberlain, but not of a capital burgeſs. 2. They had not returned, that the mayor, aldermen, and capital burgeſſes, which was the common-council, had a power to remove. The charter does ſay, the capital burgeſſes ſhall continue in for life, unleſs removed; but it does not ſay by whom that removal is to be made. And 11 *Co.* 99. *Palm.* 451. *Stiles* 477. are authorities, that a Freeman ſhall not be removed by a corporation, unleſs by virtue of a charter or preſcription. But if the mayor, aldermen, and capital burgeſſes, could be looked on as having an authority to remove a capital burgeſs, becauſe he was choſe by them; yet the court held, this was not a ſufficient cauſe to remove *Scott* from that office, for the reaſons beforementioned.

1 Ro. Rep. 225. 4 Leon. 61. Dyer 332. b. pl. 28.

Eaſter Term

3 Georgii 2. regis B. R. 1730.

The mayor, aldermen and burgeſſes of Baſingſtoke *againſt* Vaughan Bonner.

Intr. *Hil.* 3 *Geo.* 2. B. R. Rot.

2 Stra. S. C. 864.

Privilege of attorney.

IN debt for 800 *l.* rent in arrear due from the defendant to the plaintiffs upon a leaſe by indenture made by them to the defendant, he pleaded his privilege as an attorney of the Common Pleas in this manner, *viz.* that he, the day of exhibiting the plaintiffs ſaid bill, and long before *et continue abinde hucuſque*, *fecit* [inſtead of *fuit*] *et adhuc exiſtit*, an attorney of the Common pleas, *&c.* To which plea the plaintiffs demurred, and the defendant joined in demurrer. And judgment was given, that the defendant ſhould anſwer over, becauſe the defendant had not averred, he was an attorney of the Common Pleas the day of the exhibiting the plaintiffs bill, by reaſon of the miſtake of the word *fecit* inſtead of *fuit*, *May* 5, 1730.

James Stewart, Eſq; Henry Rowe and Elizabeth his wife, *verſus* Smith et al' bail of Solomon Ranger.

Intr. *Mich.* term 3 *Geo.* 2. B. R. Rot. 339.

S. C. 2 Stra. 866.

When *ſcire facias* againſt Bail muſt be teſted.

IN a *ſcire facias*, which bore *teſte* 6 *Nov.* 3 *Geo.* 2. returnable *Monday proxime poſt craſtinum ſancti Martini*, ſued by the plaintiffs againſt the defendants as bail for *Solomon Ranger*, *&c.* the defendants pleaded, that the plaintiffs after their judgment recovered, and before the ſuing out of the *ſcire facias*, *&c.* had not ſued out a *capias ad ſatisfaciendum* againſt *Ranger*, *&c.* To which the plaintiffs replied, that after their obtaining their judgment againſt *Ranger*, and before the ſuing out of the firſt *ſcire facias* againſt the defendants, *viz.* 23d of *October* the ſame *Mich.* term 3 *Geo.* 2. they ſued out, *&c.* againſt the ſaid *Ranger* a *capias ad ſatisfaciendum* returnable *Thurſday proxime poſt craſtinum Animarum* [which was the 6th of *Nov.* the ſame day the firſt *ſcire facias* bore *teſte*] at which day the ſheriff returned, that *Ranger non eſt inventus, &c. prout per idem breve et retornum inde* among the files of writs of *capias ad ſatisfaciendum* in the ſaid court *de recordo remanentia, &c.* The defendants demurred generally, and the plaintiffs joined in demurrer. And Mr. *Strange* for the defendants inſiſted, that this was ill, becauſe the *ſcire facias* was *teſte* the ſame day the *capias ad ſatisfaciendum* was returnable, whereas the *capias ad ſatisfaciendum* ought to be returned before the *ſcire facias* was ſued out; but it did not appear to be ſo, becauſe being both on the ſame day, there is no fraction of a day. *Sed non allocatur*; for in many caſes the law takes notice of fractions of days; and here it ſhould be took, that the *capias ad ſatisfaciendum* was returned, before the *ſcire facias* was ſued out; which might very well be, though both on the ſame day. Judgment for the plaintiff, *May* 1, 1730.

John Hoare *againſt* Rivers Dickinſon. *Error.* C. B.

Intr. *Trin.* 2 *&* 3 *Geo.* 2. C. B. Rot. 645. et Intr. *Paſch.* 3 *Geo.* 2. B. R. Rot.

Special action on the caſe for damnifying the plaintiff's meſuages, by turning a watercourſe to their foundation. See Hob. 131. 1 Vent. 97. Poph. 172. Dyer 295.

JOHN Hoare the plaintiff in the Common Pleas brought an action upon the caſe againſt *Dickinſon*, and declared, that he the firſt of *July* 1 *Geo.* 2. was lawfully poſſeſſed of two ancient meſuages and two ancient ſheds ſituate in the pariſh of *St. Andrew Holborn in comitatu Middleſex*, and being ſo poſſeſſed, he afterwards, *ſcilicet* the ſame day and year, pulled down the ſaid ancient meſuages, and built in their place four other meſuages upon the ground, or part thereof, where the ancient meſuages ſtood, and the plaintiff of the ſaid four new built meſuages the ſaid firſt of *July anno ſecundo* aforeſaid, and always from thence until and after the ſecond of *December anno ſecundo ſupradicto*, was lawfully poſſeſſed: and whereas the defendant the ſaid firſt of *July anno ſecundo ſupradicto*, and always from thence until and after the ſaid ſecond of *December*, was poſſeſſed of a brewhouſe in the pariſh of *St. Sepulchre's London*, and being ſo poſſeſſed, and the ſaid *John Hoare* being poſſeſſed of the ſaid four new built meſuages, the defendant *machinans & malitioſe intendens, &c.* the ſaid firſt of *July* and divers days and times between the ſaid firſt of *July* and the ſaid ſecond of *December*, *quendam curſum aquae per maheremia tubulata deductum a quodam fonte* in the ſaid pariſh of *St. Andrew Holborn* to the defendant's brewhouſe *continuavit, et currere cauſavit* near the foundation and underpinning of the plaintiff's ſaid four meſuages, *ac maheremia tubulata illa tam negligenter manutenuit*, *reparavit et cuſtodivit*, *quod aqua a fonte illo per eundem Dickinſon in maheremiis tubulatis illis deducta*, *dictis diebus et vicibus ex maheremiis tubulatis illis*, at the ſaid pariſh of *St. Andrew's Holborn*, *ad et in murum*, *fundamentum et ſuſtentationem* of one of the ſaid four meſuages of the plaintiff's ſo new built *irruebat et profluebat*, *per quod* the ſaid meſuage and two other of theſe meſuages of the ſaid plaintiff to the ſaid meſuage near adjoining *in muribus ſuis ac in tectis eorundem magnopere debilitata et damnificata fuerunt*, and the plaintiff to ſupport and repair them *ex cauſa illa* was forced to expend 300*l.* &c. Upon not guilty pleaded, and iſſue joined, the jury found for the plaintiff, and gave him damage 203*l.* beſides coſts; for which ſum, and for 25*l.* 10*s.* coſts, judgment was given for the plaintiff *John Hoare* in the Common Pleas. Upon which judgment the defendant brought a writ of error in the King's Bench, and aſſigned the general error. And Mr. *Draper* argued for the plaintiff in error, that this action was not maintainable againſt him, becauſe the defendant was not to be compared to a *terretenant*, who may be obliged to keep his fences, &c. in repair, according to the caſe of *Tenant verſ. Goulding*, 1 *Salk.* 360. But had only an eaſement in having this water come to his brewhouſe. And it is not alledged, that the pipes were his, or that he laid them there; and therefore he was not obliged to repair them, and by conſequence was not anſwerable for any damage that might accrue to the defendant in error by reaſon of the pipes being out of repair. In the next place, if the plaintiff in error was to be looked upon as owner of the pipes (which he is not alledged to be in the declaration) then the plaintiff's declaration is ill, becauſe the defendant in error has not ſet out a good title to the four meſuages, but has only alledged that he was *legitime poſſeſſionatus*, which though it might be good againſt a *tort-feaſor*, yet would not be good againſt a *terretenant*, 1 *Salk.* 335. *Star verſ. Rookeby.* But the court were of opinion, that the action well lay, for it is alledged, that the plaintiff *machinans et malitioſe intendens eundem Johannem in hac parte minus rite praegravare*, &c. *curſum aquae*, &c. *continuavit et currere cauſavit* near the foundation of the houſes of the defendant in error, &c. *per quod*, &c. ſo that he is plainly a wrong doer, and has by his continuing and cauſing this water to run near, &c. damaged the defendant in error, which the jury have found. And therefore judgment was affirmed, *April* 18, 1730.

Inſtead of muris.

James Tully *againſt* Francis Sparkes and Chriſtopher May, executors of William Donalſon.

S. C. 2 Stra. 867.

Ante, 1546. S. C.

THE defendants the executors brought a writ of error upon this judgment (which ſee before, 1546.) in the Exchequer-chamber; where it was argued for them by Mr *Jocelin*, not only that the judgment was erroneous upon the merits, but alſo that there was an error in the entry of the judgment; for the entry was, *ideo conſideratum eſt*, that the plaintiff recover againſt the defendants his debt aforeſaid, *necnon* 22 *l. pro damnis ſuis quae ſuſtinuit tam occaſione detentionis debiti illius quam pro miſis et cuſtagiis ſuis per ipſum circa ſectam ſuam in hac parte appoſitis, eidem Jacobo per curiam dicti domini regis nunc hic adjudicatas, de bonis et catallis quae fuerunt, &c.* Which was inſiſted upon to be erroneous, becauſe it was not, that the taxing of the damages was *ex aſſenſu* of the plaintiff, for the words *ex aſſenſu ſuo* after *per curiam dicti domini regis nunc hic* were omitted; which ought to be in, as appears by all the precedents in the books of entries. For the taxation of the damages *occaſione detentionis debiti*, as well as of the coſts of ſuit, being by aſſent of the plaintiff (which is always entred of record) will conclude the defendant; but if the plaintiff will not conſent to this, then he ſhall have a writ of inquiry of the damages *occaſione detentionis debiti*, if he will; but this is in the plaintiff's election, and not in the election of the defendant, in judgment in actions of debt upon default or confeſſion, 2 *Saund.* 107. *Holdip verſ. Otway.* And the ſame reaſon holds in judgment in debt upon a demurrer. And the juſtices and barons in this caſe ſeemed ſtongly of opinion, that by reaſon of this omiſſion in the entry of the judgment, the judgment was erroneous. Then it was moved in the Exchequer-chamber, that they would let the record be amended. But the court held, they could not amend it; but if it was amendable, it muſt be in the King's Bench. Whereupon Mr. *Harper* moved for the plaintiff in the original action, that the judgment might be amended, by inſerting the words *ex aſſenſu ſuo.* And a rule was made, for the defendants to ſhew cauſe, &c. And Mr. *Jocelin* came to ſhew cauſe why the rule ought to be diſcharged. And firſt that the record was not in this court, but that it was removed by the writ of error into the Exchequer-chamber, and was there now. And for this he inſiſted upon the words of the ſtatute of 27 *Eliz. cap.* 8. which requires the chief juſtice of the King's Bench to cauſe the record to be brought before the juſtices of the Common Pleas, &c. The writ of error alſo requires the record to be carried before the juſtices, &c. 1 *Anderſ.* 143. *Sed non allocatur*; for the court held, the record remained here, notwithſtanding the writ of error in the Exchequer-chamber, and that it was only a tranſcript ſent thither, *March* 72. *Palm.* 198. and that if this defect is amendable by law, it muſt be amended in this court. *Cro. Jac.* 429. Then Mr. *Jocelin* and Mr. ſerjeant *Eyre* inſiſted, that this could not be amended, becauſe this is not barely *vitium clerici*, but an error in matter of judgment. Beſides, they ſaid the application for the amendment was too late, the cauſe having been twice argued in the Exchequer-chamber. But *e contra*, ſerjeant *Chapple* and Mr. *Harper* argued, that this was amendable by virtue of the ſtatute of 16 & 17 *Car.* 2. *c.* 8. whereby it is enacted, that no judgment ſhall be reverſed, by reaſon that the coſts in any judgment whatſoever are not entred to be by conſent of the plaintiff, but that ſuch omiſſions, and all other matters of like nature, *&c.* ſhall be amended by the judges of the court where ſuch judgment ſhall be given, or whereunto the record is or ſhall be removed by writ of error. And they inſiſted, that the omiſſion in the preſent caſe of *ex aſſenſu* of the plaintiff as to taxation of damages *occaſione detentionis debiti* was of the like nature as that of coſts not entred to be with aſſent of the plaintiff. And of this opinion was the court, and the amendment was granted, *May* 2, 1730. And in *Trinity* term following, upon Mr. *Harper*'s motion the tranſcript of the record in the Exchequer-chamber was amended by the record of the King's Bench. And in that term the judgment of the King's Bench was affirmed in the Exchequer-chamber by lord chief juſtice *Eyre*, *Price* and *Denton*, juſtices of the Common Pleas, and *Carter*, *Comyns* and *Thompſon*, barons of the Exchequer, *Forteſcue* juſtice being abſent and doubting, and *Reynolds* being abſent, having joined in the judgment in the King's Bench.

Trin. Term

3 & 4 Georgii 2. regis, B.R. 1730.

S. C. 2 Stra. 870.

The King *againſt* Clendon.

Cannot join an aſſault of two people in the ſame indictment.

THE defendant was indicted for an aſſault and battery committed by the defendant upon *J. S* and *J. N.* and upon not guilty pleaded a verdict was found for the King, that the defendant was guilty, *&c.* And a motion was made in arreſt of judgment by Mr. *Ketelbey* for the defendant, that theſe were two diſtinct batteries, and two diſtinct offences, for which the defendant ought to have been indicted by ſeveral indictments, and that they could not be joined in the ſame indictment; for as the offences were ſeveral, ſo the judgments ought to be ſeveral, and diſtinct fines ſet upon the defendant in reſpect of them. Upon which a rule was made, to ſtay judgment, until, *&c.* And Mr. *Taylor* for the proſecutor moved to diſcharge the rule, for although he agreed, *J. S.* and *J. N.* could not have joined in an action for theſe batteries, yet they might be well enough put in the ſame indictment, becauſe the court would conſider them as different indictments, and might very well give different judgments, and ſet different fines. But the court held, that as no caſe was cited, nor precedent, to warrant ſuch an indictment, it was ill for the reaſons given by Mr. *Ketelbey*. And judgment was arreſted abſolutely, *Saturday*, *May* 30, 1730.

S. C. 2 Stra. 873.

Coppin *verſ.* Gunner.

Leave to charge a felon convict with civil proceſs. 9 Geo 1. c. 22. continued by 12 Geo. 1. c. 30.

Gunner was convicted of an offence within the black act, *viz.* ſhooting at a perſon, *&c.* and ſentence of death pronounced againſt him; but my brother *Forteſcue*, before whom he was tried, reprieved him, in order that a letter of the ſecretary of ſtate might be obtained for his tranſportation, according to 4 *Geo.* 1. *cap.* 11. *par.* 1. And Mr. *Wheat* moved in behalf of *Coppin*, to whom

Gunner was indebted, that he might have leave to ſerve *Gunner* in gaol with a copy of a *latitat*, to intitle the plaintiff to file common bail for him, if he did not cauſe an appearance to be entred, it being alleged, that *Gunner* had an eſtate fallen to him; there being a *proviſo* in the act of 9 *Geo.* 1. *c.* 22. that offenders againſt that act ſhould not incur corruption of blood, nor a forfeiture of lands, tenements, goods or chattels. And laſt term a rule was made for the gaoler and *Gunner* to ſhew cauſe. And upon hearing counſel this term, the rule was made abſolute, and leave given to *Coppin* to ſerve *Gunner*, according to the motion; it being no prejudice to the gaoler, and there being no reaſon, that the defendant ſhould not pay his debts, if the plaintiff could recover, and find effects; he undertaking not to ſue execution againſt the perſon of *Gunner*, and that conſent being made part of the rule.

Mich. Term

4 Georgii 2. regis, B. R. 1730.

Rex *verſ.* Huggins.

S. C. 2 Stra. 882.

Intr. *Trin.* 3 *Geo.* 2.

Special verdict in murder, and judgment of the court.

THIS was a ſpecial verdict found at the *Old Bailey* on an indictment of murder againſt *James Barnes* and *John Huggins.* The indictment ſets forth, that *John Huggins* from the firſt day of *October* in the twelfth year of the late King to the firſt day of *January* next following, and long before and after, was warden of the priſon of the *Fleet*, *&c.* and that *James Barnes* was during that time ſervant to *John Huggins*, and employed about the care of the priſoners; and that *James Barnes exiſtens perſona crudelis naturae et immanis diſpoſitionis erga priſonarios in eadem priſona exiſtentes*, on the firſt day of *November* in the twelfth year, *&c.* made an aſſault upon one *Edward Arne*, then being a priſoner in the ſame priſon under the cuſtody of the ſaid *John Huggins*, and him the ſaid *Edward Arne* then and there with force and arms, *&c.* unlawfully, feloniouſly, wilfully, and of his malice aforethought, and without the conſent of the ſaid *Edward Arne* took, and him with force and arms, *&c.* to a certain room within the priſon aforeſaid then newly built, unlawfully, *&c.* conveyed and led, and him the ſaid *Edward Arne* with force and arms, *&c.* in the ſaid room for a long time, to wit for the ſpace of ſix weeks then next following, unlawfully, *&c.* impriſoned and detained; and him the ſaid *Edward Arne* then and there with force and arms, *&c.* for all the time laſt mentioned in that room *abſque ſolamine ignis necnon ſine aliqua matula, ſcaphio, vel aliquo alio hujuſmodi utenſili* unlawfully, *&c.* forced to remain and be (the walls of the aforeſaid room made of bricks and morter at the aforeſaid time of the impriſonment of the ſaid *Edward Arne* in the ſame being very moiſt, and the room aforeſaid being ſituate over the common ſewer of the ſaid priſon, and near the place *ubi* *ſordes et fimus priſonae praedictae necnon excrementa priſonariorum praedictorum adtunc uſualitur poſita fuerunt*, by reaſon whereof the room aforeſaid then was very unwholeſome and greatly dangerous to the life of any perſon detained in the ſame: and the indictment farther ſets forth, that the ſaid *James Barnes* and *John Huggins* at the ſaid time of the impriſonment of the ſaid *Edward Arne* in that room well knew, that the ſaid room had then been newly built, and that the walls of that room, being made of bricks and morter, were then very moiſt, and that the ſaid room was ſo ſituate as aforeſaid: and the indictment farther ſets forth, that the ſaid *Edward Arne*, during the impriſonment and detaining aforeſaid in the ſaid room, *viz.* the ſeventh of *November*, *&c.* by dureſs of the ſame impriſonment and detaining became ſick, and thereby from the ſame ſeventh day of *November* until the ſeventh day of *December* then next following in the room aforeſaid languiſhed, on which ſaid ſeventh day of *December* the ſaid *Edward Arne* by dureſs of the impriſonment and detaining aforeſaid in the room aforeſaid died, *&c.* the indictment farther ſets forth, that the ſaid *John Huggins*, being a perſon of a cruel nature and ſavage diſpoſition, and a grievous and inhuman oppreſſor of the priſoners in the ſame priſon under his cuſtody being, during the ſaid impriſonment and detaining of the aforeſaid *Edward Arne* in the room aforeſaid, *viz.* the ſaid ſeventh day of *November*, *&c.* and divers other days and times during that impriſonment and detaining, at *London*, *&c.* feloniouſly, wilfully, and of his malice aforethought, was preſent, aiding, abetting, comforting, aſſiſting and maintaining the aforeſaid *James Barnes*, feloniouſly, wilfully, and of his malice aforethought, the ſaid *Edward Arne* in manner aforeſaid to kill and murder: and ſo the jurors aforeſaid upon their oath aforeſaid ſay, that the ſaid *James Barnes* and *John Huggins* the ſaid *Edward Arne* in manner and form aforeſaid feloniouſly, wilfully, and of their malice aforethought, did kill and murder, againſt the peace, *&c.* On Not guilty pleaded by the priſoner *Huggins* the jury find a ſpecial verdict as follows. That Queen *Anne* by her letters patent bearing date the 22d of *July* in the twelfth year of her reign granted to *John Huggins* named in the indictment the office of warden or keeper of the *Fleet*, and keeper of the priſon and gaol of the *Fleet*, ſituate, *&c.* and of the priſoners then committed or to be committed to the priſon and gaol of the *Fleet* aforeſaid, and the capital meſuage for the cuſtody of the priſoners, and thirteen meſuages in the pariſh aforeſaid, and all other meſuages, *&c.* and all that rent, fee or ſalary of 7*l.* 12*s.* 1*d.* yearly payable and to be paid by the hands of the ſheriffs of her city of *London* and her county of *Middleſex*, *&c.* and all other rents, *&c.* and him the ſaid *John Huggins* warden or keeper of the *Fleet* and of the priſon and gaol of the *Fleet* aforeſaid, for herſelf, her heirs and ſucceſſors, did make, ordain and conſtitute, by the ſame letters patent; to have, hold, enjoy and exerciſe the ſaid office, meſuages, lands, *&c.* to the aforeſaid *John Huggins*, by himſelf or by his ſufficient deputy or deputies, for and during his natural life, in as ample manner and form as Sir *Jeremy Whitchcott*, baronet, or any other warden of her priſon of the *Fleet* aforeſaid, the ſaid office and other the premiſſes or any of them had before had, held, uſed or enjoyed, or ought to have had, held, uſed or enjoyed; with the uſual averments: and they further find, that the ſaid *John Huggins* 1 *Sept.* in the twelfth of the late King, and for divers years before and continually from thence after until the firſt of *January* then next following, was warden or keeper of the ſaid priſon of the *Fleet*; and that one *Thomas Gibbons* for all the ſame time was deputy of the ſaid *John Huggins* in the ſaid office of warden or keeper of the priſon of the *Fleet* aforeſaid by the ſame *John Huggins* appointed, and acted as ſuch his deputy: and they further find, that *James Barnes*, in the indictment named for all the ſame time was ſervant of the ſaid *Thomas Gibbons*, deputy of the ſaid *John Huggins*, in the ſame office ſo as aforeſaid being, and acted under the ſame *Thomas Gibbons*, *&c.* in and about the care of the priſoners committed to the ſaid priſon, and in the ſame priſon being, and particularly in and about the care of *Edward Arne* in the indictment named then and there a priſoner in the ſame priſon being: they farther find, that the ſaid *James Barnes* the ſeventh of *September* in the twelfth year, *&c.* in and upon the ſaid *Edward Arne*, a priſoner in the ſame priſon then as aforeſaid being, in manner and form as in the ſaid indictment is ſpecified, made an aſſault, and him the ſaid *Edward Arne* then and there without his conſent in manner and form as in the ſaid indictment is ſpecified took, and him the ſaid *Edward Arne*, to a certain room within the ſaid priſon then newly built, in the ſame indictment mentioned, without his conſent in manner, *&c.* conveyed and led, and him the ſaid *Edward Arne* in the ſaid room for a long time, to wit for the ſpace of forty four days from thence next following, without the conſent of him the ſaid *Edward Arne* in manner, *&c.* impriſoned and detained, and him the ſaid *Edward Arne* then and there for all the time laſt mentioned in that room, *abſque ſolamine ignis necnon ſine aliqua matula ſcaphio vel aliquo alio hujuſmodi utenſili*, to remain and be without his conſent in manner, *&c.* forced: and they farther find, that the walls of the ſaid room were made of bricks and morter, and at the ſaid time of the impriſonment of the ſaid *Edward Arne* in the ſame were very damp, and that the ſaid room was ſituate over the common ſewer of the ſaid priſon, and near the place *ubi ſordes et fimus priſonae praedictae necnon excrementa priſonariorum praedictorum adtunc uſualiter poſita fuerunt*, by reaſon whereof the ſaid room was then very unwholſome, and greatly dangerous to the life of any perſon detained in the ſame: and they farther find, that the ſaid *James Barnes* at the ſaid time of the impriſonment of the ſaid *Edward Arne* in that room well knew that the ſaid room had then been newly built, and that the walls of that room were made of bricks and morter, and were then very damp, and that the ſaid room was ſituate ſo as aforeſaid: and they farther find, that during the ſaid impriſonment and detaining of the ſaid *Edward Arne* in the ſaid room, to wit by the ſpace of fifteen days at leaſt before the death of the ſaid *Edward Arne*, the ſaid *John Huggins* knew, that the ſaid room had been then newly built, and that the walls of that room were made of bricks and morter, and then were damp; but whether the ſaid *John Huggins* knew that, on the ſaid 7th day of *September* in the twelfth year, *&c.* the jurors know not: and they farther find, that the ſaid *Edward Arne* during the ſaid impriſonment and detaining of him the ſaid *Edward Arne* in the ſaid room, to wit the tenth day of the ſame month of *September* in the twelfth year aboveſaid, by dureſs of the ſame impriſonment and detaining became ſick in the ſaid room, and thereby from the ſame tenth day of *September* in the twelfth year aboveſaid until the twentieth day of *October* then next following in the ſaid room languiſhed, on which ſaid twentieth day of *October* in the twelfth year aboveſaid the ſaid *Edward Arne* by dureſs of the ſaid impriſonment and detaining in the room aforeſaid died, to wit at *London*, *&c.* and they farther find, that during the impriſonment and detaining of the ſaid *Edward Arne* in the ſaid room, to wit by the ſpace of fifteen days at leaſt before the death of the ſaid *Edward Arne*, the ſaid *John Huggins* was once preſent at the ſaid room, and then and there ſaw the ſaid *Edward Arne* in that room under the dureſs of the ſaid impriſonment, and then and there turned away, and the ſaid *James Barnes* locked the door of the ſame room at the ſame time in which the ſaid *John Huggins* turned away as aforeſaid (the ſame *Edward Arne* at the ſaid time in which the ſaid door was locked by the ſaid *James Barnes* being in the ſaid room under dureſs of the ſaid impriſonment): and they farther find, that the ſaid *Edward Arne* in the ſaid room under dureſs of the ſaid impriſonment remained and was continued from the ſaid time in which the ſaid door of the ſaid room was ſo locked by the ſaid *James Barnes* as aforeſaid until the ſaid time in which the ſaid *Edward Arne* ſo as aforeſaid died: and they farther find, that the ſaid *John Huggins* ſometimes acted as warden or keeper of the ſaid priſon, during the time in which he the ſame *Thomas Gibbons* was deputy of the ſaid *John Huggins* in the ſaid office as aforeſaid; but whether upon the whole matter, *&c.*

The record of this indictment and ſpecial verdict being removed into the King's Bench by *certiorari*, it was argued on *Tueſday* the ſixteenth of *June* 1730 by Mr. *Willes* for the King, and Mr. ſerjeant *Eyre* for the priſoner. And on the laſt day of *Michaelmas* term following, after the caſe had been argued on the fourteenth of *November* at *Serjeants Inn* hall before all the twelve judges, the lord chief juſtice delivered the opinion of the judges.

In this caſe two queſtions have been made. 1. What crime the facts found upon *Barnes* in the ſpecial verdict will amount to? 2. Whether the priſoner at the bar is found guilty of the ſame offenſe with *Barnes*?

1. As to the firſt queſtion, it is very plain, that the facts found upon *Barnes* do amount to murder in him. Murder may be committed without any ſtroke. The law has not confined the offenſe to any particular circumſtances or manner of killing; but there are as many ways to commit murder, as there are to deſtroy a man, provided the act be done with malice, either expreſs or implied. *Hale P. C.* 46. 3 *Inſt.* 52. Murder is, where a perſon kills another of malice, ſo he dies within a year and a day. *Hale P. C.* 43. And malice may be either expreſſed or implied. In this caſe the jury have found the malice expreſs; for the facts charged on *Barnes* are laid in the indictment to be *ex malitia ſua praecogitata*, to wit, that he having the cuſtody of *Arne*, aſſaulted him, and carried him to this unwholeſome room, and confined him there by force againſt his will, and without his conſent, and without proper ſupport, *ex malitia ſua praecogitata*; by means of which he languiſhed and died. And the jury have found, that *Barnes* did all theſe facts, *modo et forma prout in indictamento praedicto ſpecificatur*.

But upon the finding of theſe facts there is alſo a plain malice ariſing in conſtruction of law. *Hale P. C.* 46. The law implies malice in reſpect of the perſon killing. If a priſoner by dureſs of the gaoler comes to an untimely end, it is murder. It is not neceſſary, to make it dureſs, that there ſhould be actual ſtrokes or wounds. And in 3 *Inſt.* 35. the putting into a dungeon is dureſs, or into a place too ſtrait, 3 *Inſt.* 91. *pluis arctment que devoit. Crompt.* 90. The untimely end, mentioned by lord chief juſtice *Hale*, is what is meant by *Briton*, *cap.* 11. *fol.* 18. If a man die in priſon, the coroner is to take an inqueſt upon the view of the body; and if it is found by the inquiſition, that the perſon was brought nearer to death, and farther from life, *per dure gard del gaoler*, it is felony.

The reaſons, why the law implies malice in ſuch caſes, are plain. Becauſe it is a breach of his duty, and of the truſt which the law has repoſed in him. A priſoner is not to be puniſhed in gaol, but to be kept ſafely. *Flet.* 38. *Bract.* 105. The act alſo is deliberate And the nature of the act is ſuch, as that it muſt apparently do harm. It is alſo cruel, as it is committed upon a perſon that cannot help himſelf. And it is committed by force, and without the conſent of the priſoner. So that the charge in the indictment againſt *Barnes* is murder, and theſe facts found in the verdict as to him fully maintain the indictment, and amount to murder. But *Barnes* is not before the court, he having fled (as it is ſaid) from juſtice.

2. The next queſtion is, whether the priſoner *Huggins* is found guilty of the ſame offence as *Barnes*; or how far it appears by this ſpecial verdict, that he has been aiding and aſſiſting to *Barnes* in the committing of theſe facts.

In the indictment the offence is as ſtrongly charged upon *Huggins* as upon *Barnes*. The indictment charges, that the priſoner at bar, during the impriſonment of *Arne* in the ſaid room (the ſituation and condition of which the indictment expreſly charges *Huggins* to have the knowledge of) on the ſeventh of *November*, *et diverſis diebus et vicibus* during that impriſonment, feloniouſly, voluntarily, and of his malice aforethought, was preſent, aiding, abetting, comforting, and aſſiſting the ſaid *Barnes*, the ſaid *Arne* feloniouſly and of his malice aforethought to kill and murder, *&c.* which, if found by the verdict, would certainly be murder in the priſoner. But there is a great difference in the finding of the verdict. As to *Huggins*, the jury have only found theſe facts, *viz.* That he had the office of warden of the *Fleet*, *&c.* granted to him by letters patent of 22 *July*, 12 *Ann.* to hold for his life, and to execute by himſelf or his deputy: that he 1 *Sept.* 12 *Geo.* 1. and before, and from thence to 1 *January* 12 *Geo.* 1. was warden of the *Fleet:* that *Thomas Gibbons* was, and for all that time acted as his deputy in that office: That *James Barnes* was for all that time ſervant of *Gibbons*, and acted under him about the care of the priſoners, and particularly about the care of *Arne:* then they find, that *Barnes* aſſaulted, and carried by force, the ſaid *Arne* into the room, and kept him there againſt his conſent, *prout* in the indictment, forty four days: then they find the ſituation and condition of the room, whereby it was very unwholſome, and dangerous to the life of any perſon kept therein: that *Huggins*, during the impriſonment of *Arne* in that room, *viz.* for fifteen days before *Arne*'s death, knew that the room was then lately built, and that the walls were made of brick and morter, and were then damp; but whether he knew it the ſeventh of *September*, *ignorant:* that *Arne* the tenth of *September* 12 *Geo.* 1. by dureſs of impriſonment became ſick, and languiſhed to the twentieth of *October*, and then died by dureſs of impriſonment in the ſaid room: that during the impriſonment of *Arne* in that room, *viz. per ſpatium quindecim dierum ad minus* before his death, *Huggins* was once preſent at that room, and then ſaw the ſaid *Arne* in that room *ſub duritie impriſonamenti praedicti, ac adtunc et ibidem ſe avertit*, and the ſaid *James Barnes*, the ſame time as *Huggins* turned himſelf away, locked the door, the ſaid *Arne* at the time when the ſaid door was locked by *Barnes* being in the ſaid room *ſub duritie impriſonamenti praedicti*; and that *Arne* remained under that dureſs till his death: that *Huggins* acted ſometimes as warden, during the time *Gibbons* was deputy; but it is not found that he acted as warden during the confinement of *Arne*.

The judges are all unanimouſly of opinion, that the facts found in this ſpecial verdict do not amount to murder in the priſoner at the bar; but as this ſpecial verdict is found, they are of opinion, that he is not guilty. Though he was warden, yet it being found, that there was a deputy; he is not, as warden, guilty of the facts committed under the authority of his deputy. He ſhall anſwer as ſuperior for his deputy civilly, but not criminally. It has been ſettled, that though a ſheriff muſt anſwer for the offences of his gaoler civilly, that is, he is ſubject in an action, to make ſatisfaction to the party injured; yet he is not to anſwer criminally for the offenſes of his under-officer. He only is criminally puniſhable, who immediately does the act, or permits it to be done. *Hale's P. C.* 114. So that if an act be done by an under-officer, unleſs it is done by the command or direction, or with the conſent of the principal, the principal is not criminally puniſhable for it. In this caſe the fact was done by *Barnes*; and it no where appears in the ſpecial verdict, that the priſoner at the bar ever commanded, or directed, or conſented to this dureſs of impriſonment, which was the cauſe of *Arne*'s death. 1. No command or direction is found. And, 2. It is not found, that *Huggins* knew of it. That which made the dureſs in this caſe was, 1. *Barnes*'s carrying, and putting, and confining *Arne* in this room by force and againſt his conſent. 2. The ſituation and condition of this room. Now it is not found, that *Huggins* knew theſe ſeveral circumſtances, which made the dureſs. 1. It is not found, that he knew any thing of *Barnes*'s carrying *Arne* thither. 2. Nor that he was there without his conſent, or without proper ſupport. 3. As to the room, it is found by the verdict, 1. That the room was built of brick and morter. 2. That the walls were *valde humidae*. 3. That the room was ſituate on the common ſewer of the priſon, and near the place where the filth of the priſon and excrement of the priſoners were uſually laid, *ratione quorum* the room was very unwholſome, and the life of any man kept there was in great danger. But all that is found with reſpect to the priſoner's knowledge is, that for fifteen days before *Arne*'s death he knew that the room was then lately built, *recenter*, that the walls were made of brick and morter, and were then damp. But it is not found, nor does it appear, that he knew, they were dangerous to a man's life, or that there was a want of neceſſary ſupport. Nor is it found, that he directed, or conſented, that *Arne* ſhould be kept or continued there. The chief thing relied upon is, that the verdict finds, that once the priſoner at the bar was preſent at the room, and ſaw *Arne ſub duritie impriſonamenti praedicti, et ſe avertit, &c.* which, as was objected, made him an aider and abettor. But in anſwer to this, 1. Being preſent alone, unleſs he knew all the circumſtances, and directed that *Arne* ſhould continue, or at leaſt conſented that he ſhould, cannot make him an aider or abettor in the murder. *Kelynge* 113. A man may be preſent and be intirely innocent. He may be caſually preſent. 2. The verdict is, *vidit ſub duritie impriſonamenti praedicti.* He might ſee him, and ſee him while he was *ſub duritie impriſonamenti praedicti*, that is, while he was in fact under the dureſs by *Barnes*; but it does by no means follow from thence, that he knew that the man was under this dureſs, and it is not found that he did know it. It was objected, that if he ſaw the man under this dureſs he muſt know it, and it was his duty to deliver him. But we cannot take things by inference in this manner. The *vidit* does not imply a knowledge of the ſeveral facts that made the dureſs. If the nature of this dureſs be conſidered, it is impoſſible that it ſhould be diſcovered by one ſight of the man. It conſiſts of ſeveral ingredients and circumſtances, that are not neceſſarily to be diſcovered upon ſight. For though he ſaw *Arne* in the room, yet by the view he could not tell, that he was there without his conſent, and by force, or that he wanted neceſſary relief. It is not found, that the man made any complaint to him, or that any application was made to him on the man's behalf. If he was there with his conſent, it would take off the dureſs. His ſeeing is but evidence of his knowledge of theſe things at beſt, and very poor evidence too. And therefore the jury, if the fact would have born it, ſhould have found, that **Huggins** knew, that *Arne* was there without his conſent, and that he conſented to and directed his continuance there. Which not being done, we cannot intend theſe things, nor infer them. For in ſpecial verdicts in criminal caſes the court muſt never intend, nor infer facts, but judge upon the facts found, and not on the evidence of the facts. *Kelynge* 78. Whether a man is aiding and aſſiſting in murder or no, is matter of fact, and ought to be expreſly found by the jury. *Kelynge* 111. *Rex verſ. Plummer.* It does not appear by the ſpecial verdict there, that *Glover*, or the perſon unknown, who ſhot off the gun, did diſcharge it againſt any of the King's officers; but it might be, for ought that appears, for another purpoſe: though upon the particular circumſtances in the ſpecial verdict there are things found, which were a ſufficient evidence, that the gun was diſcharged againſt the King's officers; and ſo it might be reaſonably intended, conſidering they were all armed, and in proſecution of an unlawful act in the night, which they deſigned to juſtify and maintain by force, eſpecially when the gun was ſhot off upon the watch word given, and as the King's officers were endeavouring to ſeiſe the wool: the jury thereupon might well have found, that the fuſee was diſcharged againſt the King's officers. But ſince they had not found it, the court were confined to what they had found poſitively; and were not to judge the law upon evidence of a fact, but upon the fact when it is found. See *Kelynge* 218.

This caſe was ſo well argued on both ſides, that ſome objections on the part of the crown muſt be taken notice of, though they are already in a great meaſure anticipated. As,

1. That *Huggins* as warden, though he had made a deputy, had ſtill the care of the priſoners; and it was incumbent on him, to ſee that there was no illegal dureſs. And to explain what the law means by dureſs, *Brit. cap.* 11. *fol.* 18. was cited. If a priſoner is brought nearer to death, and farther from life, *per dure gard del keeper:* and *Staunf. P. C. lib.* 1. *cap.* 35. If he keeps him more ſtrictly than of right he ought, it is dureſs. And the dureſs need not be by the hand of the gaoler; for if it is done with his privity, it will affect him. But that is a miſtake: for when an officer has power to make a deputy, and has appointed a deputy, he has diſcharged himſelf of the whole care; the deputy has the whole power, and it is incumbent upon the deputy, till the principal reſumes his office. Indeed when the principal comes to execute his office himſelf, the power of the deputy ceaſes: but a bare accidental coming to the place will not determine the deputation, unleſs he comes with an intent to reſume his office. The caſe of a diſſeiſee coming to dine with the diſſeiſor, or to ſee his pictures, may be very properly compared with this.

2. It was objected, that this murder was done with his privity; it is found, that he ſaw *Arne* under this dureſs, *et ſe avertit.* He ought to have taken notice of it, and removed him, as it was his duty to take care of his priſoner's life. *Vidit ſub duritie*, implies that he knew it; and therefore he was privy to the dureſs, of which *Arne* died.

But his conſent to this dureſs is not found; it intirely depends on his ſeeing the man, which does not import his conſent, for want of his knowledge of the particular facts.

3 Objection. When he was preſent, the power his deputy ceaſed; and then he ſhould have eaſed the man of this dureſs: and his ſuffering him to continue afterwards under the ſame dureſs, infers that he knowingly ſuffered him to continue till his death; and his not reforming this abuſe, implies his conſent to it. But theſe inferences are by much too ſtrong; and the not reforming an abuſe, does by no means infer a conſent to all the conſequences of it.

4 Objection. A perſon abſent may be principal in murder, as in the caſe of poiſoning. An infant was laid in a hog-ſty, and a ſow eat it; and held murder. *Palm.* 547, 548. The ſame opinion in the caſe of a ſick man laid in the cold. So in the caſe of laying an infant under leaves in an orchard, and a kite ſtruck it. *Poph.* 13. *Ow.* 98. *Hale P. C.* 53. There the perſon who did the act, occaſioned the death; but in this caſe no act was done by the priſoner at the bar. There are indeed caſes of murder, where no act was done by the perſons guilty; as the letting looſe a wild beaſt, which the party knows to be miſchievous, and he kills a man. 3 *Edw.* 3. *corone*, 311. *Staunf.* 17. *Crompt.* 24. *b.* the owner of the beaſt is guilty of murder. In anſwer to thoſe caſes; there is a difference between beaſts that are *ferae natura*, as lions and tygers, which a man muſt always keep up at his peril; and beaſts that are *manſuetae natura*, and break through the tameneſs of their nature, ſuch as oxen and horſes. In the latter caſe an action lies, if the owner has had notice of the quality of the beaſt; in the former caſe an action lies without ſuch notice. As to the point of felony, if the owner have notice of the miſchievous quality of the ox, *&c.* and he uſes all proper diligence to keep him up, and he happens to break looſe, and kills a man; it would be very hard to make the owner guilty of felony. But if through negligence the beaſt goes abroad, after warning or notice of this condition, it is the opinion of *Hale*, that it is manſlaughter in the owner. And if he did purpoſely let him looſe, and wander abroad, with a deſign to do miſchief; nay, though it were but with a deſign to fright people and make ſport, and he kills a man; it is murder in the owner.

5 Objection. It is found, that *Barnes* ſhut the door in the preſence of *Huggins*: and therefore the continuing of *Arne* under that confinement will affect *Huggins*. But there is no conſent found to his confinement. What is found is at moſt but evi-

dence of a conſent; and even not that. It is only *vidit et ſe avertit.*

6 Objection. It is not neceſſary, for the jury to find the conſent in expreſs words; and if facts are found, that amount to a conſent, the court will judge it a conſent. As in the caſe of malice, the court will judge it upon the facts found; and malice is an act of the mind, as well as conſent. To this it is anſwered, that malice is matter of law, and proper for the court to judge; but the conſent of one man to the malicious acts of another is matter of fact, which ought to be found by the jury. And here is no conſent found, nor that *Huggins* aided or abetted *Barnes*; nor is there any poſitive fact found, that muſt neceſſarily be conſtrued an aiding and abetting.

There is another matter which the King's counſel inſiſted upon, That if the court were of opinion, that they could not give judgment upon the facts found in this verdict, that the priſoner was guilty of murder; that yet the verdict was ſo uncertain, as that they could not give judgment of acquittal: and therefore that a *venire facias de novo* ought to go. And this brought it under the conſideration of the judges, whether a *venire facias de novo* ought to be granted in this caſe. And to ſpeak to that point the counſel on both ſides were heard before all the judges, on *Wedneſday* the twenty-fourth inſtant.

It was ſaid by the counſel for the King, that they ſpoke to this point without prejudice. For they inſiſted, that as to the verdict itſelf, there were ſufficient facts found affecting the priſoner, to induce the judges to be of opinion, that they amounted to murder. But for argument's ſake, in caſe the judges ſhould be of opinion, that they were too uncertain, to found a reſolution upon, that the priſoner was guilty of murder; then they argued, that a *venire facias de novo* ought to go, though it was in a capital caſe.

1. In a civil caſe if a verdict is found ſo uncertainly and ambiguouſly, as that no judgment can be given; a *venire facias de novo* muſt iſſue. *Co. Li.* 227. 2 *Roll. Abr.* 693. *Venn verſ. Howell. Cro. Car.* 322.

It was obſerved, that the book of *Co. Li.* 227. ſpeaks of verdicts in general, and does not ſay in what caſes; but as to civil caſes there is no doubt.

2. In criminal caſes writs of *venire facias de novo* have been granted. *Co. Intr.* 393. *b. Hil.* 4 *Car.* 1. *B. R. rot.* 32. *Rex v. Fiſher.* 2 93.

3. In capital caſes a *venire facias de novo* muſt go, 1. In caſes of miſtrial. 6 *Co.* 14. *a. Arundel*'s caſe, the point agreed. 2. For miſbehaviour of the jury in giving their verdict. *Hil.* 8 *Hen.* 7. *rot.* 3. *placit. reg. Rex verſ. Wayner.* Agreed. 3. As to granting a *venire facias de novo* after a ſpecial verdict found, they were ſo candid as to own, that though there was ſearch made with the greateſt diligence, yet they could not find one inſtance, nor ſo much as an opinion of a judge, except what was ſaid by lord chief juſtice *Holt* in the caſe of the King *verſ. Keite*, *Comberb.* 408. *Holt* ſays, "I ſhould not be much againſt a *venire de novo.*" And this was remembered by ſome others that heard that opinion. The jury had found in that caſe, that the priſoner had killed the man: but it did not certainly appear, whether the fact was murder or manſlaughter. Mr. Attorney general inſiſted, that if there was ſuch an uncertainty, as that no judgment could be given, in a capital caſe; the ſame reaſon held in ſuch caſe, as in civil and other criminal caſes, though there is no precedent of it as yet; for *ubi eadem eſt ratio, eſt eadem lex.* And therefore ſuppoſing (for in this it was argued upon a ſuppoſition) that the verdict was too uncertain to give judgment againſt the priſoner; they inſiſted, that a *venire facias de novo* ought to go.

See a full acco^t. of this case in post. 27. from the roll of 8. Hen: 7.

But the judges came to no reſolution, that a *venire facias de novo* could not iſſue after a ſpecial verdict in any capital caſe; it being unneceſſary for them to determine that queſtion. For, as every ſpecial verdict depends upon the particular finding of the verdict, ſo the preſent queſtion relates only to the preſent verdict before us as found. And as to that we were all of opinion, that this verdict was not ſo uncertain, as that judgment could not be given upon it. For the facts found are all poſitively found; but thoſe facts in the nature of them, joined together, are not ſufficient, to make the priſoner guilty of murder. And if ſo, then the priſoner muſt be acquitted; for it is not that the verdict is uncertain, but it is not full enough to convict him. Perhaps the jury might have found other facts, which they have not; but the court can judge only upon what is found. [*Kelyng.* 78, 79.] We all agreed in the caſe of *Green* and *Bedell* on a ſpecial verdict, that the verdict was not full enough as to them, for us to judge it treaſon in them; becauſe the verdict only found, that they were preſent, and found no particular act of force committed by them; and did not find, that they were aiding and aſſiſting to the reſt: and it is poſſible, they might be there only out of curioſity, to ſee; and whether they were aiding and aſſiſting is matter of fact, which ought to be expreſly found by the jury, and not left to the court upon any colourable implication: and accordingly thoſe two perſons were diſcharged.

And yet as to *Green*, he was found to be among the perſons aſſembled, *&c.* caſting up his cap, and hallowing, with a ſtaff in his hand; and that whilſt he was among them, he was knocked down by a party of the King's ſoldiers, that came to ſuppreſs them, and was then taken. And as to *Bedell*, it was found, that he was there, and being purſued by one of the King's ſoldiers, called out to the reſt of the company, to face about, and not to leave them.

Upon the whole, there is no authority againſt the court's giving judgment of acquittal, upon a verdict that is not ſufficient to convict; and therefore this verdict, not finding facts ſufficient to make the priſoner guilty of murder, he muſt be adjudged not guilty. And he was diſcharged.

Eaſter Term

4 Georgii 2. regis, B. R. 1731.

Giles Gardiner *againſt* Steven Merrott.

Intr. *Hil.* 4 *Geo.* 2. B. R. Rot. 441.

S. C. 2 Stra. 902.

Court *ex officio* mend a writ of error.

IN a writ of error brought by *Gardiner* to reverſe a judgment given by the court of Common Pleas againſt him in an action of aſſault and battery brought againſt him by *Merrott*, the writ of error deſcribed the record to be of a *loquela* in the Common Pleas by writ by *Stephen Merrott* and *Giles Gardiner*, and the record removed was between *Stephen Merrot* and *Giles Gardiner*, and by conſequence there was a variance, *&c.* But the court of King's Bench, *May* 28, 1731. this term made a rule, that the writ of error ſhould be amended, and made agreeable to the record, by virtue of the ſtatute of 5 *Geo.* 1. *cap.* 13. intituled, An act for amendment of writs of error, *&c.* And they held, they could do it by that act without prayer of either party, the variance appearing to them upon the record; and they gave no coſts, becauſe the ſtatute has directed no coſts to be given on ſuch amendment.

Trin. Term

5 & 6 Geo. 2. regis, B. R. 1732.

Moſes Burry *verſ.* Jeffrey Perry.

Intr. *Hil.* 4 *Geo.* 2. B. R. Rot.

2 Stra. 936. S. C.

No more coſts than damages.

Ante, 831.

21 Jac. 1. c. 16.

IN an action for words brought by the plaintiff againſt the defendant, the plaintiff ſet out in his declaration, that he was a houſe-ſmith by trade, and that the defendant ſpoke the words of him (which words were actionable in themſelves), by reaſon of the ſpeaking which words the plaintiff had loſt ſeveral cuſtomers, naming them particularly, *&c.* to his damage 100*l.* On the general iſſue pleaded, the jury found for the plaintiff, and gave him only five ſhillings damages. And ſerjeant *Belfield* moved, that the plaintiff might have full coſts, though the damages were found under 40*s.* becauſe he had received a ſpecial damage, *viz.* the loſs of his cuſtomers; ſo that if the words had not been actionable of themſelves, this action would have been maintainable, by reaſon of the ſpecial damage. And he cited two caſes, between *Philips* and *Fiſh*, and *Carter* and *Fiſh*; where in an action for words importing felony, as he ſtole my hens, *&c.* and, as he ſaid, laid by way of aggravation of damages, that he carried him before a juſtice of peace, and cauſed him to be impriſoned, *&c.* the jury gave under 40*s.* damages; and yet after ſeveral motions in court, *Trin.* 11 *Geo.* 1. *B. R.* the court made a rule, the plaintiff ſhould have full coſts. But *per curiam*, where the words are not actionable, but the action is maintained by reaſon of ſpecial damages the plaintiff has ſuſtained upon account of the words, the plaintiff ſhall have full coſts, though the damages are under 40*s.* for 'tis not the words, but the ſpecial damage is the cauſe of the action. 1 *Salk.* 206. *Brown verſ. Gibbons.* But where the words are actionable of themſelves, as in the preſent caſe, and ſpecial damages are laid by way of aggravation, and damages are under 40*s.* there ſhall be no more coſts than damages, for that is properly an action for words within the ſtatute of 21 *Jac.* 1. *c.* 16. And as to the caſes cited of *Carter* and *Fiſh*, and *Philips verſ. Fiſh*, upon conſidering that declaration the court held, that as it was laid, it was not barely laid in aggravation of damages, but was a diſtinct cauſe of action, importing *crimen feloniae ei impoſuit*, and therefore the plaintiff there had full coſts. In this principal caſe the court directed, the plaintiff ſhould have no more coſts than damages. *Tueſday*, *June* the 13th, 1732.

Wigley *againſt* Peachy, Keddon, and others.

Intr. *Paſch. Geo.* 2. B. R. Rot.

Where ſtallage is due in a market, the owner of the market has an action for it, and cannot diſtrain the goods there brought to be ſold as damage feaſant.

See 2 Stra. 1238. Mayor of Northampton *and* Ward.

THE plaintiff brought an action of treſpaſs, for taking with force and arms 7 *Aug.* 1731. his goods and chattels, *viz.* 100 buſhels of beans, 20 cabbages, *&c.* at *Goſport* in the county of *Southampton*, and carrying them away, to his damage 40 *l.* The defendant as to the force and arms, *&c.* pleaded not guilty: upon which iſſue was joined. And as to the reſt of the treſpaſs they juſtify, as bailiffs to *Richard* lord biſhop of *Wincheſter*, the taking the beans, *&c.* in a piece of ground called the market place at *Goſport* in the ſaid county of *Southampton*, of which the biſhop was ſeiſed in right of his biſhoprick, then and there damage feaſant, as a diſtreſs, *&c.* The plaintiff replied, that King *George* the Firſt, by his letters patent dated the 10th of *April* in the third year of his reign, granted to *Jonathan* then lord biſhop of *Wincheſter* and his ſucceſſors, that they might have and hold three markets, upon *Tueſday*, *Thurſday* and *Saturday*, in every week for ever at *Goſport* aforeſaid, for buying and ſelling fleſh, fiſh, and other proviſions, and all manner of goods and merchandizes commonly bought and ſold in markets, with all tolls and other profits to thoſe markets belonging. Then he ſets out, that before the time when, *&c.* *viz.* *Saturday* the ſaid 7th of *Auguſt*, a market at *Goſport* aforeſaid, in the ſaid piece of ground called the market-place, was held by the biſhop of *Wincheſter* by virtue of the ſaid letters patent; and that the plaintiff before the time when, *&c.* to wit upon the ſaid *Saturday* the 7th of *Auguſt*, did bring into the ſaid piece of ground called the market-place at *Goſport* aforeſaid, into the ſaid market there as aforeſaid then held, the goods in the declaration, being goods commonly bought and ſold in markets, to expoſe them to ſale and ſell them: and the ſaid goods in the ſaid piece of ground in the market there then held did expoſe to ſale; as he well might; which goods were in the ſaid piece of ground in the market aforeſaid ſo by the plaintiff expoſed to ſale, until the defendants of their own wrong afterwards, *viz.* the ſaid 7th of

Auguſt, during the ſaid market ſo as aforeſaid held, the ſaid goods in the ſaid piece of ground in the ſaid market ſo as aforeſaid expoſed to ſale, took and carried away, *&c.* The defendants, after having prayed and had *oyer* of the letters patent mentioned in the replication, by which the markets were granted to *Jonathan* biſhop of *Wincheſter* and his ſucceſſors, with general words of all tolls and other profits to the ſaid markets belonging, rejoin and ſay, that the plaintiff, before and at the time the ſaid goods were taken at *Goſport* aforeſaid, unjuſtly and without any reaſonable cauſe claimed to bring the ſaid goods into the ſaid piece of ground called the market-place into the ſaid market there held and to be held, and to lay them upon the ground there and to expoſe them to ſale and ſell them in the ſaid market, without payment of any toll for the ſame, and abſolutely refuſed to pay any toll for the ſame: whereupon the defendants as bailiffs of the ſaid biſhop of *Wincheſter* at *Goſport* aforeſaid requeſted the plaintiff to carry his ſaid goods in the declaration mentioned out of the ſaid piece of ground called the market-place. But the plaintiff then and there refuſed ſo to do; *per quod* the defendants as bailiffs of the ſaid biſhop of *Wincheſter* the ſaid goods then and there took there damage-feaſant as a diſtreſs for the damage, and impounded them, *&c.* To this rejoinder the plaintiff demurred ſpecially, and the defendants joined in demurrer.

Mr. *Draper* for the plaintiff argued, that judgment ought to be given for him, becauſe it appears by the replication, that the plaintiff carried the goods and chattels mentioned in the declaration into a publick market, to expoſe them there to ſale and to ſell them: that in publick markets all ſubjects have right to bring in their goods; and though where toll is due they will be obliged to pay the toll, yet if they do not, that will not make them treſpaſſers for bringing in their goods, nor can the owner of the market diſtrain them damage-feaſant. *Cro. Eliz.* 75. The mayor of *Launceſton*'s caſe; and *Cro. Eliz.* 628. *Sawyer verſ. Wilkinſon*; where it was held by the court, that the ox-hide brought into *Leadenhall* market and ſold, could not be diſtrained damage-feaſant. And as to the matter inſiſted upon in the rejoinder by the defendants, that they took the goods as a diſtreſs for not paying of toll, Mr. *Draper* inſiſted, that the rejoinder could not be ſupported, becauſe they did not ſhew, that any and what toll was due, which ought to be ſet out, that the court might judge whether the toll demanded was reaſonable. 2 *Inſt.* 222. And that toll was only payable by the buyer without ſpecial cuſtom, which was not pretended in this caſe. 2 *Inſt.* 220, 221. 2 *Lutw.* 1329, 1336. *Light verſ. Pym*; nor that any toll was demanded by the defendants of the plaintiff in particular. And Mr. ſerjeant *Belfield*, who was counſel for the defendants, gave up the rejoinder as naught, and not to be maintained.

But then he took exceptions to the replication, that that had not avoided the matter pleaded in bar, becauſe he inſiſted upon it that the plaintiff ought to pay ſtallage, or ſhew that he had tendred it, otherwiſe he could not bring his goods into the market; and cited 2 *Roll. Abr.* 123. *Mich.* 15 *Jac. B. R. Newington Fair*'s caſe, where it was held, if *A.* has a fair in a place, thoſe who have their houſes next adjoining to the fair cannot lawfully open their ſhops to ſell their goods in the fair, but ſtallage is due for it, for they cannot take any benefit of the fair without paying the duties which belong to him that purchaſed the fair, and ſtallage and pickage is incident to the ſoil in a market or fair, *Moore* 474. *Heddy verſ. Wheelhouſe*: and therefore it appearing by the defendant's plea, that the place where, *&c.* was the biſhop of *Wincheſter*'s freehold, and that the defendant brought his goods into the market; yet ſince it did not appear that he had paid or tendred ſtallage, the defendants might lawfully take them as a diſtreſs for damage-feaſant, for the plaintiff was thereby become a treſpaſſer *ab initio.*

But to this Mr. *Draper* for the plaintiff anſwered, that the defendants have no where ſhewn, ſtallage was demanded and refuſed, but rely only upon non-payment of toll in their rejoinder; and farther, that if it was due and demanded, yet the not paying it would not make the plaintiff a treſpaſſer *ab initio.* So is *Six carpenters* caſe, 8 *Co.* 146. *b.* that non-feaſance, where a man does an act by authority in law, as in this caſe where the plaintiff carried his goods to ſell into market, will not make him a treſpaſſer *ab initio*; but if ſtallage was due, the defendants ought to have an action or proper remedy for that, and not diſtrain the goods damage-feaſant. And as to the principal caſe, he relied on the caſes in *Cro. Eliz.* 75, *&* 628. as in point. Of which opinion were my brothers *Page* and *Probyn*, and myſelf, brother *Lee* being abſent for ſickneſs; and judgment was given for the plaintiff, *niſi, &c.* *June* 16 this term. But it was never moved again.

F I N I S.

A
TABLE
OF
The Principal Matters
Contained
In the SECOND VOLUME.

Abatement.

A *Pluries homine replegiando* abated for want of the words, *ad ipſorum A. et B. damnum non modicum et gravamen.* *Page* 903

A bill abated as to one treſpaſs, and ſtand good as to another. 926

Suſcepit ſuper ſe ordinem militarem, good pleading in abatement, and without a *venue.* 1014

On a good plea in abatement the plaintiff muſt diſcontinue, before he brings another action. *ibid.*

Where a replication to a plea in abatement denies the fact, it is proper for the plaintiff to pray damages. 1022

Where the replication is not to be tried by the country, a prayer of damages is a diſcontinuance. 1054

Want of ſpecification is a temporary bar, which is the ſame thing with matter in abatement. 1056, 1243

The form of concluding a temporary bar is, *ſi reſponderi debeat quouſque, &c.* 1056

After an action ſtaid in an inferior court by *habeas corpus*, the plaintiff delivers a declaration varying from the former plaint, the former action pending cannot be pleaded in abatement. *Page* 1102

Plea in abatement, that does not give a better writ, is bad. 1178

That another perſon is adminiſtrator, and not the plaintiff; may be pleaded in bar, but not in abatement. 1207

Where matter of bar may be pleaded in abatement. 1208

It is no plea in abatement, that the cauſe accrued after the action brought. 1249

A plea in abatement, that the original is not returned, muſt be verified by *affidavit*. 1409

See **Addition, Amendment, Appeals, Coſts, Demurrer, Ejectment, Error, Eſtoppel, Execution, Form and ſubſtance, Name, Pleading, Privilege, Replevin, Scire facias, Variance, Venue.**

Acceſſory.

A man receives a murderer after the ſtroke given, and before the death; he is not acceſſory. *Page* 827

A ſtatute makes a new felony; all acceſſories before and after are included. 844

Acceſſories made principals by ſtatute. 845

A ſtatute takes away clergy from aiders and abettors, yet acceſſories ſhall have their clergy. 846

See **Deerſtealing.**

Action and action upon the caſe.

Caſe lies againſt the keeper of a livery ſtable, for damaging a horſe delivered to him to keep for a reward; without ſhewing that the defendant agreed to keep him. 795

An action for nurſing a child for ſo many weeks, and other counts for nurſing the ſame child for the ſame weeks, ſo that the counts falſify one another; ill. 842

Where an action lies for refuſing the plaintiff's vote. 942

A declaration for ſhutting the plaintiff out of a veſtry held in a room *ubi tales aſſemblationes teneri ſolitae et conſuetae fuerunt*, held ill, for not ſhewing their right to the room. 1388

Caſe againſt a biſhop, for diſturbance in preſenting to a church. 948, 956

Caſe lies for not repairing his privy, whereby the filth came into the plaintiff's cellar, without ſhewing a title to the cellar. 1089

Caſe maintained by one poſſeſſed of houſes againſt the owner of a brewhouſe, for cauſing water to run near the foundation, *&c.* 1568

For not doing what ought to be done of common right an action lies, without ſhewing a particular title or charge. 1091

Caſe for falſly affirming to a purchaſer, that houſes are let at ſuch a rent, lies where the plaintiff depends upon it, and makes no other inquiry. 1118

Where an action will lie for miſchief done by a beaſt without notice of his miſchievous quality. *Page* 1583

See **Carrier, Certainty, Convictions, Cuſtom, Deviſe, Judges, Parliament, Return, Slander, Statutes, Treſpaſs.**

Addition.

An addition by reputation is good, where the ſuit is by bill, and not by original. 849, 859

Servant, a good addition in an indictment. 968

Plea in abatement, that the plaintiff is no gentleman, confeſſed by demurrer. 986

Labourer is no addition for a woman. 1179

A defendant ſued as a gentleman pleads that he is a merchant, *abſque hoc*, *&c.* this is no plea, for want of ſhewing his degree. 1541

See **Amendment, Homine replegiando, Honours.**

Adjournment.

Entry of the adjournment of a term. 794

Adminiſtrator.

Brings *trover* on the poſſeſſion of the inteſtate; the defendant cannot upon the general iſſue give evidence, that there is an executor. 824

Adminiſtration committed by the archdeacon of *Dorſet* is void as to a judgment of the King's Bench. 856

An executor obtains an award of execution on a *ſcire facias*; the adminiſtrator *de bonis non* muſt bring his *ſcire facias* on the original judgment. 1049

Adminiſtrator *durante abſentia* muſt aver in his declaration, that the executor is abſent in parts beyond the ſea. 1071

Adminiſtrator *pendente lite* muſt aver, that the conteſt continues. *ibid.*

When a wrongful adminiſtrator has ſold effects, he is anſwerable to the right adminiſtrator, after his adminiſtration is repealed,

repealed, in an action for the money received to his uſe. *Page* 1216

See **Abatement, Aſſumpſit, Averment, Executors.**

Admiralty and ſeamen.

Cannot proceed againſt a foreign ſhip for ſtores delivered on board at land, without an expreſs hypothecation, and during a voyage. 806

If the maſter of a ſhip ranſoms the ſhip and goods from an enemy or pirate, he may detain them till the ranſom is paid. 933

Whether the maſter may ſue in the admiralty againſt the ſhip and goods for ranſom. 934

Property is bound by the ſentence of a foreign admiralty. 893, 936

May hold plea againſt a ſhip on a hypothecation by bill of ſale of part of the ſhip made on land during a voyage. 982

Prohibition in a ſuit againſt ſhip and owners, to ſtay proceedings *quoad* the owners. 984

Seamen may ſue in the admiralty for their wages, though all the work is performed in the river. 1044

Prohibition does not lie in a ſuit for mariners wages, on a ſuggeſtion that the agreement was made by writing upon land. 1206

Seamen's wages are due *pro rata*, though they are impreſſed, if the ſhip arrives. 1211

No prohibition to a ſuit for wages, on a ſuggeſtion that the place of arrival was no delivering port. 1247

If *Newfoundland* and *Guinea* are as delivering ports. 1248

Antiquity of ſuits for ſeamens wages. *ibid.*

No appeal from the admiralty before definitive ſentence. *ibid.*

The admiralty may hold plea on ſtipulations entred into by part-owners of a ſhip to other part-owners for the ſafe return of the ſhip. 1285

A maſter of a ſhip ſues for his wages, and lays the contract to be made *infra fluxum et refluxum maris infra juriſdictionem, &c.* no prohibition ſhall go after ſentence. *Page* 1453

See **Habeas corpus, Limitation, Prohibition.**

Advowſon.

A purchaſer of an advowſon before preſentment ſuffers an uſurpation and ſix months to paſs, his right is loſt. 953

Age.

An infant pleads his age to a writ of error, and has judgment that the parol ſhall demur: a writ of error is brought upon this; he cannot plead his age to the ſecond writ of error. 1433

Alehouſes. See Juſtices.

Alien. See Pleading.

Amendment.

Declaration by the by refuſed to be amended in the name of the plaintiff. 771

Not granted in the addition, after iſſue joined on a plea in abatement. 859

An information may be amended in the addition, after pleading that matter in abatement. 1307, 1472

The time of the *mutuatus* being entred after the time of exhibiting the bill, amended by the judgment paper. 897

The words *per J. S. attornatum ſuum* inſerted in the entry of the exhibiting the bill from the judgment paper. *ibid.*

Errors in the caption of an indictment are amendable the term that it comes in. 968

Memorandum amended and made of a particular day. 977

A *ſcire facias quare executio non* deſcribes the record wrong; this is not amendable after *nul tiel record* pleaded, but muſt be diſcontinued. 1057, 1059

An original is amendable in the *contra pacem* by the inſtructions. 1058

A *diſtringas* is *teſte* the day after the return of the *venire*, not amendable in a criminal caſe. 1061

Caſes

Caſes of amendments in criminal proceedings. *Page* 1061, *&c.*

The *teſte* of an original is not amendable. 1066

The *teſte* of a judicial writ is amendable. 1067

Amendment by ſtriking out the defendant's joining iſſue, in another term. 1137

A blank left for the word *debiti* in the *diſtringas*, amended by the *venire.* 1144

The *niſi prius* roll of an indictment of forgery amended by the record *peroch.* for *paroch.* agreeable to the forged bond produced in evidence. 1519

A writ of error is not amendable in the return, ſo as to include a judgment given after the return. 1531

A writ of error is not amendable by adding the name of a plaintiff. 1532

A writ of error amended in the defendant's name, without prayer of the party, and without coſts. 1587

See **Coſts, Error, Statutes.**

Ancient demeſne. See **Ejectment.**

Appeals.

Entry of abatement of an appeal brought by an infant *in propria perſona.* 1289

Where a writ of appeal is abated *in B. R.* the appellant may file a bill of appeal againſt the defendant as *in cuſtodia mareſcalli.* 1290

See **Commitment.**

Appearance.

May be to a writ that is returned *nichil.* 1138

Venit et dicit, without ſaying *per attornatum ſuum*, ſhall be intended *in propria perſona.* 1449

Appearance aids error in proceſs, where a *capias* iſſues without a ſummons in an inferior court. 1544

See **Continuance, Executors, Notice.**

Apprentice.

An apprentice bound in *London* to a trade not within the ſtatute, may be diſcharged by the juſtices, if he ſerves his maſter out of *London.* *Page* 1410

See **Maſter, Poor.**

Arreſt. See **Conſtable, Soldiers, Treſpaſs.**

Aſſets.

If the heir can plead a leaſe for years made by his anceſtor in delay of execution. 784

Extendi facias where an eſtate for life is pleaded by the heir. 785

Where the heir is falſified in his confeſſion of *aſſets*, general judgment ſhall be given againſt him. 786

Plea of payment of another bond by the heir without notice, ill. 1391

Aſſumpſit.

Indebitatus aſſumpſit does not lie upon a ſpecial promiſe, to repay money advanced upon a bill, in caſe the bill be not paid. 753

The delivery of a promiſſory note is a good conſideration of an *aſſumpſit*, though the note was given without conſideration at firſt. 759

Aſſumpſit in conſideration that the plaintiff would receive *A.* and *B. ut hoſpites*; the plaintiff ſhews that he received them, and found them with meat, drink, *&c.* but does not ſay *ut hoſpites*; and held well. 838

Indebitatus aſſumpſit for foreign money. 841

Aſſumpſit without a nominative caſe, intended of the defendant, where three perſons are not named before. 899

One who undertakes to do a thing, and miſmanages to the plaintiff's damage, is chargeable, without ſhewing a conſideration. 919, 919

Aſſumpſit implies not only a promiſe to perform, but an entring upon the undertaking. 919

Being intruſted with money or goods is ſufficient conſideration of a promiſe to redeliver them. 920

Performavit omnia, bad pleading to an *aſſumpſit.* 968

For

For providing meat, *&c.* for *J. S.* and *J. D.* at the defendant's requeſt. *Page* 982

Money is allowed to remount troopers, and a captain receives it in horſes; one of his ſoldiers, who is diſcharged, may recover the value of a horſe in an action for money received to his uſe. 1007

Aſſumpſit to pay two grains of rye on *Monday*, and four grains next *Monday*, and ſo on, doubling the number every *Monday*, for a year, is binding. 1164

One who has received money under a power from an adminiſtrator, and paid it over, is not anſwerable in *aſſumpſit* to the executor, after a will found. 1210

In conſideration of a promiſe that the defendant ſhould hold lands clear of a rent granted to *J. S.* without moleſtation of the plaintiff; bad after verdict, for want of ſhewing that the rent was veſted in the plaintiff. 1217

In an action on *quantum meruit*, for *meruerit*, the court will conſtrue it according to the intent of the parties. 1223

Want of the verb *aſſumpſit*, *&c.* bad after judgment by default. 1517

See **Adminiſtrator, Baron and feme, Bills of exchange, Certainty, Debt, Expoſition, Frauds, Intendment, Notice, Payment, Pleading.**

Attachment. See **Contempts, Inferior courts, Juſtices, Witneſs.**

Attorney.

The authority of the attorney continues after a claim of conuſance, but not after a writ of error brought. 896

Remiſit damna may be entred by attorney. 1142

See **Appearance, Infants, Judgments, Leaſes, Privilege, Scire facias.**

Averment.

Of *virtute cujus*, where it is ſufficient. 800, 801

A man buys wood growing, and covenants to pay for it upon tale; there is no need to aver that he had the wood, or that the plaintiff told it. 815

In plea of a releaſe of errors there is no need to aver, that the judgment is the ſame. *Page* 1054

Indictment for conſpiring to charge a man with being the father of a child with which *E. E.* ſpinſter pretended to be pregnant, good without an averment that he was not the father. 1167

Indictment for not returning a warrant on a conviction, need not aver the conviction by the record, becauſe it is but inducement. 1192, 1193

In an action againſt an adminiſtrator there is no need to aver that adminiſtration was committed. 1510

See **Adminiſtrator, Aſſumpſit, Award, Bills of exchange, Executors, Expoſition, Indictments, King, Leet, Notice, Payment, Pleading, Privilege, Return, Staple, Statutes, Verdict, Writs.**

Avowry. See **Detainer, Leet, Replevin, Services.**

Award.

Rule to ſet aſide an award for the miſbehaviour of the arbitrators. 857

Award that one party ſhall pay to the other 50 *l.* and that the other ſhall thereupon ſeal a releaſe to him of all actions *tangen. praemiſſa*; is good, the *praemiſſa* referring to the controverſies ſubmitted. 898

That all proſecutions ſhall ceaſe, is final and good. 964

Money awarded in full of all demands, ſhall be reſtrained to the time of ſubmiſſion. *ibid.*

An award to pay money in ſatisfaction, may be pleaded in bar. 965

Not neceſſary to aver, of an award made in writing, that it was ready to be delivered. 989

An award to provide two pullets, *&c.* may be pleaded in bar, becauſe the ſubmiſſion implies a promiſe to perform it. 1039

An award, that deals erected on the defendant's ground to the nuſance of the plaintiff ſhall be taken down, implies that the defendant ſhall take them down. 1076

An award without date to do an act within fifty days after the date, muſt be performed within fifty days after the delivery. *Page* 1076

A parol award to be favourably expounded. 1142

A releaſe to a day before the ſubmiſſion may be awarded, and it ſhall not be intended that any controverſies have ariſen ſince. *ibid.*

Bail.

Special bail required in *trover* removed out of an inferior court, though the merits appeared to be againſt the plaintiff. 767

Bail pleads, that no *capias ad ſatisfaciendum* was duly proſecuted againſt the principal; a *capias* taken out three years after the judgment will maintain the *ſcire facias*. 1097

A *capias* againſt the principal, that has not eight days between the *teſte* and return, is irregular; but is ſufficient to maintain a *ſcire facias* againſt the bail, where it is not ſet aſide. 1177

Recogniſance in an inferior court, that if the defendant ſhall abſent himſelf from execution of the judgment, *&c.* good. 1224

A *capias ad ſatisfaciendum* returned after error brought and allowed is regular to charge the bail. 1259

The principal dies after the return of the *capias ad ſatisfaciendum*, and before the return of the *ſcire facias*; the bail are charged. 1452

The circumſtances of aſſigning a bail-bond, mentioned in the ſtatute, ought to be ſet out in a declaration, but the omiſſion is aided by a judgment by default. 1564

The firſt *ſcire facias* againſt bail may bear *teſte* the ſame day that the *capias ad ſatisfaciendum* is returnable. 1467

See **Departure, Error, Executors, Intendment, Return, Scire facias, Venue.**

Bailment.

Six ſeveral ſpecies of bailment, and the nature of them. *Page* 912

A man is not anſwerable for a depoſit, without a groſs neglect. 913

In what caſes a man ſhall be anſwerable for a thing lent to uſe. 915

Under what circumſtances a pawn may be uſed. 917

Bankrupts.

A ſcrivener is made liable to be a bankrupt by 21 *Jac.* 1. *c.* 19. he is liable to be ſo for acts of bankruptcy deſcribed in 1 *Jac.* 1. *c.* 15. 852

If a ſhare in the ſtationers company will make a man liable to the ſtatutes of bankrupts. *ibid.*

A plea of bankruptcy at large, muſt ſet forth the petition, and the debts owing to the petitioning creditors. 1548

A bond given by a bankrupt to leave his wife a ſum of money in caſe of ſurvivorſhip, is not diſcharged by the certificate. 1549

See **Commitment, Copyhold.**

Bar. See **Abatement, Award, Demurrer, Trover.**

Baron and feme.

A huſband, who provides ſufficient cloths for an extravagant wife, is not anſwerable for cloths bought by her of a tradeſman, whom he has warned not to truſt her. 1006

Treſpaſs by the huſband alone, for entring his houſe, and beating his wife and ſervants, whereby the buſineſs of the plaintiff remained undone, and judgment for the plaintiff. 1032

Treſpaſs by huſband and wife, for beating the wife, and alſo for beating the wife whereby the buſineſs of the huſband remained undone; and judgment for the plaintiffs. 1031

A man recovers judgment againſt a *feme ſole*, and he recovers award of execution in a *ſcire facias* againſt the huſband and wife, and the wife dies; he may have a *ſcire facias* againſt the huſband: and *vice verſa*. *Page* 1050

Huſband and wife cannot join for a battery committed on them both. 1208

An action for a battery on the wife muſt be *ad damnum ipſorum*. 1209

See **Bankrupts, Error, Trades.**

Baſtardy.

The juſtices by 13 & 14 *Car.* 2. *c.* 12. may impower the overſeers, to ſeiſe ſo much of the goods of the reputed father of a baſtard as the juſtices ſhall think fit, *&c.* but they cannot authoriſe them, to ſeiſe as much as the overſeers ſhall think fit. 858

The juſtices cannot order the father to give ſecurity for payment, till he has diſobeyed their order in point of payment. *ibid.*

The ſeſſions cannot commit for nonpayment in diſobedience to an order confirmed there, but muſt proceed upon the ſecurity taken by the two juſtices. 1157

The weekly payments may be ordered payable on a day before the week is up. 1198

The payments may be ordered to the overſeers. *ibid.*

The pariſh in which a baſtard child was born muſt appear by the adjudication of the juſtices, and not only by the complaint. 1363

Secreting a woman, that is with baſtard child by the defendant, is not an offenſe indictable. 1368

An order to keep a baſtard child is diſcharged upon the merits upon an appeal; the defendant is thereby diſcharged, and cannot be queſtioned again. 1423

Bills of exchange and notes.

A note payable to *J. S.* or order is not a bill of exchange, and a count upon it as ſuch will arreſt the judgment. 757, 759, 774

Want of averment that the ſecond and third bills were not paid, ill upon demurrer, but aided by verdict. *Page* 810

A ſervant cannot accept a note inſtead of money, without his maſter's conſent. 930

A ſervant takes a note from a banker inſtead of money, the maſter may maintain an action againſt the banker for money received to his uſe. *ibid.*

A note is received about noon, the next morning is a reaſonable time to go for the money. *ibid.*

A man, who has received a bad note, may recover his money, though he does not bring the note back to the defendant. *ibid.*

A proteſt is not neceſſary in an action upon an inland bill. 993

An appointment to pay money out of a particular fund is not a bill of exchange. 1361

A promiſſory note to do an act, or pay a ſum of money, is not negotiable. 1362

A promiſſory note, to be accountable to *A.* or order for 100 *l.* is negotiable within the ſtatute. 1396

Pay to *J. S.* or order 9 *l.* 10 *s.* as my quarter half-pay by advance, a good bill of exchange. 1481

A note to pay money, value received of the premiſſes in *Roſemary-lane*, *&c.* held to be within the ſtatute. 1545

A bill to pay out of the fifth payment when it ſhall become due, *&c.* no good bill of exchange. 1563

The declaration need not aver, that the note was ſigned by the defendant. 1377, 1484

A bill need not be averred to be ſigned. 1542

A bill need not be expreſly averred to be drawn according to the cuſtom of merchants. *ibid.*

An action on a note, by which the defendant and another promiſed jointly *or* ſeverally, ill. 1545

See **Aſſumpſit, Debt, Latin, Payment, Verdict, Witneſs.**

Biſhops. See **Excommunication.**

Bonds.

The court will refer the taxing principal intereſts and coſt, upon a bond, without taking notice of a ſimple contract debt between the ſame parties that is barred by the ſtatute of limitations. *Page* 1033

A variance in the *ſolvendum* is immaterial, becauſe the firſt part of the bond makes it payable to the plaintiff. 1043

A bond to the King, his executors and adminiſtrators, is within the ſtatute 33 *Hen.* 8. *c.* 39. 1327

If the words *obligamus nos et utrumque, &c.* will make a bond ſeveral. 1460

See **Bankrupts, Conditions, Intendment, Variance.**

Borough Engliſh.

Shall deſcend to the daughter of the youngeſt ſon *jure repraeſentationis.* 1024

The cuſtom of a manor is found, that the copyhold ſhall deſcend to the youngeſt ſon of the tenant dying ſeiſed; a purchaſer dies before admittance, his eldeſt ſon ſhall have it: otherwiſe if it had been found, that the lands were of the nature of borough *Engliſh*, of which the law takes notice. 1026

A leaſe of borough *Engliſh* lands for three lives ſhall deſcend to the youngeſt ſon, ſo of a rent granted out of ſuch lands. 1028

Breach. See **Covenant, Pleading.**

Bribery.

To promiſe a man money for his vote at the election of a mayor, is an offenſe indictable. 1377

Bridges.

Information will not lie againſt a lord of a manor, who is bound to repair a bridge; without ſaying *ratione tenurae*, or ſhewing a preſcription; and though part of the demeſnes have been granted out, ſo that others are contributable, that will not excuſe. 792, 804

Tenant at will obliged to repair a houſe which hangs over a bridge. *Page* 856

Indictment at the ſeſſions for ſuffering a common bridge to be out of repair, good without ſhewing it to be in a highway. 1175

A *mandamus* to make a rate for repair of a bridge, muſt be directed to the juſtices of peace of the county, and not to the juſtices of a particular liberty. 1249

See **Certainty.**

Carrier.

If goods are delivered to the carrier himſelf, *trover* lies for not delivering them, or an action upon the cuſtom; but if they are delivered to his ſervant or warehouſe keeper, *trover* does not lie without an actual converſion. 792

A carrier or hoyman is anſwerable for all loſſes, except thoſe which happen by the act of God or the enemies of the King. 918

See **Detainer.**

Certainty and incertainty.

A declaration that the plaintiff *habuit et habere debuit* a way over the defendant's cloſe, is ill upon demurrer, but made good by the general iſſue. 751

Trover de 12 *thecis, Anglice* caſks, *de ſpirit. et de* 50 *galon. aquae caldae*, good after verdict. 824

Trover pro parcella culmi, ill. 1181

Trover for ends of boards well. 1219

Trover de una parcella ſegeſtrium involucrorum et funium, Anglice pack-cloths, wrappers and cords; judgment affirmed. 1529

Treſpaſs for taking two packs of flax, well. 991

Judgment arreſted after verdict in treſpaſs for taking *bona et catalla* of the plaintiff, without ſpecifying them. 1410

In treſpaſs the firſt count was *quod cum, &c.* the ſecond was *de eo quod, &c.* and after verdict judgment for the plaintiff for the damages on the ſecond count. 1413

Aſſumpſit pro diverſis bonis mercimoniis merchandizis et rebus. *Page* 1450

In caſe for negligently running down the plaintiff's barge loaden with goods, or for burning his houſe and goods; the goods muſt be particularly mentioned, otherwiſe no evidence can be admitted of them. 1007

An action for ſo negligently keeping ſheep, *quod multipliciter deterioratae fuerunt*, and well. 1041

Indictment for ſuffering the weſt part of a bridge containing half the bridge to be out of repair, ſufficient without ſetting forth the number of feet. 1175

Pons pedalis inſtead of *pedeſtris*, bad in an indictment. *ibid.*

Indictment for ingroſſing *diverſos cumulos tritici*, ill. 1181

Indictment for cheating a man of a certain quantity of hats to the value of 118 *l.* good. 1179

An indictment is good to a common intent, where ſubſtance enough appears. 1273

What certainty is requiſite in orders of conviction. *ibid.*

Information of forgery, that *J. S. onerabilis exiſtens, &c. ipſe idem J. S. ea intentione, &c.* forged, *&c.* the *onerabilis exiſtens* ſhall refer to the time of the forgery. 1467

Ejectment *de uno loco, vocato* a paſſage room, *parte meſuagii, parcella pomarii qua jacet ex boreali parte bundae fore erect. &c.* well after verdict. 1470

A bond to produce a title, and performance pleaded generally. 1082

A declaration upon a cuſtom, that it is not lawful for any perſon beſides the freemen of the gild merchant to exerciſe publickly within the city any trade, unleſs he had been educated as an apprentice, *&c.* or was otherwiſe lawfully authorized, *&c.* ill. 1129

The word *quantam* ſupplied in a count of *quantum meruit*, and alſo the nominative to *meruiſſet*, and the word *praedict.* after verdict. 1155

Dans as certain as *et dedit.* 1169

See **Bills of exchange, Convictions, Deviſe, Dower, Excommunication, Expoſition, Indictments, Intendment.**

Certiorari.

Lies from the Common Pleas to the court of *Ely*, and will ſuperſede their proceedings. *Page* 836

Certiorari, and writs of error, and *recordari*, remove all things done between the *teſte* and return. 838, 1305

A *certiorari* may be awarded to remove a conviction upon an indictment before judgment. 938

Certiorari to remove a conviction upon an indictment muſt give the defendant a day in court. 971

Certiorari to remove an indictment will not remove a record of conviction. *ibid.*

A *certiorari* to remove orders made againſt *A.* and *B.* without ſaying [or either of them] will not remove an order made againſt *A.* only. 1203

To remove an indictment of felony, upon *affidavit* that the defendant is not likely to have a fair trial. 1452

The juſtices may ſet a fine, to compleat their judgment, after a *certiorari* delivered. 1515

See **Convictions, Error, Inferior courts, Variance.**

Challenge. See **Contempt.**

Chancery. See **Dower.**

Chaplains. See **Eccleſiaſtical perſons.**

Churchwardens. See **Mandamus, Poor.**

Clergy. See **Acceſſory.**

Commitment.

By commiſſioners of bankrupts, until the party be otherwiſe diſcharged by due courſe of law, ill. 851

By the board of green cloth, for a riot in executing a *fieri facias* within the verge. 978

A perſon diſcharged of an indictment *in B. R.* is in cuſtody upon a writ of appeal being delivered to the ſheriff. *Page* 1303

See **Good behaviour.**

Common.

A man may preſcribe for common appurtenant to his cottage for cattle *levant* and *couchant* there. 1015

A commoner cannot give his title in evidence upon not guilty, as the lord of the ſoil may. 1134

Cuſtom for the reeve to drive a common, whenſoever he is commanded by the ſteward, reaſonable. 1187

Cuſtomary freeholders may have common by preſcription, and there may be a drift of the common by cuſtom. 1188

Compoſition.

What compoſition will be good within the ſtatutes. 765

The manner of pleading thoſe acts. 764, 810, 811, 967

Conditions.

Ita quod, when it will make a condition precedent. 766

Condition to make an apprentice free at the end of ſeven years, if it ſhall be deſired; it is a good plea, that he was not requeſted after the expiration of the ſeven years. 1095

Performance ought to be pleaded in the words of the condition, otherwiſe of matter of excuſe. 1140

Where the condition of a bond may be good in part, and void in part. 1459

See **Aſſumpſit, Averment, Certainty, Departure, Ejectment, Trades.**

Conſideration. See **Aſſumpſit, Frauds, Gaming.**

Conſpiracy.

Is indictable, though nothing be done in purſuance of it. 1169

Conſtable.

Of a hundred is an officer at common law before the ſtatute of *Winton. Page* 1192, 1193

A conſtable cannot execute a warrant generally directed out of his precinct, unleſs in *London.* 1299

What perſons may be taken up as ſuſpicious by a conſtable. 1299, 1301

The authority of the conſtables in *Weſtminſter* is not enlarged by the ſtatute 27 *Eliz.* 1301

A conſtable cannot arreſt after the affray is over. *ibid.*

See **Juſtices.**

Contempt.

It is a contempt to challenge the array for want of hundredors, where the jury is ſtruck upon a rule by conſent. 1364

See **Inferior courts, Notice.**

Continuances.

Are not entred in the King's Bench, till the plea comes in. 872

In the King's Bench in *Ireland apud* the King's courts *ubicunque, &c.* is but a miſcontinuance, and helped by appearance. 894

A plea as to part, and a demurrer to it, makes a diſcontinuance. 1121

Contract. See **Expoſition, Frauds.**

Convictions.

If a plea may be put in againſt a conviction removed into the King's Bench. 900, 1036

A conviction of cutting trees upon 43 *Eliz. c.* 7. muſt mention the number of the trees. 901

No objection to a conviction of cutting trees, that the defendant is a gentleman. 902

Apud Brampton praedict. ſhall be intended *in comitatu praedict.* in a conviction. *ibid.*

If a man has a pretenſe of title, he cannot be convicted on 43 *Eliz. c.* 7. againſt cutting trees; and a conviction in ſuch caſe may be falſified in an action. *Page* 900

A warrant of diſtreſs is executed before a *certiorari* delivered, the King's Bench cannot make a rule for the conſtable to return his warrant, but the juſtices may; and the King's Bench will grant no *mandamus.* 990

The place of the offenſe committed muſt appear in the conviction. 1220, 1387

Conviction of ſwearing quaſhed, becauſe in *Engliſh*, and becauſe the oaths were not ſet out. 1368

A conviction for refuſing to aſſiſt an exciſeman in weighing candles, who entred the houſe lawfully, held good, though it did not ſhew, whether it was by day or by night. 1375

Conviction for ſwearing, may ſet forth, that the defendant ſwore ſuch an oath ſo many times. 1376

Conviction quaſhed, becauſe that it was, *praeſtitit ſacramentum*, inſtead of *praeſtat. ibid.*

Exception to a conviction for ſwearing, that the age and degree of the defendant only appeared in the information and not in the adjudication, over-ruled. 1386

There is no need to ſet out the pariſh in which the offenſe was, though part of the penalty is given to the poor of the pariſh. 1478

Conviction of a forcible entry quaſhed, becauſe no fine was ſet. 1514

A conviction of deer-ſtealing quaſhed, becauſe the informer was the witneſs. 1545

Conviction on the game act quaſhed, becauſe the ſummons and appearance are before the information. 1546

See **Baſtardy, Certainty, Deer-ſtealing, Execution, Game.**

Conuſance of pleas.

If exempt juriſdiction can be granted, but to a corporation. 837

How far a grant of excluſive conuſance will exclude the juriſdiction of the ſuperior courts. 1339

Conuſance muſt be demanded the firſt day, before imparlance. *Page* 1339

See **Attorney, Inferior courts.**

Copyhold.

There can be no occupant of a copyhold eſtate *pur auter vie.* 996, 998, 1000

On a cuſtom to grant to three for their lives ſucceſſively as they are named, a grant to one, to hold for the lives of other two and himſelf, held good. 994

Copyholder for life commits a forfeiture; the lord ſhall enter, and not he in remainder. 1000

The lord ſhall not have a heriot upon the death of an aſſignee of a bankrupt, but upon the death of the bankrupt. 1002

Surrender of a copyhold muſt have the ſame conſtruction as a conveyance at common law. 1145

A declaration by copyholder, for incloſing a common, held good after verdict, though the words *ad voluntatem domini* were omitted. 1231

See **Eſtates.**

Corporation.

A corporation aggregate cannot grant to the head of the corporation. 775

Grant to a corporation for the benefit of the particular members. 952, 1134

The head of a corporation (and alſo members of the *quorum*) muſt be preſent at aſſemblies, but their conſent is not neceſſary to corporate acts. 1236

A recorder's non-attendance at the ſeſſions of the peace is cauſe of forfeiture. 1237

The recorder's duty in adviſing the corporation. 1238

Where a corporation ſhall retain their old name, notwithſtanding a charter that gives them a new name. 1239

Where a capital burgeſs quite leaves the borough, and reſides in another place, he may be removed without notice. 1275

An elected member of a corporation, who ſues to be admitted, muſt prove that he received the ſacrament within a year before his election. 1354

The major part of a common council cannot elect a member at a meeting of the corporation ſummoned for another purpoſe. *Page* 1355

An election of a member by the other members of a corporation not corporately aſſembled muſt be aſſented to by every one. 1359

An action maintained by a foreign corporation, 1535

If a pretended corporation ſue, and they are no corporation, the defendant may have the benefit of it upon the general iſſue. *ibid.*

A corporation cannot remove a freeman, unleſs by virtue of a charter or preſcription. 1566

Miſdemeanor in the office of chamberlain is no cauſe to remove a capital burgeſs. *ibid.*

A refuſal to obey by-laws, returned generally, is not a ſufficient cauſe of removal. *ibid.*

See **Conuſance of pleas, Cuſtom, Name, Parliament, Return.**

Coſts.

A defendant in replevin ſhall not have coſts on the plaintiff's confeſſing a plea of *priſel en auter lieu.* 788

In caſe for words (not actionable) by which the plaintiff loſt cuſtomers, full coſts ſhall be given, though the damages are under 40*s.* 831

Where words are actionable, and ſpecial damage is laid in aggravation; if the damage found be under 40*s.* the plaintiff ſhall not have full coſts. 1588

Where an action is brought for words, and alſo for carrying before a juſtice of peace, *&c.* full coſts ſhall be given, though the damages are under 40*s.* 1589

If an executor, who ſues for money of the teſtator's as received to the plaintiff's uſe, ſhall be liable to coſts. 865

A judgment of the King's Bench in *Ireland* is reverſed as to the coſts, and affirmed as to the affirmance; whether the coſts in *Ireland* can be conſidered by the King's Bench here. 893

Conſent of a defendant in error, that the judgment ſhall be affirmed without coſts, where an error is amended. *Page* 897

No coſts to be given on a judgment on demurrer upon a plea in abatement. 992

See **Damages, Error, Executors, Forcible entry, Judgments, Nonſuit, Scire facias, Statutes, Treſpaſs, Trial.**

Covenant.

By *A.* to make aſſurance to *B.* at the coſts of *B. A.* muſt give notice what aſſurance he will make, before *B.* is to tender the coſts. 750

In covenant if the defendant pleads an ill bar, and the plaintiff replies and aſſigns an ill breach, the defendant ſhall have judgment. 1081

An action of covenant will lie on the word *aſſignavit* in the aſſignment of a bond. 1242

Covenant maintained on the word *demiſit*, or *aſſignavit.* 1419

Covenant that ſhares in a company ſhall be ſold to make good loſſes, *&c.* an aſſignment by way of ſecurity, and the condition not broken, is not a ſale within this covenant. 1242

See **Damages, Debt, Intendment, Leaſes, Time.**

Cuſtom.

In *London*, for the common ſerjeant to exhibit an information for an aſſault or defamatory words of an alderman. 777

To disfranchiſe for defamatory words, ill. *ibid.*

A cuſtom ought not to be laid in the negative. 869

An action cannot be maintained upon a cuſtom, without ſhewing what the cuſtom is. 1135

The cuſtom of declaring in *London* on a *conceſſit ſolvere*, *&c.* need not be ſet forth at large. 1432

Cuſtom to pay 10*d.* to the vicar at the uſual time of churching women, *&c.* void for the uncertainty of the time, and for

for the unreaſonableneſs; and a conſultation denied after verdict. *Page* 1558

See **Borough Engliſh, Certainty, Common, Copyhold, Departure, Gavelkind, Prohibition, Trades.**

Damages and inquiry.

INtereſt ſhall be allowed in the taxation as damages on a judgment by default in debt on a ſingle bill, but not in debt for rent. 773

Intereſt denied to be taxed againſt an executor as damages. 774

A writ of inquiry in the preſent tenſe, as the declaration, held good. 802

Damages in covenant for not repairing muſt be the ſum neceſſary to put the tenements in repair, though they are damaged ſince the action brought. 803, 1126

Damages for not repairing ought to be applied to the putting the tenements in repair. 1126

A judgment reverſed, becauſe the damages, as laid in the declaration, *&c.* extended to a time ſubſequent to the action brought. 1382

In caſe for a falſe return of *non eſt inventus* to a *capias ad ſatisfaciendum* the whole debt given in damages. 1411

See **Coſts, Error, Forgery, Return, Scire facias, Tender.**

Date.

A deed is declared upon as bearing date 13 *Will.* 3. and upon *oyer* it appears to be dated 1701. this variance was pleaded in abatement and over-ruled. 791, 795

The words *anno domini* omitted, and ſupplied by intendment. 791, 795

A datu is the ſame as *cum datu*, but not *a die datus*. 1242

See **Award.**

Days in bank. See **Certiorari, Return.**

Debt.

The plaintiff has election, to ſue for the penalty of a penal bill, or for the money covenanted to be paid. *Page* 814

On a covenant to pay money for goods ſold, the plaintiff may have debt or covenant at his election. *ibid.*

On debt on a bill for goods ſold, the plaintiff may enter a *remittit* for what he has demanded more than is due. 816

Debt will lie againſt the party contracting, for nurſing an infant. 842

Debt or *indebitatus aſſumpſit* will not lie for goods laid to be ſold to a third perſon. *ibid.*

Debt or *indebitatus aſſumpſit* will not lie for money won at play, or upon the acceptance of a bill of exchange. 1035

See **Aſſumpſit, Damages, Fees, Rent.**

Declaration.

Muſt be delivered to the defendant's attorney, if he can be found, *&c.* and if it be left in office, it is only delivered from the time that notice is given to the defendant or his attorney. 1407

See **Action, Amendment, Bail, Bills of exchange, Certainty, Ejectment, Expoſition, Gaming, Intendment, Pleading.**

Deeds.

A writing required by a ſtatute, *&c.* to be ſigned and ſealed, ſhall not be intended a deed, nor need be pleaded with *profert in curia.* 763, 967

The omiſſion of *ſigillatum* in the *profert* of a deed cured by pleading over, or by verdict. 1126

Scriptum does not import a deed. 1206

In covenant upon a writing made at *Weſtminſter*, *&c.* the defendants pray *oyer*, and plead over, and the writing upon the *oyer* concludes, in witneſs whereof we have ſet our hands and ſeals; judgment for the plaintiff reverſed, becauſe the writing does not appear to be a deed. 1536

See **Date, Evidence, Pleading.**

Deer-ſtealing.

How the executor ought to proceed, where the informer dies before execution. *Page* 768
Conviction quaſhed, for not ſhewing that the place was incloſed. 791
The ſtatute 3 & 4 *Will. & Mar. c.* 10. extends to aiders and abettors. 842
On a warrant upon a conviction the conſtable may ſell the diſtreſs. 990
On a conviction, if goods cannot be found to ſatisfy the whole penalty, they cannot be ſeiſed for part, and corporal puniſhment inflicted for the reſidue, upon one conviction. 1196
See **Execution.**

Default.

By the defendant at *niſi prius* cannot be waved by the plaintiff in a perſonal action. 924
No judgment againſt the defendant by default, after iſſue joined. 925
See **Repleader.**

Demand. See **Detainer, Rent.**

Demurrer.

With *caret forma* for cauſe, is general. 802
Leave to diſcontinue denied by the court, after a rule for judgment upon a demurrer. 856
Demurrer in bar to a plea in abatement, and joinder in demurrer, makes a diſcontinuance. 1021
A demurrer as in abatement to a replication to a plea in bar, held not to be a diſcontinuance, though the plaintiff might have taken judgment by *nil dicit*. 1023
A demurrer confeſſes only what is well pleaded. 1056
A demurrer after iſſue joined, a diſcontinuance. 1483
A defendant demurs to a *ſcire facias* as a declaration, and the plaintiff in joining in demurrer inſiſts that his writ is good; and judgment for the plaintiff affirmed. *Page* 1504
See **Continuance, Eſtoppel, Form and ſubſtance.**

Departure.

A declaration grounded upon a fact at common law cannot be maintained by replication of a cuſtom or ſtatute. 861, 863
In treſpaſs, where the day is made material by the plea, the plaintiff's laying another day in his new aſſignment is no departure. 1015
No *capias* againſt the principal, pleaded by the bail; a rejoinder, that a writ of error was brought by the principal before the *capias* ſued out, is a departure, 1258
Plea of conditions performed, rejoinder of matter that goes in excuſe for not performing, is a departure. 1449

Depoſit. See **Bailment.**

Deprivation. See **Ecleſiaſtical perſons.**

Deputy.

A gaoler ſhall anſwer for his deputy civilly, but not criminally, unleſs he conſents to his acts. 1580
See **Inferior courts.**

Deſcent. See **Deviſe.**

Detainer and detinue.

A carrier may detain for his hire. 752
A carrier may detain for his carriage againſt the right owner. 867
That the avowant made no demand, is no plea to an avowry of an innkeeper for detaining a horſe. *ibid.*
An innkeeper may detain a horſe brought by his gueſt againſt the right owner. *ibid.*
An innkeeper who juſtifies the detaining a horſe for his keeping, need not ſhew that he received him of a gueſt. 868

Devaſtavit. See **Executors, Pleading.**

Deviſe.

Lands are deviſed to one of the coheirs, he takes the whole by the deviſe, and no part by deſcent. *Page* 829
Tenant for life, remainder to her younger ſon in tail, remainder to herſelf in fee, gives to her younger ſon all her right and intereſt in what ſhe holds by leaſe, and alſo the premiſſes intailed; this will paſs a fee. 831
Deviſe to *A.* and *B.* of intent that they permit *C.* to receive the profits during his life, and after his deceaſe ſhall ſtand ſeiſed to the uſe of the heirs of the body of *C.* with power to *A.* and *B.* to make a jointure to the wife of *C.* gives an eſtate-tail executed to *C.* 873
An action lies for a legacy deviſed out of land. 937
A mortgage is but a revocation *pro tanto.* 968
A deviſe to *J. S.* and his brothers ſucceſſively for their lives (without expreſſing the order of ſucceſſion) with condition that the tenement be not entred upon till a month after marriage. 1312
Deviſe of all the reſt of his eſtate, ſubject to debts, gives the inheritance. 1325
Deviſe of all the reſt of his eſtate, in a will that mentioned fee-ſimple lands before, will paſs an inheritance. *ibid.*
Deviſe to *A.* and after the deceaſe of *A.* to the heirs male of his body and his heirs for ever, gives an eſtate-tail to *A.* 1440
Deviſe to *A.* and his heirs lawfully begotten, that is to ſay, to his firſt, ſecond, *&c.* ſons ſucceſſively, *&c.* gives *A.* but an eſtate for life. 1561

Diſcontinuance of eſtates.

Tenant in tail conveys by bargain and ſale, covenant to ſtand ſeiſed, *&c.* the eſtate continues, till the actual entry of the iſſue in tail. 779
An eſtate made by tenant in tail to commence after his death is void. 781
An uſe ariſing out of the eſtate of a releaſee to commence from the death of tenant in tail is not void. *Page* 782
A. is tenant for life, remainder to *B.* for life, remainder to the heirs of the body of *A.* a feoffment by *A.* is no diſcontinuance. 855

Diſcontinuance of proceſs. See **Continuance, Demurrer, Pleading, Replevin, Treſpaſs.**

Diſfranchiſement. See **Corporation, Cuſtom.**

Diſtreſs.

If the landlord does not remove the diſtreſs in reaſonable time, he is a treſpaſſor *ab initio.* 1424
See **Detainer, Fairs.**

Donative. See **Eccleſiaſtical perſons.**

Dower.

Cannot be decreed in Chancery, but ought to be pleaded as aſſigned by the heir. 785
A recovery in dower will eſtop the tenant and all claiming under him from giving a prior term in a ſtranger in evidence. 1293
Dower does not lie *de tenemento.* 1384
If any but the heir can plead *touts temps priſt.* *ibid.*
See **Ejectment, Return.**

Eccleſiaſtical perſons and juriſdiction.

A Chaplain extraordinary to the King has no privilege to hold two benefices, without a diſpenſation. 791
The court will take notice of the limits of archdeaconries and other eccleſiaſtical juriſdictions. 856
Where the inhibition of the biſhop is returned in excuſe of not obeying a *mandamus*, the return muſt ſhew that the place

place where, &c. is within the dioceſe. *Page* 1379

Parſons of donatives are ſubject to the eccleſiaſtical juriſdiction in ſuits *pro reformatione* for reading the ſervice wrong, &c. but the ordinary cannot deprive them. 1205

See **Prohibition.**

Ejectment.

The confeſſion of leaſe entry and *ouſter* confeſſes an entry for condition broken. 750

Ejectment will lie *de minutis decimis.* 789

The plaintiff who has recovered judgment may enter pending a writ of error, but not by force. 808

A defendant in ejectment eſtopped by a recovery in dower from giving in evidence a term in a ſtranger. 1293

The iſſue cannot be made up different from the declaration delivered to the tenant in poſſeſſion, except in the defendant's name. 1411

Ancient *demeſne* may be pleaded without *affidavit.* 1418

See **Certainty, Dower, Execution, Time.**

Election. See **Parliament.**

Elegit. See **Execution, Fees.**

Ely.

The iſle of *Ely* has no pretenſe of being a county palatine. 837

See **Certiorari.**

Entry. See **Ejectment.**

Error.

Error does not lie in the Exchequer chamber on a judgment *de ſcandalis magnatum.* 954

De proceſſ. adjudicationis executionis judicii, will not remove a judgment againſt bail upon a recogniſance. 823

A judgment given after the return of the writ of error is not removed, and *nul tiel record* may be pleaded to a *ſcire facias quare executio non* upon it. *Page* 1179

Where a record ſhall be removed, notwithſtanding a variance in the ſtile of the court to which the writ of error is directed. 1200, 1202

One of the defendants brings a writ of error without the other; though the writ ſhall be quaſhed, the record is removed. 1403

New bail muſt be in upon every new writ of error. 840

Not putting in bail does not hinder the proceeding upon the writ of error. *ibid.*

A writ of error does not abate by the death of the defendant after *in nullo eſt erratum* pleaded. 1295

A *ſcire facias* on a judgment pending a writ of error is irregular, and to be ſet aſide on motion. *ibid.*

What coſts ſhall be given on quaſhing a writ of error. 1403

A ſham plea to a *ſcire facias quare executio non*, to compel the plaintiff to aſſign errors, ſhall be ſet aſide. 1414

Error cannot be aſſigned both in fact and in law. 883

It is not aſſignable, that the original was returned by one who was not ſheriff. 884

It is not aſſignable, that the perſon by whom judgment was given was not judge. 885

Granting *oyer* is not aſſignable for error, but denying it is. 970

Giving judgment of *reſpondes ouſter*, where it ought to be final, is no error aſſignable by the defendant. 1018

It is not aſſignable, that a juror who gave his verdict, was not returned upon the *venire*, where the *venire* is not returned to a *certiorari*, becauſe againſt the record. 1414

It is not aſſignable, that the defendant died before the day of *niſi prius*, where he is recorded to have appeared. 1415

A *feme ſole* after a writ purchaſed againſt her marries before appearance, this will be no error in the judgment. 1525

A warrant of attorney returned of a term ſubſequent to the *placita* is no error. 1534

If

If the court may award a *certiorari ad informandum conſcientiam* after a releaſe of errors ill pleaded. *Page* 1005

Want of original aſſigned for error is confeſſed by a plea of a releaſe of errors. 1048

Plea that a releaſe of errors was given of the errors in another judgment. 1046

On want of original aſſigned, the defendant takes out a rule for the plaintiff to return his *certiorari.* 1156

The entring a *miſericordia* againſt an infant is aided by 16 & 17 *Car.* 2. *c.* 8. 1284

Want of a writ of inquiry is aided by a judgment by default. 1397

The court will not reverſe a judgment as not being by original bill, without having it returned to a *certiorai*, that there is no bill. 1442

Where it is returned upon a *certiorari*, that there is no writ of inquiry, the defendant in error may have another *certiorari*, and get a writ of inquiry returned. 1476

If a *certiorari* to verify errors bear *teſte* before the errors aſſigned, the judgment ſhall be affirmed. 1554

An intire judgment for ſeveral damages, and part of them erroneous, ſhall be reverſed for the whole. 825

A record returned to a *certiorari* contrary to the record returned before cannot be received. 1122

A judgment reverſed for the abſurdity and prolixity of the pleadings. 1252

An attorney and his wife ſue by writ of privilege, and have judgment by default; the judgment was affirmed, becauſe the writ of privilege was not returned before the court of *B. R.* on a *certiorari.* 1398

An award of execution upon a *ſcire facias* affirmed, and the judgment for damages *occaſione dilationis executionis* reverſed. 1534

The omiſſion of *ex aſſenſu ſuo* in the award of damages in a judgment in debt on demurrer is error, but amendable in the court where the judgment was given. 1570

See **Age, Amendment, Appearance, Attorney, Averment, Bail, Coſts, Damages, Ejectment, Fines, Indictments, Infants, Inferior courts, Nul tiel record, Pleading, Recogniſance, Surpluſage, Variance, Writs.**

Eſcape.

Caſe for an eſcape upon an *excommunicato capiendo.* *Page* 788

A priſoner may be taken upon an eſcape warrant before the ſitting of the court, though his name is in the day-rule that day. 927

An eſcape warrant may be executed upon a *Sunday.* 1028

See **Executors, Return.**

Eſtates.

A rent is granted to *A.* for the life of *B.* if *A.* dies, the rent ceaſes, and there can be no occupant. 1000

Upon what terms an eſtate at will may be determined in the middle of a quarter. 1008

A copyholder ſurrenders to the uſe of himſelf for life, remainder to the uſe of *A.* and *B.* his wife for the term of their lives, and of the heirs and aſſigns of *A.* and *B.* and for default of ſuch iſſue, &c. *A.* and *B.* take a remainder in fee. 1144

Difference between the ablative caſe and the genitive as to the limitation of entails. 1153

See **Deviſe, Diſcontinuance, Eſtoppel.**

Eſtoppel.

In a *ſcire facias* upon a miſrecited judgment the defendant pleads *nul tiel record*, and it is found that there is ſuch a record; he is eſtopped from ſhewing the variance afterwards. 1050

An eſtoppel that creates an intereſt in or works upon the eſtate of the land, eſtops a jury. 1051

The heir in tail ſuffers judgment in a *ſcire facias* by default, he is eſtopped to claim the benefit of the entail. *ibid.*

In what caſe eſtoppels muſt be pleaded. 1051, 1054

In debt for rent, where the plaintiff declares upon a demiſe by indenture, the defendant cannot plead *nil habuit in tenementis*; and it is ill upon demurrer, without replying the eſtoppel, becauſe that appears upon record. *Page* 1551, 1154

A defendant, who has pleaded a *miſnomer* in abatement, is eſtopped by his plea to deny that name in another action or indictment. 1308

By a recogniſance to a corporation the defendant is eſtopped to ſay they are no corporation. 1535

An aſſignee of the reverſion ſhall have the benefit of the eſtoppel againſt a leſſee by indenture. 1551

A leſſee by indenture cannot plead *nil habuit*, *&c.* ſpecially, without admitting an intereſt. *ibid.*

See **Dower**, **Ejectment**, **Evidence**, **Fines**, **Return**, **Verdict.**

Evidence.

Of the truth of ſcandalous words given in mitigation of damages. 831

A rule to produce the caſh book of the *India* Company, and the transfer book of bank-ſtock, at a trial. 851

Where a bond need not be given in evidence, ſpecification need not be proved. 852

The hand of a ſervant that is dead to a delivery book is good evidence of the delivery of goods. 873

The ſeal of a competent court of juſtice, as of the eccleſiaſtical court to a probate of a will, or of a court of admiralty, *&c.* is concluſive evidence as to the property. 893, 936

Rule to produce corporation books denied to a proſecutor upon the teſt act. 927

Depoſitions of a witneſs read, who was become blind, and had referred to his rental, and the witneſs alſo examined to what he remembred. 1166

A deed of intail proved by an inquiſition *poſt mortem* finding it *in haec verba.* 1292

Indorſements on a bond by the obligee, of payment of intereſt, allowed to be given in evidence by his adminiſtrator, to take off the preſumption from the length of time. *Page* 1371

An admittance of a freeman written two months after the time, and not ſigned, *&c.* not admitted in evidence. 1446

See **Adminiſtrator**, **Limitation**, **Slander**, **Trepaſs**, **Wills**, **Witneſs.**

Excise. See **Convictions.**

Excommunication.

Biſhops ſubject to excommunication, and to the writ of *excommunicato capiendo.* 817

After pardon of the contempt the defendant is not ſubject to impriſonment, though the promoter has an intereſt in the coſts. 818

Significavit for non-payment of coſts *in quadam cauſa officii ſive correctionis*, ill, and quaſhed. 817

See **Eſcape**, **Habeas corpus.**

Execution.

Levari facias lies for the penalty on a conviction of deer-ſtealing. 768

An *habere facias poſſeſſionem* cannot be ſued out a year after judgment in ejectment, without a *ſcire facias.* 807

Where one of the plaintiffs or defendants dies after judgment, execution may be ſued upon ſuggeſtion of the death. 808

A *fieri facias* bearing *teſte* before the defendant's death may be executed upon the goods in the hands of the executors. 850

A *fieri facias* out of the Common Pleas is executed before error brought, the Common Pleas ſhall award the *venditioni exponas.* 990

By ſeiſing goods on a *fieri facias* the debt is diſcharged, and payment to the ſheriff is good. 1072

Seiſing goods on a *fieri facias* will not diſcharge a co-obligor, unleſs the goods are ſold, and the plaintiff ſatisfied. *ibid.*

The ſheriff may ſell goods ſeiſed on a *fieri facias*, after he is out of his office, without a *venditioni exponas.* 1073

A *fieri facias* may be executed after the death of the plaintiff. *Page* 1073

An *elegit* ſued out by an executor cannot be executed on behalf of an *adminiſtrator de bonis non.* *ibid.*

The ſheriff is bound to anſwer the returned value of the goods, though they are afterwards reſcued. 1075

After an *elegit* executed upon goods, and a return that the defendant has no lands, the plaintiff may have the body in execution for the remainder of his debt. 1451

See **Aſſets, Bail, Deer-ſtealing, Jointenants, Notice, Scire facias.**

Executors.

Where one appears, and the reſt make default, upon the return of the *capias, &c.* the plaintiff ſhall have his judgment againſt all, but for the coſts only againſt him that appears; and all muſt join in error. 870

An executor may have an action againſt an adminiſtrator, againſt whom his teſtator recovered judgment, for a *devaſtavit* in the time of the teſtator. 973

An executor may have an action for an eſcape out of execution in the time of the teſtator, but he is not chargeable for an eſcape. *ibid.*

Where an executor brings an action that will lie in his own right, though he names himſelf executor, he need not make *profert* of the letters teſtamentary. 1215

If a grant of all goods will paſs goods which the grantor hath as executor. 1306

A joint executor charged with payment of a legacy out of his moiety of the ſurplus, though he had left the money in the hands of the other executor, from whom the legatee had received intereſt, as well as a dividend out of his eſtate after he became bankrupt. 1320

In a *ſcire fieri* inquiry on a judgment recovered by an executor, there is no need to aver, that his teſtator was dead; nor need it be returned, that the jury were ſworn *de et ſuper praemiſſis.* 1395

An executor ſues on a bond given to his teſtator, and aſſigns a breach in his own time; he ſhall not be liable to coſts. *Page* 1413

See **Adminiſtrator, Coſts, Damages, Deer-ſtealing, Execution, Jeofailes, Intendment Joining in action, Limitation, London, Pleading, Quare impedit, Releaſes.**

Expoſition of words and ſentences.

The words *ea occaſione* will ſupply the want of *corum ipſo rege* in the deſcription of the priſon of the King's Bench in a *ſcire facias* againſt bail. 805

An agreement to pay ſo much for every hundred ſtacks of wood will not make any thing due for fifty ſtacks, without the words *ſecundum ratam.* 815

A *viz.* rejected in a *reddendum*, becauſe repugnant. 819

Where a *viz.* ſhall be explanatory, and may contain an averment. 1271

Praedict. in an information, relating to the county, where ſeveral counties are mentioned before, uncertain. 886

Praedict. ſhall refer to the perſon named before, that is meant in common underſtanding, though there is another of the ſame name. 1095

Praedict. in an order or indictment does not refer to the county mentioned in the margin, as it does in a declaration. 1304

Treſpaſs for breaking the plaintiff's cloſe, and taking goods there found, and alſo taking and carring away ſo much ground wheat of the plaintiff's; after intire damages judgment arreſted, becauſe it did not ſufficiently appear, that the firſt goods were the plaintiff's. 890

Proclamation made the fourth of *December*, that an election would be made on the ninth of *December* then next following; the word [next] refers to the day, and not to the month. 905

Gilda mercatoria, a corporation. 1134

Expreſſio eorum quae tacite inſunt will have no operation upon the clauſe wherein it is expreſſed, but may control a ſubſequent clauſe. 1154

In a declaration againſt a priſoner in cuſtody of a ſheriff by virtue of a *latitat, de placito quod reddat ei, &c.* theſe laſt words ſhall be referred to the *latitat*, ſo as to ſhew it to be at the ſuit of the plaintiff according to the act of parliament. *Page* 1362

Articles of a horſe race to ride *ſine flagello et baculo vel aliis armis*, the whole ſentence is disjunctive. 1367

Quoddam, the ſame as *aliud*. 1522

See **Aſſumpſit, Award, Certainty, Conditions, Deeds, Indictments, Latin, Pleading, Statutes, Surpluſage, Time.**

Extinguiſhment. See **Preſcription.**

Fairs and markets.

GOODS are brought into a market, the owner of the ground cannot diſtrein them *damage feaſant*, becauſe ſtallage, &c. is not tendered. 1590

Falſe tokens. See **Indictments.**

Fees.

Debt lies for the ſheriff's fees for executing an *elegit*. 1212

Felony.

A miſpriſion or a treſpaſs is merged in felony. 981

See **Acceſſory.**

Fenſes.

A man may be charged to repair fenſes, without ſhewing a preſcription or tenure. 804

Feoffment. See **Diſcontinuance.**

Fines.

A fine levied to a ſtranger may extinguiſh a right, but cannot increaſe an eſtate. 782

If a fine is acknowledged before commiſſioners in the country in the vacation, and the conuſor dies before the term; though no writ of covenant was ſued out, or King's ſilver entred, the court will permit the conuſee to enter the fine as of the term preceding. *Page* 850

Reverſed for the death of the conuſor before the return of the writ of covenant. 872

Forcible entry.

Reſtitution ſhall not be granted after three years. 1011

On a plea of three years poſſeſſion to an inquiſition of forcible entry removed by *certiorari*, the defendant, if it be found againſt him, ſhall pay coſts. 1036

See **Ejectment, Indictments.**

Forgery.

Indictment for forging an aſſignment of a term, muſt ſhew that the aſſignment was ſigned, or that it was a deed of aſſignment. 921

Indictment for forging an aſſignment of a leaſe muſt aver that there was a leaſe, and not with a *teſtatum exiſtit, &c. ibid.*

Forgery of an order, or acquittance, an offenſe puniſhable at common law. 1464

In forgery of a diſcharge, it is not neceſſary to ſhew how the defendant was bound. 1468

There is no neceſſity to lay a publication in an information for forgery. 1469

How the double coſts and damages can be aſſeſſed, where a man is convict of forgery purſuant to 5 *Eliz. c.* 14. upon an indictment. 1523

See **Certainty.**

Form and ſubſtance.

The omitting *profert in curia* of a deed, ſubſtance. 762

Pleading that he was ſeiſed by force of the ſtatute of uſes, where the conveyance is at common law, is form. 802

The omiſſion of *contra pacem* in treſpaſs is ſubſtance, but aided by verdict. 985

Matters of form may be taken advantage of on a general demurrer to pleadings in abatement. *Page* 1015

See **General iſſue, Jeofailes.**

Frauds and ſtatute of frauds.

In conſideration that the plaintiff would let his horſe to *J. S.* *&c.* is within the ſtatute; otherwiſe if it had been, in conſideration that he would let *J. S.* ride the horſe. 1085

A promiſe to pay, in conſideration that the plaintiff will forbear to ſue a debtor; within the ſtatute. 1087

See **Aſſumpſit, Debt.**

Game.

A Conviction upon the game acts muſt aver the want of the qualifications particularly. 1415

Gaming.

In an action for money won at play the firſt count was laid properly upon mutual promiſes, and the ſecond count was *cumque etiam ad ludum praedictum lucrifecit*, *&c.* without a conſideration; after verdict for the plaintiff, judgment ſtaid. 1034

See **Debt.**

Gavelkind.

All the lands in *England* were of that nature before the conqueſt, and deſcended to all the iſſue. 1024

Lands in *Kent* ſhall be preſumed gavelkind, unleſs they are proved to be diſgavelled. 1292

General iſſue.

If pleading matter that amounts to the general iſſue in *trover*, be matter of form or ſubſtance. 869

See **Adminiſtrator, Common, Corporation, Pleading.**

Good behaviour.

Binding to the good behaviour the proper puniſhment for ſcandalous words of magiſtrates. 778

Commitment for want of ſureties for the good behaviour for words ſpoken of a magiſtrate muſt be made preſently. *Page* 1030

Grant. See **Corporation, Executors.**

Guardian.

A child taken from the guardian appointed by the ſpiritual court, upon the return of a *habeas corpus*, and delivered to the guardian appointed by the father. 1334

Habeas corpus.

A Priſoner in execution upon a ſentence of the admiralty ſhall not be turned over to the King's Bench on a *habeas corpus*, unleſs a plea be depending againſt him; and the like upon an *excommunicato capiendo.* 789, 790

Plea put in by a priſoner brought up by *habeas corpus.* 817

Habeas corpus ad teſtificandum for a priſoner in execution. 851

See **Guardian, Inferior courts, Parliament.**

Hackney coaches.

Letting horſes to be uſed with a gentleman's coach is not within the act for licencing hackney coaches. 1214

A ſtage coachman ſetting a paſſenger down, before he gets out of the bills of mortality, and taking his fare for the whole ſtage, is not within the acts for licencing hackney coaches. 1506

Heir. See **Aſſets, Borough Engliſh, Deviſe.**

Highways. See **Hue and cry, Way.**

Homine replegiando.

Two plaintiffs may join in the firſt writ and the *alias*, which are *vicontiel*; *quaere* of the *pluries*. 903

Addition of the defendant is not neceſſary, becauſe the proceedings are upon the *pluries*, and not upon the original. *Page* 987

See **Abatement.**

Honours.

Names of dignity, as baronet, *&c.* are neceſſary additions. 859

A baron called by writ may be named eſquire, *&c.* otherwiſe of a baron created by patent. *ibid.*

The beginning of ſeveral degrees of peerage. *ibid.*

Hue and cry.

Robbers aſſault a man in the hundred of *A.* and carry him into the hundred of *B.* and there rob him; the hundred of *B.* is liable. 826

A man is aſſaulted in the highway, and carried into a houſe and robbed there, he has no remedy againſt the hundred. 828

The hundred are anſwerable for a robbery in a coppice out of the highway. 829

See **Intendment, Pleading.**

Jeofailes.

DEBT by an adminiſtrator in the *debet et detinet*, cured by pleading over, or by a general demurrer. 1393

Cured by a judgment by confeſſion. 1513

See **Amendment, Aſſumpſit, Bail, Bills of exchange, Certainty, Continuance, Form and ſubſtance, Oyer, Treſpaſs.**

Imparlance. See **Oyer, Privilege.**

Indebitatus aſſumpſit. See **Aſſumpſit.**

Indictments and inquiſitions.

An indictment does not lie for entertaining vagrants. 790

Indictment for words quaſhed. 857

Indictment does not lie for a treſpaſs puniſhable in a particular manner by ſtatute. *Page* 991

Indictment does not lie for ſcandalous words ſpoken of a mayor. 1029

A challenge by words is indictable. 1031

Indictment does not lie for inticing away a ſervant, though it lies for taking away a ſervant. 1116

Indictment does not lie for being a bawd, but for keeping a bawdy-houſe. 1197

Two different batteries on different perſons cannot be joined in one indictment. 1572

Two perſons may be jointly indicted of extorſion, or maintenance. 1248

Judgment upon an indictment againſt a tenant at will, for not repairing a houſe which he was obliged to repair *ratione tenurae*. 856

Indictment for cheating a man of money, pretending to aſſiſt him in procuring an office in the land bank, whereas there was no ſuch office; refuſed to be quaſhed. 865

For taking tickets, without ſaying from whom, quaſhed. 890

Indictment for not repairing the pavement before his houſe, quaſhed for not ſhewing that he was obliged to repair it. 922

Inquiſition of forcible entry quaſhed, becauſe it did not appear of what neighbourhood the jury were. 926

Indictment for receiving money as being ſent by another perſon, but without any falſe token, quaſhed. 1013

Indictment for exerciſing a trade, *&c.* quaſhed for want of *contra pacem.* 1034

Indictment for exerciſing a trade, *&c.* may be found at a ſeſſions of a borough. 1039

Indictment for exerciſing a trade, *&c.* quaſhed, becauſe the caption was *praeſentant exiſtit*, inſtead of *praeſentant.* *ibid.*

Judgment upon an indictment of a common ſcold reverſed, becauſe the word uſed was *rixa*, for *rixatrix.* 1094

Inquiſition quaſhed, becauſe it did not appear for what county the coroners were, and for want of the words *proborum et legalium hominum* in the caption. 1305

In

In an indictment for a miſdemeanor in receiving ſtolen goods, there is no need to aver, that the principal felon cannot be taken. *Page* 1370

The word *proditorie* in an information for a miſdemeanor will not vitiate. 879

Contra pacem dicti nuper regis refer to the King in whoſe reign the offenſe was committed. *ibid.*

In information for ſubornation of perjury, if one of the aſſignments is good, and the defendant is found guilty, he ſhall be puniſhed. 887

The inducement in an indictment may be laid with *quod cum.* 921

A man cannot plead over, but in caſes of treaſon or felony. 922

After a verdict, a man cannot plead that indictment depending, but muſt plead *auterfoits acquit.* *ibid.*

An indictment removed by the proſecutor cannot be carried to trial by the defendant without leave of the court upon motion. 1083

Indictments for offenſes againſt a ſtatute muſt conclude *contra formam ſtatuti.* 1104

Indictments for uſury, and upon ſeveral ſtatutes, cannot be taken at the quarter-ſeſſions. 1144

Indictment for a fact that is a nuſance at common law, and concluding *contra formam ſtatuti,* where the penalty inflicted by the ſtatute is not recoverable upon an indictment; the *contra formam ſtatuti* ſhall be rejected as ſurpluſage. 1163

Indictments reciting convictions, may ſet them forth ſhortly. 1196

Indictment for diſobeying an order of juſtices, muſt find poſitively that ſuch an order was made, and not by way of *quod cum.* 1363

After coſts taxed by the maſter, the proſecutor ought not to move to aggravate the fine. 854

See **Addition, Amendment, Averment, Baſtardy, Bribery, Bridges, Certainty, Certiorari, Conſpiracy, Executors, Expoſition, Forgery, Infants, Juſtices, Judgments, King, Latin, Nuſance, Perjury, Riots, Trades, Trial, Variance, Venue, Way.**

Inducement. See **Indictment, Pleading.**

Infants.

Appear in the crown-office by attorney to informations for riots, *&c.* *Page* 1284

See **Age, Appeals, Time.**

Inferior courts.

Attachment againſt a ſteward for ſitting judge in his own cauſe, or for miſdemeaning himſelf between parties. 766

In caſe for negligently keeping a horſe within the juriſdiction, by which he was abuſed, the abuſe need not be ſhewn to have been within the juriſdiction. 796, 1040

Ought to give judgment expreſs upon the point in iſſue, that the plea is ſufficient, *&c.* 822

The ſeveral ſorts of inferior juriſdiction, conuſance of pleas, and exempt juriſdiction. 836, 837

The judgment of an inferior court muſt be entred, *per eandem curiam.* 895

A *habeas corpus* does not remove the cauſe, as a *recordari* or *certiorari* do, and the plaintiff may vary in his declaration, but then he diſcharges the bail. 1102

Judgment of an inferior court reverſed for want of the averment, that the cauſe was within the juriſdiction. 1310

A court held before the under-ſteward *ſecundum conſuetudinem, &c.* without ſetting forth the cuſtom, and well. 1543

De placito tranſgreſſionis is ſufficient in a plaint, without *vi et armis.* 1544

The value received in a promiſſory note need not be averred within the juriſdiction, nor the monies due in a ſtated account. 1555

See **Abatement, Appearance, Bail.**

Ingroſſing. See **Certainty.**

Innkeeper. See **Detainer.**

Inquiſition and inquiry. See **Damages, Indictments, Return.**

Inſurance.

Inſurance.

A ſhip is ſeiſed by the government, and converted into a fireſhip; if the inſurers are liable. *Page* 840

A deviation after a damage happening will not diſcharge the inſurers from the damage that happened before. *ibid.*

That a ſhip was loſt by the fraud and negligence of the maſter, is a good aſſignment of a breach of a policy, which inſures againſt the barretry of the maſter and all other dangers, *&c.* 1349

Intendment.

The meaning of certainty to a common intent. 765

A robbery ſhall be intended againſt the hundred to have been committed in the day, if the contrary is not averred. 829

A covenant or promiſe to enter into bond, that the obligee ſhall enjoy certain land, or for payment of money, ſhall be intended in a ſum to the value of the land, or double the money. 1078

A promiſe, in conſideration that the plaintiff would deliver up a bond; it ſhall be intended to the obligor, and not to the defendant. 1126

A promiſe made, ſhall be intended to the plaintiff. 1127

Priſona mareſcalciae mareſcalli noſtri ſhall be intended the priſon of the King's Bench in a recogniſance of bail taken *in B. R.* 1177

In an action fot turning the plaintiff out of his ſervice contrary to his promiſe of continuing the plaintiff ſo long as the defendant ſhould be paymaſter, it ſhall be intended that the defendant continued paymaſter. 1222

An executor brings debt for rent incurred in his own time on the demiſe of his teſtator; after verdict it ſhall be intended, that his teſtator's eſtate was a term, *&c.* 1231

See **Aſſumpſit, Award, Certainty, Convictions, Date, Verdict.**

Joining in action.

A man cannot join a demand in his own right with a demand as executor. *Page* 841

Where an action of treſpaſs may lie for a matter jointly with others, which could not be maintained ſingly. 1032

Two cannot join in an action for entring the houſe of one of them, and taking the goods of both. 1381

See **Baron and feme, Homine replegiando.**

Joint and ſeveral.

Whenever two perſons are named, it is generally underſtood of them jointly. 1203

A releaſe by *A.* and *B.* is joint and ſeveral. 1199

See **Bonds, Certiorari, Indictments.**

Jointenants and tenants in common.

On an execution againſt one partner in trade the ſheriff can ſell no more than his moiety of the goods. 871

See **Limitation.**

Iſſue. See **General iſſue.**

Iſſue joined. See **Demurrer.**

Judges.

An action does not lie againſt a judge for what he does as judge. 767

See **Niſi prius, Nonſuit, Warrants.**

Judgments.

Regularly entred after the defendant's death. 766, 849

Entred on a warrant given by a priſoner without the preſence of his own attorney. 797

A plaintiff may have leave to enter a judgment upon a warrant, though the warrant be revoked. 850

A roll of a judgment refuſed to be received, becauſe not brought in till after the eſſoin day of the ſubſequent term. *Page* 850

Where the plaintiff appears by attorney as of the ſame term, the court will not ſtay the judgment, on a ſuggeſtion that he has been dead ſome time. 869

Where the cauſe of action is fully confeſſed, and the matter of the plea is ill in ſubſtance; judgment ſhall be given for the plaintiff notwithſtanding a verdict for the defendant. 924

A *capiatur* need not be entred, where the fine is taken away by the ſtatute. 927

A fine ought not to be ſet in the priſoner's abſence. 937

In entring judgments upon demurrer in debt *in C. B.* they give the coſts in the name of *damna pro detentione debiti.* 1047

Judgment may be arreſted after judgment by *nil dicit* upon an indictment, but not after a judgment upon demurrer. 1221

In what caſes after an interlocutory judgment againſt one defendant judgment ſhall be arreſted upon the acquittal of another defendant. 1373

See **Aſſets, Covenant, Default, Error, Executors, Inferior courts, Latin, Nul tiel record, Treſpaſs.**

Juriſdiction. See **Inferior courts, Prohibition.**

Juſtices of peace.

The King's Bench will take ſecurity for obeying an original order, that is not removed before them; but not for an order confirmed there, becauſe an attachment lies. 858

An order of ſeſſions to proſecute a man as a common barretor at the charge of the county, quaſhed. 871

A mayor is not a juſtice of peace, without a particular grant in the charter. 1030

A conſtable of a hundred is obliged to execute a juſtice's warrant on a conviction of deer-ſtealing. 1190

A conſtable may be indicted for not returning a juſtice's warrant. *Page* 1191

Juſtices of peace cannot command the ſheriff, but where they have ſpecial power. 1192

An order of two juſtices quaſhed, becauſe it was, doth adjudge, inſtead of, do adjudge. 1198

Juſtices of peace may appoint a ſeſſion without a precept, but people are not compellable to appear at it. 1238

The juſtices in ſeſſions have a diſcretionary power of ſuppreſſing alehouſes, without ſhewing any cauſe or miſdemeanor. 1303

See **Apprentice, Baſtardy, Certiorari, Labourers, Poor, Summons, Trades, Vagrants, Warrants.**

King.

THE court will take notice of the death, or acceſſion of the King, without any averment. 811

Information lies for ſcandalous words ſpoken of deceaſed Kings, advancing pernicious doctrine. 879

See **Bonds, Statutes.**

Knights. See **Abatement.**

Labourers.

AN order to pay wages in huſbandry and other monies, ſhall be confirmed, if it appear upon examination, that the other money was due for work in huſbandry. 820

The ſtatute of labourers is extended to covenant ſervants in huſbandry. 1305

An order to pay wages quaſhed, becauſe made upon the ſervant's oath. *ibid.*

Latin.

Mereretur held the ſame as *meruit* after verdict. 835

Recuperaret for *recuperet* in a judgment, ill. *Page* 893

In declaring upon a writ to elect burgeſſes, *praecepit* refers to the King. 907

Apprenticus for *apprenticius*, ill. 1179

At ſi for *ac ſi* allowed. 1183

A verb in the ſingular number inſtead of the plural, ill. 1198

Falſe ſenſe is not aided by a verdict as falſe *Latin*. 1223

A judgment reverſed, becauſe the defendant was charged by a verb in the plural number. 1383

Indictment of treſpaſs for taking three heifers *coloris* brown, quaſhed. 1394

Dolia, *Anglice* tons. 1468

Contrafecit. *ibid.*

Auſtrialia for *auſtralia* in the name of the *South-Sea* company, bad. 1516

Declaration on a bill of exchange *pro valore in manibus*, *&c. accommodatis de eodem querente*, held good. 1542

Fecit for *fecerunt*, in ſetting out a promiſſory note, ill. 1544

Fecit for *fuit* in a plea of privilege, bad. 1567

See **Aſſumpſit, Certainty, Convictions, Damages, Indictments.**

Latitat.

The antiquity of that proceſs. 882

See **Limitation.**

Leaſes.

Made before entry after a recovery are void. 853

An office cannot be leaſed by *parol*. *ibid.*

A leaſe made by an attorney in his own name is void, and the covenants to pay the rent are void. 1419

See **Eſtates, Eſtoppel, Powers.**

Leet.

An avowry for a fine in a leet need not aver it by the record. 1173

Legacy. See **Deviſe, Executors.**

Limitation of actions.

A perſon who receives a moiety of the rents for twenty years, gains no title againſt the right owner who receives the other moiety. *Page* 830

The ſtatute of limitations muſt be pleaded, and cannot be taken advantage of from the matter appearing generally upon the record. 838

Non aſſumpſit intra ſex annos is not pleadable where the cauſe of action accrues after the time of making the promiſe. *ibid.*

Clauſum fregit in the Common Pleas held not to be a proper commencement of an action to avoid the ſtatute of limitations. 880

A writ ſued out and not returned, will not avoid the ſtatute. 885

Prohibition to the admiralty for over-ruling a plea of the ſtatute to a ſuit for mariners wages. 937

The ſtatute of limitations is no bar to a matter meerly of admiralty conuſance. 935

Not guilty within ſix years is a bad plea in treſpaſs. 1099

Where a promiſe is laid to the teſtator, and the ſtatute is pleaded, the plaintiff cannot give in evidence a promiſe made to himſelf. 1101

The ſtatute was not pleadable to a ſuit in the admiralty for mariners wages before 3 & 4 *Ann. c.* 16. 1204

A proſecution in an inferior court removed by *habeas corpus* may be replied to a plea of the ſtatute of limitations. 1429

In an action on a promiſſory note the ſtatute is pleaded, and the plaintiff replies a ſuit in *London pro diverſis pecuniarum ſummis prius debitis*, *&c.* for the ſame cauſe. 1430

A *latitat* may be replied to a plea of the ſtatute, without ſhewing a bill of *Middleſex*. 1441

See **Bonds, Forcible entry.**

London.

London.

The ancient method of chuſing aldermen. *Page* 1246

The court of *B. R.* will not ſtay proceeding againſt a freeman upon the ſtatute erecting the court of conſcience, upon *affidavit* that the cauſe of action is under 40 *s.* but it ought to appear upon the trial. 1504

A loſs in a deceaſed freeman's eſtate, by the inſolvency of his executor, muſt be born by the teſtamentary part. 1330

See **Apprentice, Conſtable, Cuſtom, Limitation, Nuſance, Trades.**

Mandamus.

TO reſtore the clerk of the butchers company. 959, 1004

To the company of gunmakers, to give a proof mark to a freeman, denied, becauſe they are no legal eſtabliſhment. 989

A *mandamus* to ſwear two church-wardens, a return that they were not duly elected, without ſaying *nec aliquis eorum, &c.* is ill. 1008

To grant a licence to preach. 1206

An officer at will ſhall have a peremptory *mandamus*, if an inſufficient cauſe of removal is returned. 1240

A peremptory *mandamus* granted, becauſe the return contained inconſiſtent matters, though the ſeveral matters would have been each a good return by themſelves. 1244

On a *mandamus* to reſtore a clerk of the peace, an order of removal is uncertainly returned; he ſhall not have a peremptory writ, while the order is in force. 1267

After reſtitution on a peremptory *mandamus* the party may be removed for the former cauſe. 1283

A return, that the party conſented to be turned out, is not a good return of a reſignation. 1304

A *mandamus* to a univerſity, to reſtore to degrees. 1334

A return of a deprivation from degrees, *&c.* is not good, without a ſummons to the party. *Page* 1348

If *non fuit electus* be a good return to a *mandamus* to ſwear a church-warden. 1379, 1405

Commiſſioners of ſewers return to a *mandamus* to make a rate, that they could not do it *propter brevitatem temporis* before the expiration of their commiſſion; a good return. 1479

See **Bridges, Convictions, Corporation, Eccleſiaſtical perſons, Name, Return, Summons.**

Manor.

Cannot be continued without two freehold ſuitors. 864

Mariners. See **Admiralty.**

Maſter and ſervant.

Difference between a ſervant, and an apprentice. 1117

An apprentice muſt be bound and diſcharged by deed. *ibid.*

Trover does not lie for a *negro.* 1274

See **Bills of exchange, Carrier, Indictments, Labourers, Poor.**

Miſpriſion. See **Felony.**

Modus.

To pay 2 *s.* in the pound of the true improved yearly rent or value of the land, void. 1158

To pay from *April* to *November* the tenth day's milk once ſkimmed made into cheeſe, in lieu of tithe milk, if good. 1171

See **Prohibition.**

Money. See **Aſſumpſit.**

Mortgage. See **Deviſe.**

Murder.

Killing a perſon aſſiſting a conſtable in the unlawfully impriſoning a ſtranger, manſlaughter. *Page* 1300

Killing an officer acting irregularly, though the party did not know of the irregularity, or a thief whom the party took to be an officer, manſlaughter. 1302

A. throws a bottle at *B.* and the blow is returned, they are parted, and an hour after they fight without any reconciliation intervening, and *A.* kills *B.* it is murder. 1485

The ſeveral kinds of malice, that make killing murder. 1488

Where one man kills another, it is preſumed murder, unleſs the ſuddeneſs of the quarrel appears. 1493

The court are judges of malice, and not the jury. 1493, 1584

Where a priſoner dies by dureſs of the gaoler, it is murder. 1578

Aiding or conſenting to a murder is matter of fact, and cannot be inferred from other facts in a ſpecial verdict, if it is not found. 1581, 1584, 1585

Where the death of a man cauſed by a miſchievous beaſt will be murder in the owner. 1583

See **Acceſſory, Certainty.**

Name and miſnomer.

A MAN ſued by the name of *John*, pleads in abatement, that he was baptized by the name of *Benjamin, abſque hoc quod idem Johannes, &c.* ill. 1015

In a plea of another name of baptiſm there is no need to traverſe, *&c.* 1016

In what caſes a plea of *miſnomer* may begin with *et praedictus.* 1178

In what manner a corporation muſt take advantage of a *miſnomer* in a *mandamus.* 1238

See **Corporation, Eſtoppel.**

Negro. See **Maſter and ſervant.**

New aſſignment. See **Departure.**

Nil dicit. See **Demurrer.**

Niſi prius.

The foundation of the authority of judges of *niſi prius.* *Page* 1143

See **Default.**

Nonſuit.

Proceedings in a ſecond action ſtaid until payment of the coſts of a former nonſuit. 1308

Motion to ſet aſide a nonſuit on the miſdirection of the judge, denied. 1371

Notice.

In what manner notice muſt be averred. 1126

Where a third perſon is named in the conſideration of an *aſſumpſit*, of whom the defendant may inform himſelf, notice need not be given of performance. 1127

Defect of notice aided by appearance. 1240

In what caſes notice is neceſſary, to puniſh a contempt. 1343, 1344

Notice muſt be given of the execution of a *ſcire fieri* inquiry, but not of an *elegit* or extent. 1382

See **Covenant.**

Nul tiel record.

If a judgment be reverſed after *nul tiel record* pleaded, and before the day for bringing it in, the record is avoided *ab initio.* 1014

See **Error, Eſtoppel, Privilege, Recogniſance.**

Nuſance.

Indictments for nuſances not to be quaſhed upon motion. 1163

Keeping hogs in *London* a nuſance at common law. *ibid.*

See **Indictments.**

Occupant. See **Copyhold, Eſtates.**

Officers and offices.

A Motion to admit a chamberlain of the King's Bench priſon denied, becauſe the granting the office is inſeparable from the office of marſhal. *Page* 1038
If judicial offices are ſaleable, that are not within the ſtatute of *Edw.* 6. 1245
See **Leaſes.**

Orders. See **Juſtices, Labourers, Poor.**

Outlawry.

Where it may be pleaded in bar, and where in abatement. 1056

Oyer.

Need not be given of a writing unneceſſarily brought into court. 892
An unneceſſary *profert*, as of a ſentence of the admiralty, will not hurt a good replication. *ibid.*
In B. R. oyer may be demanded of a deed after imparlance, but not *in C. B.* 970
A defendant is not intituled to *oyer* of the writ after judgment of *reſpondes ouſter*, though in the ſame term. *ibid.*
Omiſſion of *per ſcriptum ſuum obligatorium* cured by *profert* and *oyer*. 1056
An imperfect *oyer*, if received, makes no variance. 1176
See **Error.**

Palace.

PRivileged during the King's reſidence. 780
See **Commitment.**

Pardon. See **Excommunication.**

Parliament.

In an action for a double return, it is enough to ſhew the writ, and that the ſheriff proceeded to an election, and that the plaintiff was *debito modo electus.* *Page* 907
The electors may agree to chuſe one member firſt, and then another. *ibid.*
A ſheriff, who has pretended to execute a writ of election, ſhall not take advantage of any irregularity of his own. 908
Caſe againſt a returning officer for refuſing a burgeſs's vote. 938
Grant to chuſe members of parliament can only be to a corporation. 951
The writ for levying the burgeſs's wages. 952
Perſons committed by the houſe of commons, for bringing actions againſt a returning officer, remanded upon a *habeas corpus.* 1105
What ſuits may be commenced againſt a member of parliament without breach of privilege. 1113
By 12 & 13 *Will.* 3. *c.* 3. the Common Pleas may hold plea by bill againſt a member of parliament. 1442
See **Peerage.**

Pawn. See **Bailment.**

Payment.

Solveret et deliberaret in the conſideration of an *aſſumpſit*, implies a transferring of the property. 895
Payment to aſſigns is payment to the party, and therefore the not paying to aſſigns need not be particularly averred. 898
Where a man ſells goods, and at the ſame time takes a caſh-note for the value, it is good payment, though the note prove bad. 929
See **Bills of exchange, Execution, Pleading, Tender.**

Peerage.

The court will not ſuperſede proceſs againſt one who claims peerage, where he has never been admitted in parliament. 1247
See **Honours.**

Perjury.

In evidence circumſtantially material, though not full enough to prove the iſſue. *Page* 889

Perjury aſſigned in an oath taken before the chief baron in a trial before the chief baron *aſſociato ſui, &c.* and the exception over-ruled. 1221

See **Indictments.**

Plantations.

On an appeal the appellant muſt procure the proceedings to be tranſmitted, and proceed, within a year after the appeal allowed, or the appeal will be diſmiſſed with coſts, without notice. 1447

The foreign courts cannot tranſmit a matter for difficulty to the King in council, but muſt determine it. 1448

Pleading.

Plea of a priſoner brought up by *habeas corpus* refuſed, becauſe pleaded as *in cuſtodia marreſcalli.* 817

Plea refuſed, becauſe without a concluſion. *ib.*

Alien enemy cannot be pleaded to a *ſcire facias* upon a judgment, becauſe it ſhould have been pleaded to the original action. 853

Where alien enemy is pleaded in abatement, the replication ſhould conclude to the country; otherwiſe where it is pleaded in bar. *ibid.*

Matter of abatement concluded as in bar is a plea in bar, *quaere* of matter in bar concluded as in abatement. 1018

A plea commencing with *petit judicium de narratione* is in bar. 1205, 1461

Nil debet is no plea to an action for the penalty of articles for the transfer of ſtock. 1500

Nil debet may be pleaded to an action againſt an executor upon a *devaſtavit.* 1502

Payment may be pleaded to *indebitatus aſſumpſit,* becauſe it confeſſes and avoids. 787

Pleading to part, and omitting part, will diſcontinue the whole, if judgment is not entred. 841

A plea, that demands ſuch judgment as the court cannot give upon it, is ill. 1053

Plea of delivery as an eſcrow, *&c.* ought to conclude to the country. *Page* 787, 803

A plea, that a writ of error *pendet indeterminatum,* is in the negative, and need not be averred. 1140

Matter of record muſt be averred by the record. *ibid.*

Plea of no *capias ad ſatisfaciendum* muſt not conclude to the country. 805

The admiſſion of the party in the inducement to a traverſe is not material. 864

In debt upon a bond, in a replication that traverſes the plea a breach need not be aſſigned, except in the caſe of an award. 892

Declaration againſt a hundred, that robbers robbed the plaintiff's ſervants in his company, well becauſe agreeable to the fact. 904

Quadraginta dies jam praeterierunt in a declaration againſt the hundred, well, the *jam* refering (an *adhuc*) to the *teſte* of the original. *ibid.*

Title muſt be ſhewn in a juſtification, but need not in an action againſt a wrong-doer. 923

A term muſt not be pleaded, without ſhewing the commencement of it. *ibid.*

A plea to enter may be made up, either as of that term, or as of the next. 1122

The perſons who are ſheriff of *Middleſex* declare in the plural number upon a bond, and have judgment. 1135

A declaration againſt a wrong-doer need not be ſo certain as a bar. 1230

Quod indemnificavit ac indemnem ſervavit, good upon a general demurrer. 1416

See **Abatement, Action, Addition, Aſſumpſit, Averment, Award, Bankrupts, Certainty, Conditions, Continuance, Convictions, Covenant, Cuſtom, Date, Deeds, Demurrer, Departure, Detainer, Dower, Ejectment, Error, Eſtoppel, Form and ſubſtance, General iſſue, Habeas corpus, Indictments, Judgments, Limitation, Name, Outlawry, Priſoners, Privilege, Replevin, Scire facias, Services, Surpluſage, Traverſe, Treſpaſs, Trover, Venue, Uſes.**

Pluralities. See **Eccleſiaſtical perſons.**

Poor.

The quarter-ſeſſions have not power originally to order church-wardens to make a poors rate. *Page* 798
Overſeers who have laid out money, may reimburſe themſelves out of a rate to be made for relief of the poor; but a rate cannot be made to reimburſe the overſeers. 1009
The overſeers with the confirmation of the juſtices may make a poors rate without the concurrence of the pariſhioners. 1013
A farmer is not rateable to the poor for his ſtock, but a tradeſman is. 1280
Children removed from the place of their birth to the place of their father's ſettlement after the death of the father. 1332
An apprentice, when his maſter has failed, hires himſelf into another pariſh without his maſter's conſent, and afterwards his maſter delivers up his indenture; this gains no new ſettlement. 1352
An apprentice, who does not lodge with his maſter, gains no ſettlement. 1371
An order appointing an overſeer, quaſhed, becauſe it did not ſhew, that he was a ſubſtantial houſholder. 1394
Orders to maintain a daughter-in-law, or a mother-in-law, quaſhed. 1454
Poor children are ſettled where their mother gains a ſettlement, if ſhe continues a widow. 1473
Hiring for a year, and ſervice for a year, make a ſettlement, though the hiring is not for the ſame year that the ſervice is. 1512
See **Baſtardy.**

Powers.

Of revocation, may be executed in part at one time, and in part at another. 908
To make leaſes reſerving the ancient yearly rent annually, it may be reſerved payable on a day before the year is up. 1198
See **Variance.**

Premunire.

On a conviction of ſetting up a project, contrary to 6 *Geo.* 1. *cap.* 18. the court may give ſuch part of the judgment of a *premunire*, as they think fit. *Page* 1361

Preſcription.

Preſcriptions for intereſt and profits are extinguiſhed by unity of poſſeſſion, but not preſcriptions for eaſements. 1400
See **Bridges, Common, Fences, Prohibition, Services.**

Preſentment. See **Advowſon.**

Principal. See **Acceſſory.**

Priſons and priſoners.

The court will not give leave to charge a priſoner with an action, who has a pardon upon condition of tranſportation. 848
Leave given to ſerve proceſs on a priſoner, who was capitally convicted, and reprieved for tranſportation, on the plaintiff's undertaking not to ſue execution againſt his perſon. 1573
The court will not make a rule to reſtore a marſhal of the King's Bench, who complains of being turned out by force. 1005
A priſoner diſcharged upon an inſolvent act, and afterwards arreſted for a debt exceeding the ſum limited in the act, ſhall not be diſcharged upon common bail. 1088
In debt upon a bond of 200 *l.* the defendant cannot plead the act for diſcharge of poor priſoners, without ſhewing that the bond was only for payment of 100 *l.* 1196
The ſeveral facts requiſite to give juriſdiction to the juſtices to diſcharge a priſoner muſt be ſet forth in pleading, where the act does not direct otherwiſe. 1264

The *Mint-act* is not pleadable in bar of the action, but of the execution. Page 1383

See **Commitment, Deputy, Expoſition, Habeas corpus, Judgments, Murder, Officers, Pleading.**

Privilege.

Cannot be waived, but by matter of record. 869

The court will take notice of the privilege of the Common Pleas, though it be ill pleaded; *qu.* of the Exchequer. *ibid.*

Where the Privilege of the common Pleas was laid with a double negative, which was a denial of the privilege, the plea was over-ruled. 898

Attorney of the Common Pleas may plead his privilege without averring it by the record, and *nul tiel record* may be replied to it. 1173

Privilege cannot be pleaded after a ſpecial imparlance. 1208

Privilege of a foreign miniſter's ſervant allowed upon motion. 1524

A barriſter, or a maſter in Chancery, has privilege to lay the *venue* in *Middleſex.* 1556

See **Error, Parliament, Venue.**

Profert in curia. See **Deeds, Executors, Form and ſubſtance, Oyer.**

Prohibition.

Where a prohibition is founded on a preſcription, and the defendant traverſes the preſcription; if the plaintiff demurs, a conſultation ſhall go. 755

The ſpiritual court cannot proceed for ſolicitation of chaſtity, where it was accompanied with violence. 809

The ſpiritual court may cenſure for adultery, though the huſband has recovered againſt the adulterer in an action. 810

Prohibition denied againſt a ſuit for brawling in the belfrey, againſt the mayor, who came to ſuppreſs a riot. 850

Prohibition to the admiralty denied, before appearance and libel filed. 983

Prohibition, till a copy of the articles delivered, in a ſuit *ex officio.* Page 991

The ſpiritual court may proceed in a ſuit for words, notwithſtanding an action brought for ſpecial damage occaſioned by the ſame words. 1101

Prohibition denied, to a ſuit for calling whore in heat. 1136

A compoſition for tithes before 13 *Eliz.* may be pleaded in the eccleſiaſtical court, and is no ground for a prohibition. 1161

Where a prohibition is granted upon a *modus* or cuſtom that is void, and a verdict is given for the plaintiff, yet a conſultation muſt go. 1162

Conſultation for not proving the ſuggeſtion in ſix months in a caſe of ſmall tithes. 1172

Prohibition not to be granted without an *affidavit* of the truth of the ſuggeſtion. 1211

Prohibition denied to a ſuit by huſband and wife and their ſon, for calling the ſon a baſtard. 1287

Prohibition to a court of equity in *Wales,* for proceeding againſt a defendant that lived out of their juriſdiction. 1408

The ſpiritual court proceed againſt a pariſh clerk appointed by the parſon, to remove him, and to puniſh him, for ſcandalous crimes that are puniſhable by indictment; and on a prohibition a conſultation was granted as to the removing him, and the prohibition ſtood as to the puniſhing him. 1507

See **Admiralty, Cuſtom, Limitation, Tithes.**

Property. See **Admiralty.**

Prout patet per recordum. See **Averment Lect, Pleading, Privilege.**

Quare impedit.

By an executor for a diſturbance in the time of the teſtator. 973

See **Action, Advowſon.**

Quo

Quo warranto.

Information in nature of a *quo warranto* is not to be filed at the inſtance of a private proſecutor, for ſetting up a warren. *Page* 1409

Exception to an information for uſurping the office of bailiff, that it was not ſaid, that the town was a corporation or a borough, over-ruled. 1559

Ranſom. See **Admiralty.**

Rates. See **Mandamus, Poor.**

Recogniſance.

ENtred as taken before a judge, will not make good a recogniſance declared upon as taken in court. 966

Entred into upon bringing a writ of error, differing from that required by the ſtatute, is good. 1140

A recogniſance unneceſſarily entred into, as on behalf of an executor plaintiff in error, is good. 1459

See **Eſtoppel, Intendment.**

Records. See **Averment, Certiorari, Judgments, Nul tiel record, Pleading.**

Recovery.

Where the tenant in tail is jointly vouched with another, the entail is well barred. 753

How a leſſee for years ſhall falſify a recovery. 785

Releaſes.

Releaſe to an adminiſtrator of all right to the perſonal eſtate, will not diſcharge a bond given by the inteſtate. 786

If a releaſe of all debts by an adminiſtrator will diſcharge a debt due to the inteſtate, where there is a debt due to the adminiſtrator in his own right. 1306

See **Joint and ſeveral.**

Remittit. See **Debt.**

Rent.

Reſerved on *St. Thomas*'s day or within ſo many days after, muſt be demanded according to the *reddendum*, and not according to the *habendum*. *Page* 819

Debt does not lie for rent reſerved on a leaſe for life upon 32 *Hen.* 8. *c.* 37. without ſhewing that the eſtate is determined. 1056

Rent reſerved to the reaſonable value of the land. 1160

Where the leſſee is excuſed from repairs in caſe of loſs by fire, yet the rent is not ſuſpended while the tenements remain unbuilt. 1477

See **Eſtates.**

Repleader.

Cannot be after default made by the defendant at *niſi prius*. 923

Replevin.

Property in the defendant or a ſtranger ought to be pleaded in bar, and not in abatement. 984

The defendant pleads property in a ſtranger, he ſhall not have return; otherwiſe where he pleads property in himſelf. 1017

When the defendant pleads matter in abatement, as *priſel en auter lieu*, he ſhall not have return without making avowry, *&c.* *ibid.*

Where the defendant pleads *priſel en auter lieu*, and avows for rent arrear; if the plaintiff traverſes the avowry, and the defendant demurs, it is a diſcontinuance. *ibid.*

The manner of concluding a plea in abatement, where avowry is made to have return. 1019, 1020

See **Coſts, Homine replegiando.**

Requeſt. See **Conditions.**

Return of writs.

A bill of *Middleſex* returnable the ſame day that it is ſued out is ill, and will not avoid the ſtatute of limitations. *Page* 772

A *capias ad ſatisfaciendum* with a term intervening between the *teſte* and return is not void, ſo as to excuſe the ſheriff for an eſcape. 775

Where a *ſcire facias* againſt bail is not returned, the plaintiff cannot proceed upon an *alias ſcire facias*, without an entry of the firſt upon the roll. 822, 1252

A corporation may make a return to a *mandamus* without the common ſeal or the ſigning of the mayor. 848

Caſe lies againſt particular perſons, who procure a falſe return to be made in the name of a corporation. 849

After the term in which the return of a writ is filed, it cannot be averred, that it was returned by a wrong perſon. 885

The name of the ſheriff neceſſary to his return. 886

Inquiſition upon a writ of inquiry returnable *in quindena Martini ultimo praeterit'*, held well, and not referred to the year before. 993

Inquiry of damages may be upon a ſecond writ, though the firſt was not returned. 1142

The return of a writ of ſeiſin in dower does not conclude from ſhewing that the lands returned are not parcel of the manor. 1294

The *quindena trinitatis*, &c. in computation is the *Sunday* and not the *Monday*. 1528

See **Scire facias.**

Revocation. See **Deviſe, Powers.**

Riots.

Where people are lawfully aſſembled, an affray happening will not be a riot. 965

An indictment for a riot muſt ſhew what the unlawful act was, that they aſſembled to do. 1210

Robbery. See **Hue and cry.**

Rules of court.

A rule of reference will not ſtay proceedings *in B. R.* *Page* 789

See **Error, Evidence.**

Satiſfaction. See **Execution.**

Scire facias.

WHERE the parties to a judgment or conviction are changed, execution ought not to be ſued without a *ſcire facias*. 768

In *ſcire facias* againſt bail *in B. R.* the year and term of the recogniſance need not be ſhewn; *contra in C. B.* 789

If a *ſcire facias* lay upon a judgment in a perſonal action at common law. 808

Scire facias upon a judgment by original may be returnable *ubicunque*, &c. or at a day certain. 854

A *ſcire facias* muſt be returnable at a common return, or at a day certain, as the original proceedings are. 1417

Scire facias is an action, and requires a new warrant of attorney. 1048, 1253

If a defendant may plead in abatement of a *ſcire facias*, that there is another terretenant not warned. 1255

Nontenure cannot be pleaded by a defendant to a *ſcire facias* upon a judgment in a perſonal action. 1256

If a tenant for years may be returned terretenant to a *ſcire facias* in a perſonal action. *ibid.*

A defendant can only plead as to the lands that he is returned tenant of. *ibid.*

A *ſcire facias* on a judgment upon a verdict after the defendant's death by 17 *Car.* 2. *c.* 8. muſt be general. 1280

The court may give coſts on a *ſcire facias* after plea pleaded, but not damages *occaſione dilationis.* 1534

See **Adminiſtrator, Baron and feme, Demurrer, Error, Execution, Pleading, Return, Variance, Venue.**

Seamens wages. See **Admiralty.**

Services.

Suit to the court of the manor to be held twice a year may be claimed in an avowry, without preſcribing in the court, and it ſhall not be taken to be the court baron. *Page* 862

See **Manor.**

Settlements. See **Poor, Vagrants.**

Sewers. See **Mandamus.**

Sheriff. See **Execution, Fees, Juſtices, Return.**

Ships. See **Admiralty.**

Slander.

Mr. *H.* is a *Jacobite*, and is for bringing in the prince of *Wales* and popery, *&c.* actionable, being ſpoken of a juſtice of peace, *&c.* 812

Words are actionable, that charge a man with evil inclinations. 813

J. B. ſtole my box-wood, actionable. 959

You are a whore, and keep a man to lie with you; not actionable. 1004

In caſe for words, whereby the plaintiff loſt her marriage with *J. N.* evidence cannot be admitted of a loſs of marriage with another perſon. 1007

Words potential denoting an act done are actionable. 1185

That a juſtice of peace is a raſcal, *&c.* ſpoken of the execution of his office, actionable. 1369

You are a cheating old rogue, *&c.* ſpoken generally, not actionable. 1417

He is a ſorry fellow, *&c.* he compounded his debts, *&c.* ſpoken of a tradeſman, actionable. 1480

See **Coſts, Good behaviour, Indictments, Prohibition.**

Soldiers.

An action lies for arreſting a ſoldier againſt the mutiny act, and the ſheriff may return, that the defendant is liſted. *Page* 1246

Stamps.

An admittance of five burgeſſes muſt have five ſtamps. 1445

Staple.

In debt upon a ſtatute ſtaple it muſt be averred, that one of the parties was a merchant at the time of the debt contracted. 819

Statutes and actions upon ſtatute.

Averment in the words of an act, ſufficient, 764

Debt upon a penal ſtatute ariſing in *Middleſex* may be brought by a common informer *in B. R.* 872

Where a ſubſequent ſtatute may be comprehended within the meaning of an act precedent. 1028

A ſtatute diſtributes a penalty, a moiety to the informer, *&c.* the crown ſhall have the whole, where there is no informer. 1039

Statutes that direct amendments, *&c.* on the challenge of the party, do not extend to the King. 1066

It is not the having ſtores in his cuſtody, but their being found in his cuſtody, that is the offence created by 9 & 10 *Will.* 3. *c.* 41. againſt imbeziling ſtores. 1105

Judgment arreſted becauſe the ſtatute was alleged as made 6 *Will.* 3. when the Queen was living. 1224

Buttons made of wood all but the ſhank are wooden buttons within the ſtatute 10 & 11 *Will.* 3. *c.* 2. 1276

Reſolutions of the judges on the ſtatute 5 *Ann.* relating to bankrupts. 1278

A common informer ſhall pay coſts, notwithſtanding the ſuit was carried on for the benefit of a corporation intituled to the penalty. 1333

A ſtatute requires contracts for ſtock to be regiſtred with the name of the perſon for whoſe benefit they were made; a regiſter with an entry, this is for my benefit, *&c.* is ſufficient. *Page* 1350

See **Acceſſory, Bankrupts, Compoſition, Convictions, Deeds, Deer-ſtealing, Departure, Forgery, Form and ſubſtance, Frauds, Hackney coaches, Indictments, Labourers, Parliament, Premunire.**

Suit of court. See **Services.**

Summons.

Muſt be averred in a return to a *mandamus*, where the party is deprived for a contempt. 1347

A ſummons need not be mentioned in an order of juſtices where they have juriſdiction; but if they proceed without ſummoning the party, it is puniſhable by information. 1407

See **Mandamus.**

Sunday. See **Eſcape.**

Surpluſage.

Et quod idem judicium affirmetur, at the end of a plea of a releaſe of errors, rejected as ſurpluſage. 1054

Where *praedict.* or *ſcilicet* may be rejected as ſurpluſage. 1182, 1183

See **Indictments, Verdict.**

Swearing. See **Convictions.**

Tail. See **Deviſe, Diſcontinuance, Eſtates, Eſtoppel.**

Tenants in common. See **Jointenants.**

Tender.

A Plaintiff cannot proceed for damages, after taking the money tendred out of court. 774

Tender and refuſal amounts to payment. 964

Time.

In ejectment by original the demiſe, *&c.* were laid upon the eſſoin day, and held well. *Page* 870

A man is of age the day before his birthday. 1096

In covenant the plaintiff alleges that after the deſcent to him, *ſcilicet* ſuch a day *et per decem annos tunc ultimo elapſos*, the defendant permitted the tenements to be out of repair; the *et per decem annos* was rejected as repugnant. 1126

The court will take notice of the beginning and end of moveable terms. 1557

See **Bills of exchange, Date, Expoſition.**

Tithes.

Prohibition denied after ſentence to ſtay a ſuit for tithe of faggots, on ſuggeſtion that they were cut from the ſtumps of old trees, becauſe that matter had not been pleaded in the ſpiritual court. 835

Barren land, to be exempt from tithes, muſt be ſo *ſuapte natura.* 991

See **Ejectment, Modus, Prohibition.**

Touts temps priſt. See **Dower.**

Trades.

Juſtices of peace have not power to take an indictment for exerciſing a trade not having ſerved apprentice, *&c.* 767

If a cuſtom to reſtrain men not free, from exerciſing their trades, can be good in any other corporation beſides *London.* 1129

Indictment for uſing the trade of a merchant-taylor quaſhed, becauſe not a trade within the ſtatute. 1188

The trade of a ſeamſtreſs not taken to be out of the ſtatute. *ibid.*

Baron and feme cannot be jointly indicted for exerciſing a trade, *&c.* becauſe it is the exerciſe of the huſband, and the wife's qualification will qualify the huſband. 1248

A bond given upon an agreement to take a ſervant, with condition that the ſervant ſhall not uſe the trade within half a mile of the obligee's houſe, or of any other houſe that the obligee, *&c.* may remove to, held good; the breach being aſſigned as to the houſe mentioned in the condition. *Page* 1456

See **Certainty, Indictments.**

Traverſe.

That *A.* was *rite et legitime* ſeiſed in fee ſuch a day, and granted a copyhold; naught. 902

In a replication to a plea of a releaſe of errors, a traverſe, that it was a releaſe of the errors in that judgment, is ill. 1054

Matter of record cannot be traverſed. 1140

Good matter alleged in the inducement to a traverſe cannot be taken advantage of. *ibid.*

If *de injuria ſua propria abſque tali cauſa* be a good replication to a juſtification of a ſale of a diſtreſs. 1482

See **Name, Pleading.**

Treaſon.

A ſpecial verdict finds againſt a priſoner, that he was preſent among traitors, hallowing, *&c.* yet if he is not found to be conſenting, he is not guilty. 1585

Trees. See **Convictions.**

Treſpaſs.

Quare uxorem ſuam rapuit. 810

For breaking his cloſe, *et herbam pedibus ambulando conſumpſit, necnon arbores ſuccidit, tranſgreſſiones diverſis diebus et vicibus continuando*; judgment for the plaintiff after verdict, though the cutting the trees did not lie in continuance. 823

Treſpaſs for hunting in his warren, *continuando diverſis diebus et vicibus*, held good. 974

Where a treſpaſs is laid with a *continuando* improperly, evidence of one fact only can be given. 977

Vi et armis may be omitted ſince the ſtatute that takes away the *capiatur* fine, but not *contra pacem.* *Page* 985

Pleading to an impriſonment includes an arreſt, and omitting the naming an arreſt makes no diſcontinuance. 1100

Treſpaſs againſt two; one lets judgment go by default, the other juſtifies under a licence, and has a verdict; the judgment ſhall be arreſted as againſt the other. 1372

One who has a right to enter into his neighbour's yard, fixes a ſpout to his houſe there, which does damage; treſpaſs does not lie, but caſe. 1399

Where the defendant juſtifies for a way, and the plaintiff replies *extra viam*; he ſhall have full coſts, though the damages be under 40*s.* 1444

A defendant juſtifies under proceſs as bailiff of a court, and the proceſs is ſet out as directed to the bailiffs of the borough. 1530

See **Baron and feme, Certainty, Departure, Diſtreſs, Expoſition, Felony, Form and ſubſtance, Indictments, Intendment.**

Trial.

Cannot be by *proviſo* againſt the crown. 1083

An indictment removed by the proſecutor cannot be carried to trial by the defendant without leave of the court. *ibid.*

In replevin, *quare impedit*, and attachment upon prohibition, either party may proceed to trial. 1084

A *tales de circumſtantibus* cannot be granted upon the *venire.* 1170

Attorney or not, is triable by the record. 1173

A trial where the action was laid, and not where the iſſue ariſes, held well. 1212, 1214

A ſecurity, who defends a cauſe at his own expenſe, is not intituled to coſts for not proceeding to trial. 1311

In what caſes there may be a new trial after a trial at bar. 1359

A verdict ſet aſide, becauſe a juror challenged upon the principal panel was ſworn upon the *tales.* 1410

When a *venire facias de novo* ſhall go in a capital caſe. Page 1585

See **Certiorari, Contempt, Indictments, Verdict.**

Trover.

Where a former recovery in *aſſumpſit* may be pleaded in bar in trover. 1217

See **Adminiſtrator, Bail, Carrier, Certainty, Maſter and ſervant.**

Vagrants.

ONE juſtice cannot by 12 *Ann. c.* 23. ſend a vagrant to the place of his ſettlement. 1360

See **Indictments.**

Variance.

In a *ſcire facias* upon a recogniſance the condition is ſet out to be, that the defendant ſhall give notice of trial *proſecutori et ejus clerico*, on *oyer* it is, *aut ejus clerico*; a material variance. 757

Power to make leaſes declared upon generally, and the power given in evidence has reſtrictions. 793

Writ of error quaſhed, becauſe directed *majori aldermannis et vicecomitibus civitatis Briſtol*, and the record removed was before the mayor and conſtables of the ſtaple. 819

Certiorari to remove convictions for removing foreign ſalt will not remove a conviction for removing ſalt generally. 820

A writ of error of a plea *inter G. et Jacobum Waller*, and the record returned is *Capit. Jac. Waller*; no variance. 894

Where a bond is dated at a place beyond ſea, the want of that date in the declaration may be pleaded in abatement. 1043

Writ of error upon a judgment on a *ſcire facias* quaſhed, becauſe it was *ſuper quoddam breve noſtrum*, and the *ſcire facias* was a writ of the late King. 1141

A writ of error was quaſhed, becauſe *loquelae per billam*, where it ſhould have been *per breve de privilegio*. Page 1170

Declaration in *trover de equis*, and the evidence is of geldings, no variance. 1209

Where the writ contains more or leſs than the count, it muſt be abated. *ibid.*

Writ of error quaſhed for a variance in the ſum of the debt. 1220

Variances between a *diſtringas* and the indictment over-ruled, becauſe according to precedents. 1523

See **Bonds, Error, Treſpaſs.**

Venue.

A releaſe of errors pleaded without a *venue* is ill, and amounts to a confeſſion of errors. 1005

Want of a *venue* is aided by pleading over. 1040

Want of a *venue* of a fact that is only laid in aggravation of damages is immaterial. 1042

Matters touching the perſon may be pleaded without a *venue*, as privilege of attorney, or *alien nee* in abatement. 1173, 1243

On an indictment for not returning a juſtice's warrant the *venue* need only come from the place where the neglect was, without regard to where the warrant was made or executed. 1191, 1193

Want of *venue*, or an ill *venue*, aided by verdict. 1214

The clerk of the aſſiſe may lay his action in *Middleſex*, and the *venue* ſhall not be changed. 1253

Venue changed into *Cheſter*. 1418

The aſſignment of a bail-bond may be laid in another county than where the arreſt was. 1455

Huſband and wife bring a *ſcire facias* on a judgment recovered by the wife *dum ſola*, there need be no place named where the marriage was had. 1504

See **Abatement, Convictions, Privilege.**

Verdict.

Will aid a defective averment of the indorſement of a bill of exchange. *Page* 810
Want of attornment in debt for rent aided by verdict. 811
A verdict finds that there is ſuch a manor, but that for twenty years there hath been but one freehold ſuitor; it ſhall not be intended that the manor is deſtroyed, but that the ſervices are ſuſpended. 864
A jury may find againſt the admiſſion of the parties, where the matter is within the iſſue. *ibid.*
If the jury in a ſpecial verdict find the iſſue, all that they find afterwards is ſurpluſage. 865
It is not neceſſary to find the life of a tenant for life, as in a plea. 999
An adminiſtrator, made by a particular ordinary, recovers execution in a *ſcire facias*, and after *elegit* executed brings ejectment, and on drawing up the ſpecial verdict the fault of the commiſſion of adminiſtration did not appear; the court refuſed to ſet it right, becauſe the objection was not made at the time of drawing up the verdict. 1037
A verdict cannot be falſified in the point tried by the iſſue in tail. 1050
In caſe upon an agreement that the plaintiff was to buy for the defendant all the plumbs he could, *&c.* the plaintiff ſhews that he bought ſo many; the want of averring, that they were all he could buy is cured by verdict. 1061
A verdict that finds but part of the matter in iſſue is ill, and a *venire facias de novo* ſhall go for the whole. 1521
See **Bills of exchange, Certainty, Copyhold, Deeds, Form and ſubſtance, Intendment, Judgments, Latin, Murder, Treaſon, Treſpaſs, Trial, Venue.**

Univerſities.

Their power of conferring degrees. 1345
If the courts will take notice, that courts of the univerſities proceed according to the civil law. 1344, 1347

Void and voidable. See **Diſcontinuance, Return.**

Uſes.

The invention of them. *Page* 799
A feoffment or releaſe may be pleaded, without ſhewing that they were to the uſe of the feoffee, *&c.* 801
S. conveys to the uſe of himſelf for 99 years if he ſo long live, remainder to *A.* for 25 years, remainder to the heirs of the body of *S.* no uſe will reſult to *S.* for his life, and the remainder to the heirs of his body, is void. 854
Power of *ceſtuy que uſe* before the ſtatute. 876
See **Deviſe, Diſcontinuance.**

Uſury. See **Indictments.**

Wager of law.

DOES not lie in *detinue*, where a charter concerning land is demanded. 992

Warrants.

If a warrant of a juſtice of peace need be returnable at a time and place certain. 1195
The conſtable may keep the warrant for his own juſtification, but muſt make return of what he has done upon it. 1196
A judge's warrant cannot be executed after his commiſſion is determined. 1513
See **Averment, Attorney, Conſtable, Deer-ſtealing, Juſtices, Scire facias.**

Warranty.

Of goods may be before the ſale, or at the ſale, but not after. 1120

Way.

An action lies for ſtopping the plaintiff's way, without ſhewing his title. 1093

Indictment againſt a pariſh, for that the highway was very foul, and ſo narrow that the people could not paſs, naught for not ſhewing that it was out of repair. *Page* 1169

Incroaching upon a highway draws the charge of repairing it. 1170

The appointment of the ſix days work upon the highways by 22 & 23 *Car.* 2. *c.* 17. muſt ſpecify the particular days. 858

See **Bridges, Certainty.**

Wills.

A teſtamentary ſchedule, without witneſſes or an executor, declared a will. 1282

Witneſſes examined to prove the teſtator's intent. 1326

Wine.

A merchant importer cannot ſell wine by the gallon, to be drank in another houſe, without a licence. 1421

Witneſs.

A woman cannot be admitted an evidence to prove her marriage with a man that is living. 752

In *trover* for a bill of exchange, the perſon who carried it to the defendant indorſed blank was held a good witneſs. 871

In caſe for negligently ſteering his ſhip, *&c.* the pilot is no witneſs for the defendant. 1007

A perſon to whom the thing in demand is made over as a ſecurity among other things which are a ſufficient ſecurity without it, cannot be a witneſs. 1008

A man who conveys lands, may be a witneſs againſt his title, but he is not compellable. *ibid.*

After a witneſs has been examined to a title in Chancery the land deſcends to him, his depoſition cannot be read. *Page* 1008

Truſtees, who had purchaſed lands, admitted to prove the value of them, notwithſtanding the objection, that it was to diſcharge themſelves of breach of truſt. 1166

On a trial concerning the conſtitution of a borough, whether any perſon can be elected into the common council but thoſe who are inhabitants and hold burgage tenures; one who comes within both theſe qualifications is no witneſs to prove the conſtitution. 1353

In caſe againſt a ſheriff for a falſe return of *non eſt inventus* to a *capias ad ſatisfaciendum*, the bailiff cannot be a witneſs to prove that he endeavoured to take him, *&c.* 1411

An attachment againſt a witneſs for not appearing. 1528

Women.

A woman appointed governor of a workhouſe, and may act by deputy. 1014

See **Additions.**

Words. See **Slander.**

Writings. See **Deeds.**

Writs.

The recital of a writ in a record cannot be judged of, without having the writ before the court. 903

A writ cannot be averred to be ſued out of the King's Bench at *Weſtminſter* in the time of vacation. 1557

See **Error, Parliament, Return, Variance.**

FINIS.

FH
MVSEVM
BRITANNICVM